Comments received on Public Discussion draft

BEPS ACTION 12: MANDATORY DISCLOSURE RULES

4 May 2015
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30 April 2015

By email to: mandatorydisclosure@oecd.org

Dr. Achim Pross
Head, International Co-operation and Tax Administration Division
OECD/CTPA

Dear Achim,

**BEPS Action 12: Mandatory disclosure rules**

**General comments**

AFME\(^1\) and the BBA\(^2\) welcome the opportunity to respond to the OECD’s discussion drafts entitled “BEPS Action 12: Mandatory disclosure rules”.

We wish to make clear that while AFME and the BBA have separate and distinct memberships, both organisations have decided to submit a single, combined response since our respective members share the same concerns with the OECD’s proposals in the discussion drafts.

We welcome that the OECD is consulting with business on its proposals. We believe that this approach is to the benefit of both policymakers and business and helps to avoid any unintended consequences arising from the OECD’s proposals. We believe that it is also

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1. The Association for Financial Markets in Europe (AFME) represents a broad range of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks and other financial institutions. AFME advocates stable, competitive and sustainable European financial markets, which support economic growth and benefit society.

2. The BBA is the leading trade association for the UK banking sector with more than 200 member banks headquartered in over 50 countries with operations in 180 jurisdictions worldwide. Our associate membership includes over 80 of the world’s leading financial and professional services organisations.
valuable for the OECD to take account of the views of business on the practical aspects of operating the intended policy.

The relatively short time available to consider the discussion draft poses a challenge for all businesses and the OECD secretariat. Should it be of assistance we would be pleased to meet with the OECD Secretariat to discuss these matters in greater detail or provide further information upon request.

**Options for a model mandatory disclosure rule**

With respect to Chapter 3 of the discussion draft, we have the following comments.

1) Whilst we welcome the consultation and acknowledge that it may lead to the introduction of a mandatory disclosure regime in jurisdictions where they do not currently exist, we note that many jurisdictions - including the UK - have already spent several years developing local disclosure regimes and local taxpayers will have become used to complying with the requirements of the local regime.

Where an effective and successful disclosure regime already exists in a jurisdiction, we believe that it should not be necessary for the local tax authority to develop another, and potentially duplicative, disclosure regime. We recommend that the OECD’s final recommendations acknowledge that.

Where changes are to be made to the existing disclosure regime or a new regime is to be implemented, we recommend that the OECD encourages local tax authorities to consult with local businesses and representative bodies in order to encourage the development of targeted and effective rules.

2) We note that the Executive Summary states that “the fact that a transaction is reportable does not necessarily mean that it involves tax avoidance.” We agree with that statement and we believe that it is important that the OECD’s final recommendations - and any domestic rules implementing the OECD’s recommendations - make clear that the reporting of a transaction does not necessarily mean that the transaction involves tax avoidance. Rather, we believe that it should be made clear that disclosures should be encouraged as part of a transparent relationship between the taxpayer and tax authorities.

3) We note that Paragraph 22 of the discussion draft states that “the scope and extent of any disclosure obligation is key in terms of achieving a balance. Unnecessary or additional requirements will increase taxpayer costs and may undermine a tax administration’s ability to effectively use the data provided.” We agree with that statement. As a general observation, we believe that any disclosure regime should balance the compliance costs to taxpayers with the benefits obtained by the relevant
tax administration and that all disclosure requirements should be specific to the relevant transaction in question.

4) We note that Paragraphs 62 to 80 set out two options regarding which entity – the promoter or taxpayer - has the obligation to report a transaction. Subject to the concerns raised in point 5 below, we believe that option B - where the promoter has the primary obligation to disclose - is preferable and should provide greater certainty for the parties involved in a transaction.

5) We note that Paragraph 77 states that countries should be free to introduce their own definition of a promoter but that it is recommended that any definition should encompass the principles set out in Box 2 of the discussion draft.

Box 2 states that:

“the common themes or principles within these separate definitions would appear to be as follows:

- the promoter is any person responsible for or involved in designing, marketing, organising or managing any reportable scheme.

- this definition can include any person who provides any material aid, assistance or advice with respect to designing, marketing, organising or managing the reportable scheme.”

We are concerned that the principles set out in Box 2 for the definition of a promoter appear to be overly wide.

In respect of the first bullet point above, we believe that it needs to be made clear that in order to create a disclosure obligation, the promoter must be responsible for or involved in designing, marketing, organising or managing the tax aspects of the arrangement. For example, a bank which determines the terms of a loan to a customer – as we would expect it to do in the course of its general lending activity - should not trigger a disclosure obligation for the bank purely because the customer intends to use the loan, or the proceeds of the loan, in its own tax planning.

In respect of the second bullet point above, again we believe that, material aid, assistance or advice should be that which is knowingly connected with the tax aspects of the arrangement. Furthermore, in many cases, a person will not have any knowledge of the wider transaction involved.

We believe that all reporting disclosures must be fair and reasonable. It is important that the obligation to report is imposed only on those who are capable of providing
the information and are actually involved in developing the tax aspects of an arrangement. We therefore believe that the definition of “promoter” requires further consideration by the OECD.

6) As noted at Paragraph 117, we believe that the use of objective hallmarks should provide greater certainty for business and tax authorities alike and would result in a lower chance of creating an unnecessary administrative burden and cost for taxpayers. We also welcome the OECD’s recommendation - noted in Paragraph 135 - that a mandatory disclosure regime should include a mixture of generic and specific hallmarks.

**International tax schemes**

With respect to Chapter 4 of the discussion draft we have the following comments.

1) As a general observation, we believe that any final recommendations should be as clear and detailed as possible so that any obligations imposed on business are clear and easy to operate for both taxpayers and tax authorities.

2) We believe that the OECD’s final recommendations should clarify that a taxpayer must disclose a scheme to the tax authority of the taxpayer’s home jurisdiction only and not to the tax authority of the counterparty’s jurisdiction.

3) We believe that careful consideration should be given to designing effective and proportionate hallmarks to identify international tax schemes, particularly as there is little precedent in this regard. As noted in point 1 above in the section headed “Options for a model mandatory disclosure rule”, it is important that during the introduction of a mandatory disclosure regime, there is regular dialogue between policymakers and business. We think that that is particularly relevant in respect of international tax schemes, and would encourage the OECD to consult again with interested parties as the proposals develop.

4) We note that Paragraph 247 states that “a taxpayer should only be required to disclose the arrangement if it is a party to the arrangement (as opposed to a person affected by it). A person will be a party to an arrangement where they are involved in the design or have sufficient information about the arrangement to understand its operation and effect”.

We are concerned that the above test appears too wide in its current form. As noted previously, we believe that a disclosure obligation should only arise when a person is knowingly involved in the design of the tax aspects of a scheme. We believe that a requirement to disclose in other circumstances does not seem feasible or appropriate.
5) We note that Paragraph 255 suggests that “where the person required to make a disclosure does not have enough information to provide tax administration with a clear, accurate and comprehensive understanding of the arrangement, the person making the disclosure should identify the persons who are believed to hold the missing information”.

We believe that the above approach is not appropriate as it seeks to impose an obligation to identify others based upon a belief as to the information they hold. Mandatory disclosure should be based upon knowledge of the party required to disclose, which is why the obligation should fall on the parties involved in the design of the tax aspects of a scheme.

Once again, we are grateful for the opportunity to share our comments with the OECD on the discussion draft and we would be happy to discuss any of the above in greater detail with the OECD and would be pleased to contribute further as the OECD’s work develops.

Yours sincerely,

Richard Middleton
Managing Director
Tax and Accounting Policy
AFME

Sarah Wulff-Cochrane
Director of Policy
Taxation
BBA
April 30, 2015

**BEPS Action 12: Mandatory Disclosure Rules**

Comments by the Banking and Finance Company Working Group on BEPS

**Introduction**

These comments are being submitted to the OECD by the Banking and Finance Company Working Group on Base Erosion and Profit Shifting (BEPS),\(^1\) a group of global banks and finance companies, in response to the public Discussion Draft released on 31 March 2015 by the OECD entitled “BEPS Action 12: Mandatory Disclosure Rules.”

Our members are located in several countries, including the United States and the United Kingdom, that spent considerable time and effort developing and implementing mandatory disclosure rules (MDRs) regarding tax planning strategies or “schemes.” We welcome the opportunity to comment on the Draft in the hope that the lessons learned from developing such rules in these countries will be applied globally and will contribute to the process in countries that implement MDRs in the future.

**General comments**

*Scope of the rules*

The Draft does not specify whether MDRs should be applicable only to schemes related to income taxes or whether they would also be applicable to schemes designed to avoid other taxes, such as withholding taxes. The Working Group recommends that MDRs should apply only to schemes related to income taxes. Limiting the scope of MDRs to income taxes is important, in order for the hallmarks for disclosure to operate in a reasonable and consistent fashion across jurisdictions and in light of the different rules of law dealing with withholding taxes and withholding agents.

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\(^1\) The Banking and Finance Company Working Group is comprised of members of the Securities Industry and Financial Markets Association (including Citigroup, T.D. Bank, JPMorgan Chase & Co., Bank of America, State Street, BNY Mellon, and Goldman Sachs), Barclays, and General Electric and American Express. The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information and a complete list of SIFMA members, visit [www.sifma.org](http://www.sifma.org)
Properly targeted definition of reportable schemes

The Draft acknowledges that MDRs should not have overly broad definitions of disclosure-required transactions; otherwise tax authorities would be inundated with unwanted disclosures and the compliance burden on taxpayers and service providers would be unreasonable. In this regard, the Working Group recommends that any jurisdiction contemplating the implementation of MDRs should consult extensively with the financial services industry before finalizing the rules. Such a process of discussion is likely to prevent the undesirable occurrence of having substantial volumes of disclosures about transactions that are of no interest to the tax authorities. This collaborative and consultative process worked well in developing the final MDR regimes in both the United States and the United Kingdom.

The Draft also acknowledges that definitions of transactions subject to the MDRs should be very clear and specific, in order for the MDR’s to be most effective for tax authorities without creating undue burdens for taxpayers. Accordingly, ambiguous or subjective criteria, such as “transactions that do not appear to be consistent with the intent of the law,” should be avoided.

Schemes entered into by flow-through entities

Under some countries’ current MDRs, a disclosure requirement may arise for a taxpayer because a flow-through entity, such as an investment fund or a partnership, discloses a transaction in the flow-through entity’s tax return. A taxpayer with an equity interest in such a flow-through entity would typically, under the MDR’s, also be required to make a similar disclosure in the taxpayer’s tax return. However, there are instances where the taxpayer and the flow-through entity have a legitimate disagreement as to whether the disclosure requirement was in fact triggered by the transaction or transactions reported by the flow-through entity. In such instances, the MDRs should permit the taxpayer to not file a disclosure in the its tax return, where the taxpayer disagrees with the disclosure by the flow-through entity and believes, in good faith, that there is no disclosure requirement under the relevant rules.

Specific comments

Definition of “promoter” (Chapter III, Part A, pages 26-29)

The Draft indicates that each country is free to define “promoter” for the purposes of MDRs as it wishes, while recommending that any definition incorporate the principles of the existing definitions of the term set out in Box 2 on page 28. The Working Group believes that the OECD should explicitly recommend that a bank should not be considered a promoter unless it is involved in the design, organization, or management of the tax aspects of the scheme or transaction in question. It follows that if a financial institution enters into a financial transaction on market terms with a customer and if such financial institution is not aware that the customer is entering into such financial transaction as part of an aggressive tax scheme, then the financial institution should not be considered a promoter of that tax scheme.
The Draft suggests that a confidentiality requirement is an appropriate general hallmark of reportable transactions. In today’s environment, however, a general confidentiality filter is unlikely to identify many aggressive tax schemes, because we believe that such schemes are typically offered on terms that expressly provide that the parties are free to disclose the details of the structure. Rather, a general confidentiality filter would be more likely to apply to transactions that are not of interest to the tax authorities, such as confidential merger or acquisition transactions where all details of the transaction, including non-aggressive tax structuring, must be kept confidential.

Similarly, in our view, using a general hallmark of a contingent fee for the promoter is not likely to identify many schemes of concern to the tax authorities. Although such fees were used in the past, it is increasingly unlikely that a promoter of an aggressive tax scheme would charge a transaction fee that is contingent on realization of the tax benefit or agree to a claw-back of the promoter’s fee if the taxpayer loses its tax benefit (e.g., upon examination). Thus, we believe it is unlikely that a contingent fee filter would generate a substantial number of valuable disclosures.

We note that, when the US and UK MDRs were first implemented, confidentiality and contingent fee arrangements were appropriate general hallmarks of reportable transactions. However, in light of developments since that time, they have ceased to be, for the reasons given above.

As to premium fees, the definition of “premium fee” should be clear and specific in order to avoid confusion, unwanted disclosures, and unwarranted compliance burdens.

Specific hallmarks of reportable transactions (Chapter III, Part C, pages 36 – 40)

As noted above regarding MDRs generally, specific hallmarks should be the subject of consultation between government and the financial services industry prior to implementation. The history of MDRs is replete with examples of poorly chosen specific hallmarks that have resulted in voluminous disclosures of transactions which have been of no interest to the tax authorities and have created considerable tax compliance burdens. For example, if a tax authority wishes to have disclosures about certain loss-producing transactions, there should be very detailed rules describing the types of transactions and the types of corresponding tax features that would require the disclosure of a loss-producing transaction, in order to avoid inundation of the tax authorities with volumes of useless information.

Timeframe for disclosure (Chapter III, Part D, pages 40 – 43)

We recommend that promoters should be required to disclose transactions shortly after the transaction is implemented. The recommendation in the Draft, i.e., to disclose when the promoter makes the product “available for use,” risks being impractical, because financial institutions cannot possibly police when and how the employees involved in discussing potential transactions with their clients are crossing some undefinable line of making an idea or product
“available for use” by the clients. In order to avoid confusion and also to avoid potentially unwarranted controversy between promoters and tax authorities, promoters should not be required to disclose transactions until actual implementation of the subject transaction. If the disclosure is to be at an earlier time there will need to be a very clear definition of what elements are to be in place in order to create the disclosure obligation; otherwise there would be significant uncertainty regarding the operation of the regime and unintended under- or over-disclosure.

In contrast, we recommend that taxpayers should be required to disclose covered transactions in their annual tax returns. The recommendation in the Draft for taxpayers to disclose upon implementation of the transaction is too burdensome for taxpayers. The tax analysis and tax compliance aspects of a transaction would normally be dealt with in the course of preparation of the taxpayer’s tax return. It is at that time that the taxpayer and its advisers should evaluate whether a transaction reflected in the tax return is or is not subject to a disclosure requirement.

*Duplication of taxpayer disclosures (Chapter II, Part C, pages 14 – 15)*

In some jurisdictions, such as the United States, taxpayers are subject to numerous disclosure regimes. In many instances, the various disclosure regimes are separate and are not coordinated. For example, a transaction by a U.S. taxpayer might trigger disclosure under the MDRs (e.g. a Form 8886), another disclosure because of the nature of the transaction or of one step of the transaction (e.g., a Reorganization Disclosure Statement), another disclosure under applicable penalty rules (e.g., a Form 8275), another disclosure under the Unrecognized Tax Benefit Rules (e.g., a Form UTP), and another disclosure regarding significant book-tax differences arising in the transaction (e.g., an Attachment to Form M-3). Duplication of disclosures about one transaction, in one tax return, does not provide any additional information to the tax authorities and adds to the taxpayer’s compliance burdens.

Therefore, the Working Group recommends that MDR’s should not require duplication of substantially similar disclosures, on different tax forms, in one tax return.

*Implications of disclosure*

The Draft notes, more than once, that the fact of a disclosure should not imply automatic acceptance of the disclosed tax position by the tax authorities. It should be made equally clear that a disclosure under the MDRs should also not imply that the taxpayer’s position with respect to the tax consequences of the disclosed transaction is automatically unacceptable to the tax authorities. In addition, the enactment of MDRs should be accompanied by training of tax examiners, in order to ensure that examiners understand that the fact that a transaction is disclosed under MDRs should not necessarily give rise to disallowance of the position taken by the taxpayer regarding the tax consequences of the transaction.

*Sanctions/penalties for failure to disclose (Chapter II, Part F, pages 46-50)*

In our view, taxpayers should not be subject to “per failure” penalties. Instead, taxpayers should potentially be subject to a more severe penalty in the event that a claimed tax benefit from an
undisclosed transaction is disallowed. However, there should not be any penalty for a disclosure failure where the tax benefits from the underlying transaction are completely allowed. The problem with a “per failure” penalty rule is that it can operate to encourage tax examiners to conduct audits to find mere “foot-faults” (i.e., technical disclosure failures pertaining to transactions that are not abusive). Accordingly, the penalty for a disclosure failure by a taxpayer should hinge upon an actual disallowance of the tax benefit claimed in relation to the non-disclosed transaction.

*International tax schemes (Chapter IV, pages 56 -65)*

The Draft recommends that new hallmarks be developed to focus on particular cross-border tax outcomes. The Working Group believes that further work is needed to clarify the extent of such rules, as the proposed approach is novel and raises the concern that such rules will not be workable. Paragraph 238 simply gives some examples of cases which might be included. Therefore we believe that there should be a further public consultation once the likely scope of the arrangements to be disclosed has been more clearly determined.

The Draft recommends that MDRs should apply to international tax schemes, either where the scheme is executed entirely within the taxpayer’s controlled group or where the taxpayer is a “party to the arrangement.” The Discussion Draft explains that being a party to an arrangement requires having sufficient information about the arrangement to understand its operation and effect. It should be clarified that “sufficient information” requires that the taxpayer actually be notified of the cross-border tax outcome to the counterparty and actually be notified that the taxpayer is obtaining a specific pricing benefit in the transaction because of the cross-border tax outcome to the counterparty. More specifically, a disclosure requirement should not be triggered merely because a taxpayer suspects that the counterparty is achieving some type of cross-border outcome beneficial to the counterparty in the counterparty’s home country; otherwise, the disclosure regime will be completely impractical. Indeed, our earlier comments on the definition of a promoter are relevant here; we believe that a bank should only be treated as a promoter where it is involved in the design, organization or management of the tax aspects of the arrangements.

We believe that the same approach should be taken in controlled groups. In other words, a company needs to knowingly be party to the design, organization, or management of the tax aspects of an arrangement in order to be a promoter for this purpose. This will ensure that subsidiary companies, which in some cases may not be wholly owned, are not subject to a disclosure obligation in cases where they do not have access to the relevant information to determine whether there is a disclosure obligation. We therefore disagree with the assertion in paragraph 235 of the Draft that taxpayers can be expected to obtain information from other group members.

The Draft should also clarify that a taxpayer’s disclosure of an international tax scheme solely involves a disclosure by the taxpayer to the taxpayer’s home country tax authority, and does not include any requirement that the taxpayer disclose the transaction to the counterparty’s home country tax authority.
The Working Group does not agree that it would be appropriate to reduce the threshold tests (e.g., the de minimis exceptions) for international tax schemes. The purpose of such thresholds is to exclude irrelevant, unnecessary or immaterial disclosures. That objective is equally valid for international schemes, if not more so, given the novel and unclear nature of the proposition that international schemes should be subject to MDRs.

Finally, the recommendation in paragraph 255 of the Draft that “where the person required to make a disclosure does not have enough information to provide tax administrations with a clear, accurate and comprehensive understanding of the arrangement, the person making the disclosure should identify the persons who are believed to hold the missing information…” requires further consideration. The definition of “promoter” is potentially very wide and could encompass “promoters” who may have not have knowledge of the consequences of the transaction in which they are involved. Rather than imposing an obligation to identify others based upon “belief”, consideration should be given to requiring disclosure of the identities of parties of whom the “promoter” is aware and who might be able to provide further facts, e.g., a counterparty or adviser.

**Conclusion**

The Working Group appreciates the opportunity to provide comments and suggestions regarding the development and implementation of MDR regimes. Most importantly, the Group looks forward to working with the OECD as this Draft is finalized and with participating jurisdictions as they develop their own MDRs. As stressed in these comments, it is critically important that tax policy makers and tax authorities work with those who will ultimately be subject to reporting as they develop their MDRs and that they follow a best practices approach that we hope will be embodied in a final report relating to Action 12.
Dear Sir/Madam,

We appreciate the opportunity to provide the OECD with comments to the Discussion Draft on Mandatory Disclosure Rules published on 31 March 2015.

BASF is a multinational group operating in more than 80 countries with business activities comprising 14 operating divisions and almost 400 production sites and with high volumes of complex transaction flows within the group. Whilst we appreciate and support the objectives of the Mandatory Disclosure Rules as regards abusive tax planning, we are concerned that the draft Mandatory Disclosure Rules will impose an unduly onerous compliance burden on tax payers in considering what tax advice needs to be disclosed. We are strongly of the view that the objectives the Mandatory Disclosure Rules regime can be substantively met without the need to impose this enormous compliance burden on taxpayers, but rather the regime should focus on promoters/advisers only. In addition, we see material practical difficulties with the operation of Mandatory Disclosure Rules for taxpayers in controlled group situations which cannot be easily mitigated. We have included a number of suggestions to address these issues, the key ones being:

- Mandatory Disclosure Rules should apply only to promoters/advisers and not to taxpayers in most cases.
- However, if taxpayers are to be within the Mandatory Disclosure Rules regime, when looking at controlled group transactions, disclosure must be limited to material information that is within the knowledge or possession of the domestic taxpayer without the need to perform any further intra group due diligence as regards the tax and/or commercial impact of other associated group companies linked to the transactions.
- The use of 'hypothetical tests' and 'main benefit test' should not be included as an option available to tax administrations as this introduces an unacceptable level of uncertainty and complexity.
Our comments in detail are as follows:

**BASF recommends that the scope of Mandatory Disclosure Rules should be limited to promoters only and not taxpayers**

The objectives of the Mandatory Disclosure Rules (MDR) are said to be:

- To obtain early information about tax avoidance schemes in order to inform risk assessment.
- To identify schemes, and the users and promoters of schemes in a timely manner.
- To act as a deterrent, to reduce the promotion and use of avoidance schemes.

Taxpayers, when looking at in-house actions with no promoter involvement, are unlikely to be the source of the widespread risk that the MDR are looking to address. Any in-house taxpayer actions would only be reportable under MDR after implementation. In terms of the first objective, MDR would likely only inform of a one-off risk that is not widespread. In terms of the second objective, albeit the ‘scheme’ would be identified earlier than under audit but this timing benefit is likely to be no more than a year or so at most. In terms of the third objective, there is no promotion in the case of in-house tax actions, and so this objective is not met. The imposition of MDR on taxpayers (as opposed to promoters) does not then achieve the stated objectives of the MDR.

MDR would place a significant compliance burden upon all taxpayers to consider whether any transactions (which may well be wholly acceptable as falling short of being “aggressive or high-risk”) are potentially reportable under MDR, a burden significantly greater than any potential modest benefit i.e. simply a slightly earlier notification of already implemented, not widespread and not promoted actions of individual taxpayers. BASF consider that the imposition of MDR on all taxpayers is an unacceptable administrative burden when considered against the modest impact in terms of the stated objectives of MDR.

**BASF recommends that any tax due under MDR should be aligned with the normal tax payment and collection rules.**

Paragraph 51 suggests that the UK approach of ‘guilty until proven innocent’ is a positive action as the Exchequer, not the taxpayer, holds the benefit of the money during the dispute. The ‘guilty until proven innocent’ approach carries with it a concern that a taxpayers’ business could be put at risk due to adverse cash flows when the end result is quite possibly that no tax is eventually found to be due as a result of the MDR. This ‘innocent’ verdict could come many years after the original tax was imposed, and at a time after the business has been forced to cease its activities as a result of the adverse cash flow imposed by MDR. Any tax due under MDR should be treated as any other tax; if the tax is ultimately due then this should be collected along with interest to reflect proper commercial restitution. BASF do not consider that the ‘guilty until proven innocent’ approach will affect taxpayer behaviour and therefore no ‘special case’ i.e. ‘pay now, prove innocence later’, is required for any tax potentially due under MDR.

**BASF recommends that only the promoter should have the primary obligation to disclose under MDR**

The comments at paragraph 74 are supported by BASF. Option A appears to add little to the MDR other than a potential increase in compliance costs to both sides. The arguments put forward at paragraph 67 are equally supported, the promoter is best placed to provide full information in the most efficient way. BASF considers that Option A should not be used and that only Option B should be put forward with the promoter having the primary obligation. The use of scheme reference numbers (paragraph 168) is also supported in this context.
Whilst the primary reporting obligation should be with the promoter/adviser, the cases where this reporting obligation should fall back to the taxpayer, as set out at paragraph 76, are considered reasonable. To assist taxpayers in knowing when a reporting requirement falls back on them as a result of the promoters/advisers asserting legal professional privilege, the promoter/adviser should be required to notify the taxpayer of this and taxpayers should then be given a reasonable time to make the required MDR disclosure.

**BASF strongly objects to the use of the hypothetical test on the basis that it introduces an unacceptable level of uncertainty and complexity**

As stated at paragraph 114, the use of hypothetical/subjective hallmarks introduces an administrative complexity and uncertainty for both the taxpayer/promoter but also tax administrations. BASF considers that if a “sufficiently new or innovative scheme” is not actually promoted or implemented, there does not appear to be any material tax risk to be addressed by the tax administrations. If the scheme is promoted or implemented, the use of hypothetical/subjective hallmarks then simply advances the MDR notification that would subsequently be required. At best then, this complexity would achieve only an earlier MRD notification. BASF considers that this potential timing benefit does not outweigh the associated administrative complexity and uncertainty for all parties in having to consider hypothetical/subjective hallmarks. BASF strongly suggest that the option to introduce hypothetical/subjective hallmarks should not be adopted.

**BASF considers that the ‘main benefit test’ should not be used as this introduces an unnecessary level of complexity and uncertainty**

Paragraphs 79 to 82 discuss the threshold requirement, and in particular the “main benefit test”. In practice, as suggested at the end of paragraph 85, difficulties can arise with the “main benefit test”, in particular practical difficulties can arise in defining what “the arrangements” are to which the tax benefit should be measured against; should this be the individual transaction step or should it be the wider commercial transaction? The consideration of what “the arrangements” actually are is likely to be a reason why [per paragraph 82] “at least one country suggest that it [the main benefit test] can be used as a justification for not disclosing tax avoidance schemes that would be of interest to a tax administration”.

This ‘main benefit test’ threshold creates complexity and uncertainty about what should be disclosed. Whilst the MDR must achieve the required objectives, this must be done in a way that balances the benefits of any particular rule against the associated compliance burden. BASF considers that a highly subjective ‘main benefit test’ introduces an overly burdensome compliance obligation, we suggest that the MDR objectives should be addressed instead by having only clear and understandable objective hallmarks.

**BASF strongly objects to the recommendation at paragraph 248. BASF recommends that the disclosure requirement for transactions within a controlled group should be limited to material information that is within the knowledge or possession of the domestic taxpayer**

Multinational groups achieve their business objectives by working together, this working together creates a highly complex spiders’ web of commercial transactions. Each company in a multinational group is likely to be transacting with 10’s of other group companies in many different jurisdictions. BASF for example has over 470 companies operating in more than 80 jurisdictions. Within a “controlled group” it is a wholly unreasonable expectation that each member of the group should investigate and understand the tax and/or economic consequences of the non-domestic side of each and every group transaction that the taxpayer undertakes [as is suggested should happen at paragraph 235 where it is said that group taxpayers “can be expected to obtain information on the operation and effect of an intra-group scheme from other group members”]. In order to be able to say that the hallmarks set out at paragraph
238 do not apply to any particular transaction, some level of compliance work is needed to be done. The amount of transactions that would need to be investigated is enormous and the likely result (looking at the relatively modest numbers at Chapter II, Section F) in terms of transactions that would lead to a requirement to notify under MDR does not warrant this level of compliance burden. Further, from a practical perspective, the response to any enquiries are quite likely only to be available in the other local language and would reference non domestic legislation wholly unfamiliar to the domestic taxpayer; this information then would require translation and interpretation by the domestic taxpayer. In addition, many of the transactions will be with sister companies where there is no direct or indirect control, and so no natural way for the domestic taxpayer to enforce compliance with the request for information. It is noted that if neither of the domestic taxpayers has any information that would suggest that MDR disclosure is required, it is (a) unlikely that the transaction will have an intended “abusive or high-risk” character or (b) even if it did, enquiries between the two domestic taxpayers would not reveal this character. BASF strongly objects to the general scope of the recommendation at paragraph 248 and considers that the disclosure requirement should be limited to material information that is within the knowledge or possession of the domestic taxpayer without the need to perform any further investigations beyond that which should reasonably have been done in the course of ordinary commercial due diligence.

Where the domestic taxpayer is aware that an offshore scheme should be disclosed under the MDR but does not have full information, BASF considers that the recommendations at paragraph 255 impose an acceptable obligation. That said, from a practical perspective, in situations without direct control between the parties, any request for information is quite likely not to yield any response and therefore a pragmatic position may be that the OECD should accept this as a likely consequence and simply leave it to the appropriate tax administrations, and not the taxpayers, to request the information if they think necessary.

We hope that our comments are useful. Please feel free to contact us with any questions you may have on the above.

Yours faithfully,

Mark Lawson
Tax Manager, BASF plc
BEPS MONITORING GROUP

Comments on BEPS Action 12:
Mandatory Disclosure Rules

This report is published by the BEPS Monitoring Group (BMG). The BMG is a group of experts on various aspects of international tax, set up by a number of civil society organizations which research and campaign for tax justice including the Global Alliance for Tax Justice, Red de Justicia Fiscal de America Latina y el Caribe, Tax Justice Network, Christian Aid, Action Aid, Oxfam, and Tax Research UK. This paper has not been approved in advance by these organizations, which do not necessarily accept every detail or specific point made here, but they support the work of the BMG and endorse its general perspectives.

This paper has been prepared by Sol Picciotto, with comments and input from Jeffery Kadet and Veronica Grondona.

We welcome this opportunity to comment on the Discussion Draft (DD), and would also be willing to speak at the public consultation on the subject.

SUMMARY

Legal requirements for disclosure in advance of schemes for tax avoidance are a useful instrument for tax enforcement. However, in most countries where they have been introduced they affect mainly small and medium enterprises and wealthy individuals, and do not cover most avoidance by large multinational enterprises (MNEs). This is because they target standard schemes which are widely marketed by promoters, whereas MNEs generally use arrangements tailored to their specific needs, even if based on standard techniques. For example, it seems that the tax clearances arranged by PwC in Luxembourg over a period of eight years for 343 MNEs were not notified under the UK’s DOTAS requirements.

This DD mainly discusses standard schemes, but also includes some relevant proposals to adapt disclosure requirements to international corporate tax avoidance, which we support, with some suggested modifications. In our view, however, more needs to be done in this respect. Hence, we recommend extension of notification requirements to providers not only promoters, and put forward some hallmarks based on common international tax avoidance structures. In addition, we suggest that further specific hallmarks should be identified as part of the work on the other specific BEPS Action Plan points, to ensure that mandatory disclosure schemes can play a part in helping tax administration monitor compliance during the implementation phase of the BEPS project.

Like all methods of improving compliance, mandatory disclosure must balance deterrence with cooperation. However, there should be safeguards against the pitfalls experienced by some forms of ‘cooperative compliance’, which have led to public concerns about ‘sweetheart deals’. An important safeguard is greater transparency, and we recommend that the proposals should include (i) provisions for access to information derived from notification by a wide range of other tax authorities, and (ii) standards for reporting to the public of information and data from disclosure arrangements, to facilitate independent evaluation of the effects of such schemes.

1. GENERAL REMARKS

1. Mandatory disclosure regimes have been introduced by a number of tax authorities, to try to deal with aggressive tax planning of all kinds. They have not been aimed mainly at international tax avoidance techniques, nor indeed at corporate tax avoidance. Their main focus in most countries has been schemes which are marketed, the clients usually being small
or medium enterprises and individuals with substantial wealth. Hence, as the DD itself points out (para. 227) countries with such regimes have experienced comparatively few disclosures of international tax schemes. Tax avoidance structures used by multinational enterprises (MNEs) would not normally be considered notifiable under most existing mandatory disclosure schemes, because (i) such structures are usually designed for each firm specifically, even if based on common techniques, and (ii) they are usually based on legal interpretations which, although they may be challenged by the tax authorities (sometimes successfully), are considered to be within the scope of the law. Indeed, many such schemes have not been challenged by tax authorities, presumably because they consider that they have insufficient legal grounds to do so. However, this is also the case for marketed schemes, which tax authorities often have to counter through legislative action. Revision of the design of disclosure schemes to make them more applicable to cross-border tax avoidance, and hence more relevant to the BEPS project, is therefore an important issue.

2. For example, the so-called ‘LuxLeaks’ documents published by the International Consortium of Investigative Journalists in November 2014 revealed that Big 4 accounting firm PwC had secured tax clearances with the Luxembourg tax authorities for 343 multinational companies between 2002 and 2010, which involved questionable international financing structures. Questioned by the UK House of Commons Public Accounts Committee, PwC replied that these were ‘individual arrangements, each tailored to the needs of individual clients’, and implied that they did not need to be notified under the UK’s mandatory disclosure scheme (DOTAS), which it defined as being ‘all around secrecy, not wanting HMRC to know’. Although in evidence to that Committee PwC had asserted that ‘we do not mass-market tax products, we do not produce tax products, we do not promote tax products’, the Committee concluded that ‘The number of cases involved plainly demonstrates that PwC is effectively selling variations on a scheme to a large number of its clients’. Yet it seems that such activity, although involving routinized international tax avoidance, would not need to be notified under the type of mandatory disclosure scheme envisaged in this Discussion Draft (DD). Even less likely to be notified are the more specifically tailored arrangements which are widespread. The Luxembourg authorities of course treated these clearances (and as many more negotiated by other firms) as confidential. AP5 of the BEPS project on Harmful Tax Practices includes proposals for ‘compulsory spontaneous exchange of information’ of such tax rulings, but it seems that this will be an essentially voluntary procedure. Although the European Commission in March published proposals for mandatory exchange of information on such rulings, this will apply only between EU Member States. Hence, it seems that none of these arrangements would enable tax authorities of most countries to be notified about such tax avoidance structures, until perhaps at the audit stage, where some details may be required to be provided in transfer pricing documentation.

3. The BEPS project aims to reform international tax rules so that, it is hoped, many or most existing international tax avoidance structures will become otiose. Nevertheless much room for interpretation is likely to remain, especially as there will be a diversity of new provisions around the world. The DD rightly points out the important role of mandatory disclosure together with other methods for early identification of compliance and tax policy issues. It is

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2 The report under BEPS AP13 in September 2014 would require the firm to include in the Transfer Pricing Master File ‘A list and brief description of the MNE group’s existing unilateral advance pricing agreements (APAs) and other tax rulings relating to the allocation of income among countries’. While this seems intended to include rulings such as those of Luxembourg, the formulation may leave some room for doubt.
clearly important for tax authorities to be aware as early as possible of corporate arrangements and transactions which may raise issues of compliance with the spirit as well as the letter of international tax rules, especially in a period of rapid change. Knowledge of such schemes can be shared with other tax authorities, and discussions can be held in relevant forums on how they should be dealt with. Hence, in our view mandatory disclosure should be given wider scope as part of a more systematic follow-up to the BEPS project.

4. Therefore, greater attention is needed to ensure that disclosure schemes are redesigned to fit into the BEPS project. The DD makes a start on this in its chapter IV, which identifies some relevant proposals, including a broader definition of a reportable ‘arrangement’, withdrawal of the threshold requirement for cross-border arrangements, and development of new ‘hallmarks’ specifically targeted at international avoidance. In our view, however, more is needed to integrate these proposals into the BEPS project as a whole, and especially its follow-up. Thus, we recommend that a more systematic effort should be made, when finalising each of the Action Point proposals in the BEPS process, to identify issues which might raise issues of compliance. These should be fed back into this Action Point 12, to help in the formulation of suitable ‘hallmarks’ to include in disclosure regimes, which would be specifically targeted to international tax and BEPS issues. It is notable, as the DD points out, that few existing schemes include hallmarks specifically aimed at international avoidance arrangements. The DD itself includes three suggestions (para. 238) but these essentially deal only with hybrid mismatch arrangements. We suggest that much more could and should be done, through an international collaborative effort including especially non-OECD G20 countries and developing countries more generally, to develop a reporting template more directly geared to international tax avoidance issues.

2. Specific Comments

Chapter II

1. Does Mandatory Disclosure have any other impacts on disclosure and taxpayer compliance not covered in this Chapter?

Tax authorities have been caught between adopting approaches based on deterrence or ‘cooperative compliance’, stick or carrot. While deterrence can be important, it is inappropriate where there is uncertainty about what actually constitutes ‘compliance’, i.e. where the rules themselves are indeterminate.³ This has been a factor in the problems experienced by programs for ‘cooperative compliance’, especially in the international tax sphere. Such programs have become discredited by public revelations of ad hoc settlements which have been criticized as ‘sweetheart deals’.⁴ They also have become unfortunately endemic in the international tax field, largely because of the trend towards rules relying on subjective and ad hoc judgments, notably in relation to transfer pricing.


⁴ The procedures followed by the head of the UK’s HMRC in concluding private settlements with large MNEs involving billions were heavily criticised by the House of Commons Public Accounts Committee (‘HM Revenue & Customs 2010–11 Accounts: tax disputes’, 61st Report of session 2010-12, December 2011); although they survived scrutiny by the National Audit Office, and a court challenge (see De Cogan, ‘UK Uncut Legal Action v HMRC: legal inaction and a return to Fleet Street’, British Tax Review 552-62 (2013)), newspaper coverage has been less charitable: see e.g. Syal, ‘Revealed: 'Sweetheart' tax deals each worth over £1bn’, The Guardian, 29 April 2013, and Malone ‘The Tax man with his nose in the trough’, Daily Mail 11 February 2015.
This does not mean, however, that there should be a switch towards a greater emphasis on deterrence. The best remedy, in our view, is to adopt rules which are based on clear criteria and which are therefore easy to administer, as we have advocated in our various submissions. The next best remedy is increased transparency, which we have also strongly urged. Although disclosure by taxpayers to tax authorities is clearly part of this, it is by no means sufficient to deal with the potential dangers. While it is important for tax authorities to maintain strict protection of confidential information received from taxpayers, there should be much greater emphasis on

(i) exchange of information between tax authorities, and

(ii) reporting to the public of information and data from disclosure arrangements.

As regards (i) the Introduction to the DD mentions that work under AP 12 will include proposals for enhanced forms of exchange of information about tax schemes. It is important that these should be as comprehensive as possible, in particular extending to developing countries. More could clearly be done to extend to tax officials from a wider group of countries the benefits of the work of Joint International Tax Shelter Information Centre (JITSIC), and of access to the Aggressive Tax Planning (ATP) Database. As regards (ii) we would like to see clear recommendations for standards of reporting to the public of information about the workings of disclosure regimes. Such reporting should be sufficiently detailed to allow evaluation of the regimes by regulatory bodies such as government auditors, as well as analysis by academics and civil society organizations. It is notable that as the DD points out (para. 38) data on the effectiveness of such regimes have been collected only by the United Kingdom, and this has been in part due to public concerns and a scrutiny by the National Audit Office. Tax authorities are not best placed to evaluate the effectiveness of such regimes, not least because they are under-resourced, a much better solution is publication of data for others to evaluate.

2. Are there any practical issues that arise from the perspective of the promoter or taxpayer that are not covered in this Chapter? If so what are those issues and how could they be dealt with?

We suggest that, as part of the revision of disclosure regimes to address international avoidance, there should be a reorientation to a focus on ‘providers’ rather than ‘promoters’. As pointed out in section 1 above, the concept of promoters is directed primarily at off-the-peg schemes which are widely marketed. Disclosure is equally important for arrangements tailored to individual companies, which are often based on replicable techniques. For example, providers including lawyers, accountants, and investment banks often will recommend partially or fully tailored schemes to achieve a tax goal indirectly that cannot be achieved directly. The development of such schemes should be squarely within the disclosure requirements.

Chapter III

3. Are there any other considerations, not mentioned above that arise with option A or option B, if so what are they?

In our view, Option B is clearly preferable, i.e. notification by both providers (not only promoters) and users, and it should be recommended to countries for adoption. It has the

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5 A study by the Oxford University Centre for Business Taxation, at the request of the National Audit Office, of the UK scheme reported that the published information was insufficient to allow an adequate assessment, and provided a list of questions to elicit further information: Devereux, Freedman Vella J., ‘The Disclosure of Tax Avoidance Schemes Regime’, OUCBT (2012).
strong advantage of greatly improving compliance. The DD mentions only that it ‘reduces the risks of inadequate disclosure’, but these are substantial. The evaluation of the UK scheme by the National Audit Office revealed both substantial failure to report by taxpayer users of schemes, and non-reporting by promoters, sometimes due to avoidance of the reporting obligation by techniques such as obtaining a legal opinion. A dual reporting obligation is essential to help improve compliance.

4. Are there any other features common to promoted schemes that could be included in generic hallmarks?

In our view a different approach should be adopted to specifying the hallmarks for international tax avoidance schemes. Although such schemes may be very varied and complex, they depend at bottom on some basic techniques. It should be possible to capture these techniques by specifying hallmarks, in addition to the ones that have been mentioned in the DD (i.e. loss schemes, leasing arrangements, arrangements involving hybrid instruments). We suggest generic hallmarks along the following lines:

(a) inclusion in a multinational corporate group structure of an entity (i) not resident in the country where it is formed, or (ii) formed or resident in a jurisdiction designated as non-transparent, defined strictly based on compliance with the OECD’s Common Reporting Standard and including access to information on beneficial ownership;

(b) organising a multinational corporate group structure involving associated enterprises in different countries such that reportable profits and tax payable are significantly out of line with the real economic activities in the country concerned, especially by (i) transferring assets such as intellectual property rights to an entity to hold or manage without performing any substantive functions involving innovation or creativity; (ii) designating an entity as a provider of services for associated enterprises which generate an income to that entity significantly disproportionate to the real economic activities for which it is responsible; (iii) designating an entity to hold capital and make loans or other investments to associated enterprises while not performing any other economic activities; (iv) designating an entity as a principal in a contract manufacturing, contract distribution or contract research and development scheme; (v) restructuring of a global value chain so as to locate high value-adding functions in jurisdictions where they would benefit from low effective rates.

5. What is the best way of capturing those transactions where the promoter’s benefit is priced into the return on the transaction itself (rather than through a separate premium fee)

As stated in our reply to Question 2 above, we favour a wider approach covering providers, not only promoters. We therefore support a wider definition such as that in the Canadian scheme, outlined in Box 2 on p.28, which would not rely only on a premium or contingent fee, but extend also to any payment for an arrangement which the provider represents would result in a tax advantage.

6. Are there any other specific hallmarks which should be considered but are not covered in the documents?

See answer to Question 4 above, and to Question 18 below.

7. Have you encountered any practical and administrative difficulties in applying generic and specific hallmarks in practice? If so why have these arisen and how could they be overcome?

Countries which have specified as a hallmark the use of an associated enterprise located in a low-tax jurisdiction or tax haven have found it difficult to decide when a jurisdiction should be designated as such. Some, for example Argentina, replaced that concept with that of a
‘non-cooperating jurisdiction’, but at the time that this was defined in terms of signature of information exchange agreements many countries rushed to sign such agreements and this test became ineffective. We hope that a more rigorous process of evaluation of compliance with the Common Reporting Standard including access to beneficial ownership information, will make such a hallmark more effective.

8. Does a hypothetical test effectively address one-off or tailored transactions? Are there any other ways in which such transactions could be captured by a mandatory disclosure regime?

As already stated, we consider that disclosure should not be limited to off-the-peg or marketed schemes, but should use a wider definition covering providers of arrangements creating a tax advantage.

9. Do any practical problems arise from an earlier reporting date and short timescale. If so what are those and how could such issues be dealt with?

10. What further information or detail is needed in respect of the concept of availability or is this clear?

11. Are there any other practical issues that arise from setting the reporting period, if so what are they and how can they be dealt with?

In line with our recommendation that disclosure should not be limited to marketed schemes, we suggest reporting should be (i) by advisors triggered by the date on which the advisor becomes a ‘material advisor’, as in the US scheme outlined in para. 144, and (ii) by the taxpayer based on the date of the first transaction forming part of the scheme.

12. Are there any other ways in which to identify scheme users other than scheme number or client lists?

13. What might prevent the automatic provision of client lists to the tax administration and how could this be dealt with?

14. Do you think that the proposed disclosure form (in Boxes 10 and 11) will be appropriate to provide tax administrations with the information necessary to understand the reportable transaction?

15. Are there any other information powers that would be necessary in the context of obtaining information from a promoter or advisor?

The disclosure forms in Boxes 10 and 11 may be appropriate and feasible in countries in which the taxpayer that has paid for the scheme and the advisor relating to the scheme are located. In countries where affiliates or related parties are located which have not participated in the design of the scheme such disclosure forms could be equally relevant, but the tax authorities could encounter some problems in ensuring that foreign advisors comply with form B; and even that taxpayers comply with the ‘scheme details’ and ‘all parties to the transaction’ heads in form A. It is therefore essential that the proposals in this DD be complemented by appropriate proposals for enhanced models of information sharing which the DD explains (p.2) will be developed as a follow-up to these proposals.
16. Is there any additional information that should be reported to the tax administration?

17. Do any problems arise in practice in providing the information set out at Box 10 and 11. If so what are those and how could they be dealt with?

**Chapter IV**

18. Do you think that the Recommendations will be effective to capture international schemes, and, if not can you suggest alternative approaches?

In our view, as already outlined above, it is important to rethink disclosure schemes to adapt them more appropriately to international avoidance arrangements, and in particular to ensure that they can play a suitable role in the follow-up to the BEPS project. This chapter has made a start on such rethinking, but more needs to be done to ensure that this Action Point is more firmly integrated into the proposals from the other parts of the BEPS Action Plan.

To that end, we suggest that the working parties and groups engaged on the other substantive points of the BEPS Action Plan should be asked to specify structures or transactions which they consider might raise issues of compliance with both existing tax rules and the changes they recommend. Suitable hallmarks could be devised for inclusion in disclosure schemes to ensure that tax authorities have information in good time of arrangements or transactions that may raise problems of compliance.

19. Are the purpose and meaning of the terms used in the chapter clear, if not what further clarification is necessary?

We agree that the disclosure obligation on the taxpayer should be limited to persons resident or having a tax reporting obligation in the jurisdiction (as outlined in para. 233), and that this obligation should apply to any arrangement involving a cross-border outcome regardless of the country where such outcome arises (para. 236). We also agree that this should apply even if the taxpayer is not directly a party to the transactions creating the cross-border outcome (para. 241). However, we do not see the need for a materiality requirement as suggested in paras. 242ff, which would be complex and difficult to apply. It should be sufficient that the person is party to a transaction or series of transactions which involve a cross-border outcome, and is subject to a tax reporting obligation. States have now accepted the obligation to collect information from persons within their jurisdiction even if they have no tax interest, if it is foreseeably relevant to the enforcement of another country’s tax laws. The same principle should apply to these reporting obligations.

Also, since we support dual reporting, in our view the obligation on advisers should apply in relation to any arrangement involving an entity formed or resident in the country concerned, whether or not that entity is a taxpayer or has a reporting obligation there.

20. Are there any other examples of international tax schemes which should be disclosed under MDR?

We have already outlined in answer to Question 4 above some suggested generic criteria, and in answer to Question 18 the approach that should be adopted to identifying the types of arrangement which should be reportable.

21. Do you think that the Recommendations will impose an undue compliance burden on taxpayers? If so, why?

We have no doubt that this question will provoke the usual deluge of responses lamenting the compliance burden, many of them from tax advisers, nobly standing up for their clients. However, it should be borne in mind that disclosure obligations are required only for arrangements entered into by taxpayers which are complex and produce a tax advantage.
Such arrangements generally involve extensive documentation and hence very significant transaction costs to set up, and often to administer, as well as substantial fees to advisers or promoters. In view of this, it is hard to take seriously complaints about a compliance burden involved in reporting such arrangements.
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April 30th, 2015

Ref: OECD DISCUSSION DRAFT: MANDATORY DISCLOSURE RULES (BEPS ACTION 12)

Dear Achim

BIAC thanks the OECD for the opportunity to provide comments on its Discussion Draft on Action 12 (Mandatory Disclosure Rules) of the Base Erosion and Profit Shifting (“BEPS”) Action Plan issued 31 March 2015 (the “Discussion Draft”).

In the attached document, you will find a number of both general and specific comments, giving our feedback and concerns in response to the OECD’s “building block” recommendations. BIAC supports the development and use of well targeted mandatory disclosure rules. As we state in the attachment, however, we are concerned that the options set out in the Discussion Draft could lead to over-broad rules, substantially increasing the burden for taxpayers and tax authorities alike (especially in cross-border settings), and even create duplicative reporting requirements in some instances. We believe a more targeted set of “best practice” proposals would be more appropriate, as these could fully take into account both the many ways that tax administrations can gather better data (for example, and very importantly, through cooperative compliance relationships), as well as how the Action 12 proposals do (or should) interact with other parts of the BEPS project.

We very much hope that you find our comments useful, and we look forward to working with you on these important issues over the next few months.

Sincerely,

Will Morris, Chair, BIAC Tax Committee
General comments

1. Although BIAC supports the OECD’s work on Action 12, we believe that the establishment of clear “best practices,” rather than broader “building block” recommendations would be a more appropriate objective. BIAC believes that well targeted and designed Mandatory Disclosure Regimes can act as effective deterrents to aggressive tax avoidance, helping governments to legislate quickly and target specific arrangements.

2. We believe that a well-designed Mandatory Disclosure Regime should be tightly focused on instances of aggressive avoidance schemes, and should require disclosure from the promoters of such regimes. Maintaining a narrow scope will ensure that the administrative burden faced by the vast majority of compliant taxpayers is minimized where possible.

3. If the scope of the proposals is drawn too broadly, new Mandatory Disclosure Regimes will risk substantially increasing the compliance burden faced by taxpayers, and could swamp tax administrations with more information than they can effectively review, potentially reducing the possibility of targeting aggressive schemes.

4. We also note that through a number of other BEPS Actions, additional requirements will be placed on taxpayers to document and/or report transactions to tax administrations (for example, the OECD’s proposals through Action 13 on Transfer Pricing Documentation). In some cases, such information will even be automatically exchanged by tax administrations, providing more data than ever before. We believe that the proposals made under Action 12 should assist countries in targeting specific situations of avoidance that seek to abuse specific rules, for example, the situations identified in Paragraph 238 of the Discussion Draft.

5. The Discussion Draft briefly refers to the important work done by the Forum on Tax Administration in the area of Co-operative Compliance. The report states that mandatory disclosure and Co-operative Compliance programs are both intended to improve transparency, risk assessment and ultimately, taxpayer compliance. However, the Discussion Draft undermines the principle of a co-operative compliance relationship, by stating that mandatory disclosure rules can reinforce the effectiveness of a cooperative compliance regime. Under a Co-operative Compliance program, the taxpayer and tax administration enter into a more open relationship, where the taxpayer shares additional information about its business and transactions. These programs form a deliberate part of a tax administration’s risk management strategy. The quality and scope of information provided through such a relationship is much higher than under a mandatory disclosure regime. Mandatory disclosure regimes and Co-operative Compliance programs should be treated as distinct risk management strategies adopted by tax authorities. It would be more appropriate to provide exemptions from mandatory disclosure requirements to companies entering into co-operative compliance relationships.

6. The Discussion Draft does not make any recommendation in relation to the confidentiality of disclosures and how they would be shared among the countries. Clear guidelines will be required to ensure that information is protected and shared in an appropriate way. Transactions and
“schemes” reported under a mandatory disclosure regime should be protected by appropriate confidentiality provisions as some of the information reported is likely to be commercially sensitive. Much like the OECD’s proposals under BEPS Action 13, disclosures should be shared between tax administrations rather than between the taxpayer and multiple tax administrations.

7. BIAC believes that any new mandatory disclosure regimes should be implemented on a forward looking basis (i.e. applying to new “schemes” or transactions entered into after the date of implementation. Such rules should not require the retroactive disclosure of transactions.

8. The European Commission (“EC”) has announced proposals for a Tax Transparency Package, part of which would require the automatic exchange of tax rulings. As part of the proposed package, EU countries would be required to report every three months to all other Member States on all advance cross-border tax rulings and advance transfer pricing arrangements. Mandatory disclosure regimes should take into account how and if such rulings will be disclosed to other relevant jurisdictions to avoid duplication.

Limited period for full consultation

9. Due to the extremely short comment period and the need, in parallel, to comment on a number of additional consultation documents, BIAC has focused on high-level issues. The absence of comments on other sections of the Discussion Draft should not be considered an endorsement of the proposals contained therein.

Specific comments

The need for clear guidelines

10. BIAC recognizes the importance of establishing principles for implementing Mandatory Disclosure Regimes. The OECD’s recommendations should be clear and easy to understand. Existing disclosure regimes do not always achieve these goals. The OECD should, therefore, provide guidance as to “best practices”. This is crucial as countries looking to introduce a Mandatory Disclosure Regime will hopefully look to base their regime on such best practices. Non-best practices should be identified as such, and countries should be discouraged from adopting them.

Preventing duplication of disclosures

Multiple disclosure requirements the same transaction

11. BIAC believes that Mandatory Disclosure Regimes should consider existing reporting requirements to avoid duplication. A Mandatory Disclosure Regime that applies a “main benefit threshold” would likely be similar to any applicable GAAR. Applying such similar tests would risk creating duplicative reporting requirements for the same transaction. GAARs should already discourage taxpayers from entering into such arrangements. The main benefit or a main benefit threshold would also create an unacceptable level of uncertainty. In particular, applying two different regimes could result in double penalties for the same failure. That is, if a taxpayer does not consider the main purpose of the transaction to be the tax benefit, and therefore does not report
it, applying both a GAAR and a Mandatory Disclosure Regime could result in double penalties. At a minimum, the OECD should provide that penalties should not be applied more than once in relation to a particular transaction.

12. BIAC believes that information that is provided as part of the OECD’s Transfer Pricing Documentation package should not be demanded again under a Mandatory Disclosure Regime. This is especially relevant to the reporting obligations suggested in Section IV of the Discussion Draft focusing on “international tax schemes” (see below).

**Alternative ways to understand international tax management**

13. As noted in our general comments, BIAC strongly recommends that the OECD considers the many other ways in which countries do and will obtain information on a company’s tax arrangements. Tax administrations already have access to a wealth of information that is often not examined. Adding more information without also increasing the capacity of the tax administration to process and use such information will only increase the amount of information reported, without increasing its usefulness.

14. Tax administrations should review annual income tax returns and filings (including the audited accounts of relevant entities prepared under the relevant local Generally Accepted Accounting Principles or International Financial reporting Standards) and Transfer Pricing Documentation. In order to make best use of this information, they should dedicate the necessary staff.

15. An alternative way to obtain insight includes making better use of the list of transactions identified by the Joint International Tax Shelter Information Centre (JITSIC). This list is expanding to include more countries and more potentially aggressive arrangements.

**Compliance burden and cost**

16. Mandatory Disclosure Regimes are most effective at identifying “mass marketed” or “pre-packaged” schemes. If the scope of disclosure rules is broadened beyond that, they risk imposing an enormous compliance burden on a huge number of companies that are not engaging in aggressive tax avoidance.

17. The purpose of early identification of new schemes is best served in domestic situations as the tax administrations can respond promptly as information is provided, including by proposing and enacting legislative changes if necessary. In cross-border situations, this may not be possible as the information could be provided to another jurisdiction and the affected jurisdiction might not receive the information promptly. Thus, the principle benefit of a Mandatory Disclosure Regime – i.e. upfront information that facilitates a quick response – will not be realized with respect to cross-border arrangements. BIAC is concerned that the disclosure of international tax schemes will merely be a tool in the hands of the receiving assessing officer, and will only serve their unilateral domestic tax (collection) purposes. We understand that this is not the intention of the proposals.
18. The Discussion Draft proposes that reporting of “key provisions of foreign law relevant to the elements of the disclosed transaction” will be required. However, in making this disclosure, taxpayers (and professional advisors) will be entirely dependent on foreign counsel, and will need to rely on advice and information provided by advisors in those countries. These will generally not have, even in the largest firms, the expertise to verify whether that analysis is complete or accurate – in such cases, penalties should not be applied to taxpayers due to understandable errors or omissions in their disclosures.

19. The compliance burden on taxpayers, professional advisors and tax administrations should be proportionate to the expected benefit. In this context, Mandatory Disclosure Regime should identify one jurisdiction for a specific tax arrangement, rather than having a multiple reporting requirement to tax administrations in multiple jurisdictions regarding one tax arrangement.

20. The Discussion Draft recognizes that disclosure is not necessarily intended to expose only ‘aggressive avoidance’, but any tax arrangement that may have negative tax consequences. We are concerned that this objective is too broad, and as noted in our general comments, would create a disproportionate compliance burden for taxpayers and, at the same time, would risk swamping tax administrations with information.

21. BIAC believes that any penalties imposed under a Mandatory Disclosure Regime should be restricted exclusively to tax penalties – whether monetary or non-monetary (such as an extension of statute of limitations). Penalties ought not to include those unrelated to taxes, such as restrictions over the ability to apply for future government tenders.

**Risk management by taxpayers**

22. The Discussion Draft recognizes that a taxpayer may have a minor interest in a “tax scheme”. We believe it is incorrect to assume that all taxpayers would be sufficiently aware of the material tax or economic consequences for any one of potentially multiple parties to a “scheme”. In many instances, the taxpayer will have an obligation to collect information that it does not have and cannot demand. Moreover, the taxpayer may not even be aware of its role, or the materiality of other parts of the “scheme”, whether they are related or otherwise.

**Promoters**

23. The Discussion Draft proposes that a promoter should be required to report a transaction when the transaction is offered to a taxpayer. The recipient of such a proposed tax plan often chooses not to adopt the plan, which may be for many different reasons (often unrelated to the tax plan itself). Disclosure of a scheme should not be required unless and until the plan is adopted. Further, disclosure of taxpayers name by a promoter should not be required unless the taxpayer has adopted the plan. Otherwise, connecting a taxpayer to a proposed tax plan may damage their goodwill with its tax administration.

24. A tax advisor who is not a promoter may learn of a tax structure - for example, the advisor may be asked to provide a professional opinion in relation to a transaction. In such a case, the advisor may have information concerning the plan, and, under the OECD’s current recommendations,
could have to disclose that to the relevant tax administration(s). The advisor would then be subject to issues of privilege and other relevant ethical rules. In such cases, the advisor’s privilege should be respected. If reporting is required, either the promoter or the taxpayer implementing the transaction - and not a secondary advisor - should be the party required to report. Taking this approach would minimize confusion, since the scope of legal privilege differs between countries. The exclusion of such 'secondary advisors' should reduce the applicability of difficult issues concerning privilege; when it will apply and when not.

**Penalties**

25. Monetary penalties should be related to the ‘tax saving’ or ‘tax liability’ and not be a specific sum. OECD best practices should also suggest a clear statute of limitations. Even non-monetary penalties should be related to the actual tax liability or other tax related obligations. That is, an extension (but not unlimited) of a statute of limitations may be appropriate as a penalty/consequence, while precluding a taxpayer from participation in a tender would not.

**Need for Disclosures: Hallmarks**

26. The use of a “main benefit” test as a threshold for disclosure, particularly if the test is “one of the main benefits” rather than “the main benefit”, may result in an undermining of the principle that “mandatory disclosure rules should be clear and easy to understand.” The main purpose test will result in taxpayer uncertainty and the omission of transactions that governments may want to be made aware of. In addition, taxpayers will be forced to pay for advisory opinions to determine whether the test is satisfied, increasing the difficulty and cost of compliance. Taxpayers may also be subject to penalties when they believed in good faith that disclosure was not required.

**‘Hypothetical generic hallmarks’**

27. BIAC strongly objects to the use of ‘hypothetical generic hallmarks’. Taxpayers should be judged by their actions, not by what they might have done. For instance, the reference to ‘premium fees’ and whether a promoter could have charged a premium fee, but did not, introduces uncertainty and encourages second guessing as to the actual conduct of the parties.

**Hallmark loss transactions**

28. BIAC cautions against the inclusion of ‘acceleration of losses’ as a hallmark for a transaction to be disclosed. The draft does not clearly explain when a loss should be considered “accelerated”. For example, would the disposition of an asset qualify as acceleration? This test is not consistent with the hallmark for the transfer of losses – either the loss is realized and recognized by the transferor (and perhaps as a result of accelerated depreciation), or the loss carries over to the transferee. Loss trafficking would seem to justify greater concern. Economic losses that have been realized ought generally to be recognized and allowed (subject to any general limitations on the ability to use losses). The ability to claim such losses might be especially significant in a period of economic downturn. Although the Discussion Draft states the disclosure has no impact on whether the loss would be allowed or not, the overall notion is that “schemes” are subject to disclosure and the reported behavior is considered ‘suspect’.
International Tax Schemes

29. BIAC has the following comments with respect to the ‘International Tax Schemes’ proposals:

- A more appropriate approach would be for countries to consider adopting Mandatory Disclosure Regimes in light of this guidance. If countries adopt guidance, then they will define the information they wish to have reported and other conditions around that reporting. If they decide not to require any reporting that decision should also be respected. Thus, only parties immediately involved (based on governing tax law in the relevant jurisdiction) with a transaction should have an obligation to report.

- As noted above, the purpose of early identification of new schemes is best served in domestic situations as the tax administrations can respond promptly as information is provided, including by making legislative changes if necessary.

- Also, as previously stated, Mandatory Disclosure is primarily of benefit to tax administrations when information is provided upfront, therefore permitting an expedited response. BIAC is again concerned that the International Tax Schemes proposals will not provide that benefit, and will only represent a tool for the receiving assessing officer only relevant for unilateral domestic tax purposes.

- BIAC is concerned that although the Discussion Draft acknowledges that domestic taxpayers may have incomplete knowledge of a transaction, international reporting will nevertheless be required. In relation to paragraph 235, we note there will be cases (for example through a bare shareholding) that a parent might not always be able to ensure that relevant data can be gathered to comply with disclosure rules.

- The Discussion Draft does not offer a ‘safe harbor’ (for instance, for small companies) from reporting obligations.

- The timing requirements for filing any documentation are of particular concern to taxpayers. Many large taxpayers manage thousands of global tax filing obligations throughout the year. These taxpayers already have significant and complex reporting processes in place to ensure proper reporting for recurring obligations. The introduction of reporting obligations inconsistent with these existing timelines will require entirely new and costly reporting processes to be implemented. BIAC strongly recommends that best practices adopt timing requirements consistent with pre-existing reporting regimes (e.g., annual or quarterly tax return filings).

- Reporting of the same transaction may be required in multiple jurisdictions, by taxpayers who are not themselves in any way a party to the cross-border transaction or tax saving (if there is one). In the context of acquisitions, refinancing or restructuring, a large number of group companies may be required to report the same transaction, and each potentially reporting different information at different times regarding the same set of facts. This could
substantially increase related reporting costs and effort, with little or no benefit to tax administrations.

- The creation of a reporting obligation by countries that do not have a tax interest in the “international tax scheme” is inappropriate. The Discussion Draft recommends that “domestic taxpayers should be under an obligation to disclose a cross-border arrangement to the reporting jurisdiction even if they are not a direct party to the cross-border outcome.”

- If the proposed International Tax Scheme disclosure requirements were adopted as they currently stand, detailed guidance would be required for effective implementation by governments, so taxpayers could clearly understand their compliance obligations. Such guidance should clarify taxpayer reporting requirements regarding international tax schemes and how the disclosure rules would work in a multilateral framework. For instance, the ‘materiality standard’ in the draft is unclear.

**Materiality standard**

30. The Discussion Draft states that “an arrangement that incorporates a cross-border outcome should be treated as a reportable scheme if it involves a domestic taxpayer. A domestic taxpayer should be treated as involved in a cross-border arrangement where the arrangement includes a transaction with a domestic taxpayer that has material economic consequences for that taxpayer or material tax consequences for one of the parties to the transaction.”

This standard does not offer a clear definition. Even if materiality were clearly defined, the domestic taxpayer would not be in a position to apply the second half of the test, since the information on the tax consequences to the other parties to the transaction may not be in the possession of the domestic taxpayer that has the obligation to report.

31. Example 1 applies the materiality standard in determining whether reporting is required. It is assumed that a loan from A Co to B Co will have material economic consequences for A Co. There are no facts justifying this assumption. It is possible, and often likely, that a single loan to a related party does not have any material economic consequences to the lender. For example, if A Co has substantial assets and the loan represents a small portion of those assets, and B Co represents low credit risk, it would seem that the loan may not have material economic consequences for A Co. A Co’s entire investment in B Co could be immaterial from A Co’s point of view, depending on the relative sizes of A Co and B Co and A Co’s risk diversification profile.

32. Example 3 illustrates both flaws with the materiality test. Paragraph 272 provides that A Co must report as it is a direct party to a cross-border outcome and the transaction has material tax consequences for B Co. Again there are no facts justifying this assumption. A client database may or may not have substantial value, but if the issue is the materiality of the tax benefit then the

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1 Discussion Draft, paragraph 241.
2 Discussion Draft paragraph 243.
3 Discussion Draft paragraphs 257 through 261.
4 Discussion Draft paragraphs 270 through 274.
outcome should depend on the relative value of that benefit to the tax liability of B Co. If A Co does not have information concerning B Co’s overall tax situation how will A Co apply this test?

33. The Discussion Draft does not deal with reporting between countries. Reporting this information to the country that is not affected by the cross-border arrangement will undermine the principle benefits of a Mandatory Disclosure Regime. The transfer of disclosed information to the jurisdiction that may have a taxation interest in the transaction would likely not reach the other country quickly as the information would likely need to go through a process of exchange of information under a treaty. In addition, the disclosed information may be incomplete and difficult to understand.

34. In particular, paragraph 230 raises the issue of reporting with respect to cross-border tax planning “schemes” regarding ‘acquisitions, refinancing or restructuring’. The OECD’s guidance with respect to the Transfer Pricing master file and local file (BEPS Action 13) will already require reporting on these transactions both globally and locally if the transaction affects the local country business. Additional reporting – especially before the OECD’s revised Transfer Pricing Documentation guidelines have been evaluated – will likely be duplicative and will increase taxpayers’ costs significantly. Disproportionate increases in administrative burden and compliance costs are especially likely in this area due to the modular design of the Mandatory Disclosure Regime. Such a design framework will result in different requirements across jurisdictions as countries will pick and choose from the modules that serve their national interests. This runs counter to the design principles under Action 13, where the OECD attempted to achieve consistent reporting, partly to limit the cost of compliance.
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April 30, 2015

Ref: OECD DISCUSSION DRAFT: Mandatory Disclosure Rules (BEPS Action 12)

Dear Mr. Pross:

The Brazilian National Confederation of Industry (CNI) thanks the OECD for the opportunity to provide comments on its Discussion Draft on Action 12 (Mandatory Disclosure Rules) of the Base Erosion and Profit Shifting (BEPS) Action Plan issued 3 April 2015 (the “Discussion Draft”). The comments offered by CNI in the attached report focuses on technical and policy issues which are particularly sensitive to Brazilian Industry yet which are relevant to all nations.

CNI is the largest and highest-level representation of industry in Brazil with a mission to promote a favorable business environment, enhance competitiveness and promote sustainable development. CNI represents 27 state federations of industry, over 700,000 manufacturing companies and 2,000 sectorial associations, encompassing issues such as economic policy, infrastructure, environment, SME development, labor relations, and international negotiations. CNI develops an active process of dialogue and influence with the National Congress and the Executive. With the Judiciary, the organization has the power to propose measures to ensure that laws are empowered by the Constitution in any respect that affects the industry’s interest. CNI also operates a vast high quality network of professional qualification, education, management training and promotion of entrepreneurship through three entities it oversees: the National Industrial Training Service (SENAI), the Industrial Social Service (SESI) and the Euvaldo Lodi Institute (IEL).

CNI will remain engaged in the BEPS Project and hopes to contribute further with the OECD and the G20 in the discussion of this and all other Action items.
Brazilian-headquartered multinational enterprises (MNEs) that are members of CNI have significantly expanded their global presence and footprint in the recent past, and operate complex global value chains with massive presence in Europe, Asia, Africa and the Middle East, and North America, and substantial trade across such regions. The potential ramifications from the proposed changes under the BEPS Project might differ in different areas of the world as, we fear, different nations will tend to interpret or enforce the proposed changes according to their national tax policies and traditions.

In particular, and most regrettably, Brazil provides one of the most vivid examples of the expected inconsistency in post-BEPS national tax policies and enforcement: Brazil is a G20 country that is not an OECD Member yet that participates in the OECD/G20 BEPS Project “on equal footing” with OECD Members (and that, in return, and as per the BEPS Action Plan, would be “expected” to adopt the standards that it is jointly developing under the Project). Yet it openly declared it will maintain its unilateral practices and unilateral (incoherent) interpretation of treaty law, maintain its inconsistent transfer pricing rules, and it is not expected to adopt any form of bilateral or multilateral dispute resolution under Action 14 [no practice of Mutual Agreement Procedures (MAP) with or without Binding Arbitration, no preventive cooperative-compliance practices such as Advance Pricing Agreements (APAs)]. Nonetheless, Brazil, as many other nations that are not committed with the overall object and purpose of the Project, does exert influence on the Project and in the language of the draft reports, driven by its unilateral policies. In Action 12, on Mandatory Disclosure, such influence is quite evident.

Countries such as Brazil are expected to take the language that emanates from the BEPS Reports “out of context” and purport that their national policies are aligned with best international practices condoned by the OECD. This environment of aggressive national policies which seems to be very present
and reinforced in some of the discussion drafts, is expected to give rise to significant issues in terms of double-taxation (juridical and/or economic) affecting Brazilian MNEs globally, and will certainly expose them to adjustments and to litigation in multiple jurisdictions, whilst non-Brazilian MNEs that invest in Brazil will likely find themselves trapped between Brazil’s insulated rules and inconsistent interpretation of treaty provisions, and additional sourcing at headquarters and/or in other states post BEPS. Stringent, unclear, out-of-context, and inconsistent Mandatory Disclosure Rules around the world that might be “inspired” by BEPS Action 12 will trigger additional controversy and litigation everywhere, and without the proper remedy under Action 14, without access to strengthened bilateral or multilateral dispute resolution mechanisms, multiple instances of double-taxation will ensue and multiple barriers to cross-border investment and international trade will be raised, and as such the BEPS Project as a whole becomes simply a threat to the global economy. Its failure represents a new era of international tax conflicts and litigation which would certainly damage the world economy (and even more severely hurt Brazil).

We therefore offer our comments in this report using the following structure:

I. General Commentary on the Proposed Changes under Action 12

II. Enforcement and Interpretation Issues Affecting Industry within Brazil

III. Enforcement and Interpretation Issues Affecting Brazilian Industry in China, India, and in Developing Countries

IV. Enforcement and Interpretation Issues Affecting Brazilian Industry in Europe and North America
I. General Commentary on the Proposed Changes under Action 12

Most of the “discussion drafts” released under the BEPS Project by the CFA emphasize to a greater or lesser extent the lack of consensus between all working parties engaged in the Project, i.e., the OECD Committee on Fiscal Affairs (CFA), OECD Working Parties and country delegates. Whilst it would be expected that such disagreement or lack of consensus could exist with respect to the solutions that are under development and offered in response to the very clear Mandate from the OECD/G20 Country Leaders, it is shocking and quite disappointing to see in the reports language that significantly deviates from the BEPS Project Mandate itself.

In Action 12, this is quite appalling and it starts with the very “scope” of the work. The BEPS Action Plan of 2013 mandates:

“ACTION 12: Require taxpayers to disclose their aggressive tax planning arrangements

Develop recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the administrative costs for tax administrations and businesses and drawing on experiences of the increasing number of countries that have such rules. The work will use a modular design allowing for maximum consistency but allowing for country specific needs and risks. One focus will be international tax schemes, where the work will explore using a wide definition of “tax benefit” in order to capture such transactions. The work will be co-ordinated with the work on co-operative compliance. It will also involve designing and putting in place enhanced models of information sharing for international tax schemes between tax administrations.”

The Mandatory Disclosure Rules referred to above are part of the overall BEPS Project and not a separate project on mandatory disclosure that can be dissociated from the other Actions. These contemplated rules should not be generally applicable to any and all “uncertain tax positions” but instead should be designed to address “aggressive tax planning arrangements” that raise BEPS concerns. Therefore, a proper output from the work under Action 12 would be, for example, common international standards and
principles that enable the definition and identification of such “aggressive tax planning arrangements” that raise BEPS concerns.

Uncertainty is inherent to law as the enforcement of any law requires interpretation. In tax law this phenomenon is no different. Many countries have practices that deal with uncertain tax positions, and a few may have experience with the application of rules to international transactions that raise BEPS concerns. Rules to require the disclosure of uncertain tax treatment in a purely domestic context or in the context of international transactions which do not relate to profit shifting, should simply fall outside of the scope of the present mandate of Action 12.

Action 12 Mandatory Disclosure standards should address BEPS concerns only (Base Erosion via Profit Shifting), as should be the entire exercise under the BEPS Project. Action 12 follows Action 11 under which the BEPS problem would be quantified, and it precedes Action 13 which addresses the need for enhanced transfer pricing documentation and country-by-country reporting. The context is clear, the object and purpose of the Mandatory Disclosure Rules are “aggressive tax planning arrangements” that trigger BEPS concerns.

Furthermore, the Action Plan repeatedly links the Mandatory Disclosure work with “Co-Operative Compliance” such as in “The work will be co-ordinated with the work on co-operative compliance.”

However, the discussion draft falls significantly out of the aforementioned context. Firstly it abandons it its foreword the limitation of scope, and broadens it from “aggressive tax planning arrangements” to encompass “tax strategies”, as follows:

"Action 12 of this plan notes the usefulness of disclosure initiatives in addressing the lack of comprehensive and relevant information, available to tax authorities, on tax planning strategies and calls on OECD and G20 countries to develop recommendations regarding the design of mandatory disclosure rules."

Mandatory disclosure rules (henceforth referred to as MDR) on “tax planning strategies” referenced in the discussion draft is not necessarily the same as MDR on “aggressive tax planning arrangements”. This foreword sets the tone of the report, and sets its course in the wrong direction.
The report then presents a collection of Mandatory Disclosure practices and standards which over-emphasize certain country rules that are dissociated from cooperative compliance, and puts forth some ideas that represent no more than the ambitious desires of enforcement authorities from multiple countries in generally addressing uncertain tax positions or domestic “base erosion” unrelated to “profit shifting” in each domestic jurisdiction.

Another unfortunate feature of the discussion draft is that it relativizes the mandate on cooperative compliance. Firstly, there is no reference whatsoever to co-operative compliance in the executive summary. Then in item 7 of the introduction the following reference is made:

"7. Action 12 provides that the recommendations for the design of mandatory disclosure rules should allow maximum consistency between countries while being sensitive to country specific needs and risks and the costs for tax administrations and business. The design recommendations should also take into account the role played by other compliance and disclosure initiatives such as co-operative compliance."

Stating that the work on MDR “should take into account” other initiatives “such as co-operative compliance” is not, by any means, anywhere near the Mandate of OECD/G20 Leaders (i.e., “will be coordinated with”). This is not only unfortunate but a disconcerting deviation of purpose with potentially serious consequences.

This is not only about protecting the fundamental rights of taxpayers; it is in fact a deviation of the OECD purpose – once any report bearing the OECD brand is issued with inadequate language, a mere caveat to state that it does not necessarily reflect the views of the OECD CFA is not sufficient to cure the damage it might inflict, or to mend the responsibility of the OECD delegates to observe their mission as per the OECD Charter. Although some damage may be made by taking any commentary from a report out of context, it is when an OECD-branded report is itself predominantly out-of-context (as it goes beyond its mandate) that a greater potential damage can occur.

MDR to be developed under Action 12 should address BEPS concerns stemming from “aggressive international tax arrangements”, period. And not condone a “new wave” of incoherent MDR across multiple countries.
around the world that may simply address the inherent uncertainty of domestic tax law, unrelated to BEPS.

MDR under Action 12 should be absolutely coordinated with (and if possible integrated with) “cooperative compliance” and “service” practices which build trust and enable greater adherence to tax policy goals. Some of the practices which should be further promoted by the OECD in tandem with the MDR of Action 12 would, for example:

- Unbiased, transparent, and efficient processes of “advance rulings” (including APAs), which requires tax administrations from around the world to increase the quantity and enhance the quality resources devoted to such processes;

- Unbiased and efficient “alternative dispute resolution” mechanisms to reduce litigation, including binding MAP (even of MAP Arbitration) above and beyond the terms of the Action 14 discussion draft;

- Transparent and consultative processes of development of tax legislation and of infra-legal regulations, which not only allow taxpayers to collaborate in the development of rules, but also which would provide sufficient time for businesses to change their structures and models so as to remain in compliance with the law;

- Elimination of penalties for taxpayers who voluntarily disclose information beyond the requirement of MDR (for instance for taxpayers that seek guidance in the form of ruling requests, or that request bilateral or multilateral resolution of issues through MAP).

In addressing cooperative compliance, however, the discussion draft seems to identify such approach in a fairly narrow manner as a practice that only applies to large taxpayers and thus discriminates against other enterprises. The opportunity at hand is to develop new cooperative compliance practices that target BEPS concerns, which may involve taxpayers of any size, and thus are not discriminatory as to the subjects involved, but as to the object (i.e., to curb BEPS) which is the entire point of the BEPS Project.
The discussion draft states:

"9. In 2013 the OECD issued a report on co-operative compliance programmes [Co-operative Compliance: A Framework: From Enhanced Relationship to Co-Operative Compliance (OECD, 2013) ("2013 Report"). The 2013 Report was a follow-up to a 2008 Study on the role of tax intermediaries, which encouraged tax authorities to establish enhanced relationships with their large business taxpayers. Under co-operative compliance programmes, taxpayers agree to make full disclosure of material tax issues and transactions they have undertaken to enable tax authorities to understand their tax impact. Co-operative compliance relationships allow for a joint approach to tax risk management and compliance and result in more effective risk assessment and better use of resources by the tax administration. The 2013 Report noted the number of countries that had developed co-operative compliance programmes since the publication of the 2008 Study and concluded that their value was now well-established.

10. Both mandatory disclosure and co-operative compliance are intended to improve transparency, risk assessment and ultimately taxpayer compliance. They do this in different ways and may be aimed at different taxpayer populations, for instance co-operative compliance programmes often focus on the largest corporate taxpayers. However, as mentioned later in this document, mandatory disclosure can reinforce the effectiveness of a co-operative compliance regime by ensuring that there is a level playing field in terms of the disclosure and tax transparency required from all taxpayers."

It becomes, therefore, evident that the delegates involved in the drafting of this discussion document, through the sentence highlighted above, relativize their mandate on the matter of cooperative compliance. The statement implies that cooperative compliance practices are necessarily discriminatory (and hence, from this perspective, negative) in nature.

MDR is not necessary to “level the playing field” for all taxpayers, as broadening cooperative compliance practices in the object-matter of BEPS would certainly create such a “leveled field”. MDR should come alongside positive, trust-building “cooperative compliance” incentives and service to all taxpayers, and, in fact, perhaps enhancing and broadening cooperative
compliance in areas of BEPS concerns would be more effective than imposing uncoordinated MDR separate and aside from the maintenance of cooperative compliance practices. Stating that one set of rules would necessarily complement the other is a fallacy; instead, uncoordinated MDR may dampen the trust-building and compliance-building effects of cooperative compliance.

After the introductory remarks which (quite inadequately) set the context for the matter of MDR, the Action 12 discussion draft then structures its presentation of the matter by, first, presenting several standards and principles that can be observed around the world (and that often pursue different purposes), and secondly by recommending MDR as a general practice separate and aside from the mandate to address BEPS:

"II. OVERVIEW OF MANDATORY DISCLOSURE: A. Objectives; B. Basic elements of mandatory disclosure; C. Design principles; D. Comparison with other disclosure initiatives; E. Co-ordination with other disclosure and compliance tools; F. Effectiveness of mandatory disclosure

III. OPTIONS FOR A MODEL MANDATORY DISCLOSURE RULE: A. Who has to report; B. What has to be reported; C. Hallmarks; D. When information is reported; E. What other obligations should be placed on the promoters or users; F. Consequences of compliance and non-compliance; G. Procedural / tax administration matters

The aforementioned sections which are not specifically targeted at BEPS consume no less than two-thirds of the report (from page 13, paragraph 14, through page 56, paragraph 222). And it covers most consultation questions (17 out of 21). A separate section under Chapter IV addresses “international tax schemes”, which as per the mandate would be a subset of BEPS-related “aggressive tax planning” but as per the discussion draft would simply reinforce disclosure of BEPS-related “tax strategies”. The document, therefore, is an “all-for-all toolkit” for the setting of MDR for “uncertain tax positions” (which include all potential “tax strategies” which could be promoted in any context, whether or not aggressive or abusive, whether or not related to BEPS, as long as such strategies are material or require significant external tax advisory services), and it does so quite separately from the development of cooperative compliance practices.

On the matter of cooperative compliance, the discussion draft places it in a common category of "other compliance practices":

"D. Comparison with other disclosure initiatives"
25. A number of countries operate information or compliance initiatives in addition to or instead of having a mandatory disclosure regime. The other types of disclosure initiatives used by tax administrations to collect taxpayer compliance information are described in further detail in the 2011 Report and include:

a) Rulings regimes that enable taxpayers to obtain a tax authority’s view on how the tax law applies to a particular transaction or set of circumstances and provides taxpayers with some degree of certainty on the tax consequences. Rulings can, at least in part, play a similar role to disclosure regimes in that a taxpayer will typically apply for a ruling in anticipation of entering into a transaction. The usefulness of rulings regimes as a source of information on transactions involving tax avoidance may however be limited where the tax administration, does not rule on transactions that involve abusive or aggressive tax planning schemes because taxpayers will have no incentive to apply for such rulings.

b) Additional reporting obligations that require taxpayers to disclose particular transactions, investments or tax consequences usually as part of the return filing process.

c) Surveys and Questionnaires that are used by some tax administrations to gather information from certain groups of taxpayers with a view to undertaking risk assessments.

d) Voluntary disclosure as means of reducing taxpayer penalties.

e) Co-operative compliance programmes where participating taxpayers agree to make full and true disclosure of material tax issues and transactions and provide sufficient information to understand the transaction and its tax impact.

In fact all items above can be the object of cooperative compliance programs, which could be designed under Action 12 and in the context of BEPS-related concerns to include all taxpayers irrespective of size. Any taxpayer that engages in international reportable transactions under a new Action 12 MDR standard (i.e., transactions which raise BEPS concerns) would thus be entitled to enroll in redesigned co-operative compliance programs which could include all “compliance practices” cited above. And in the area of “rulings” the greatest contribution to be achieved within the realm of the BEPS Project would be a broader adoption of multi-country rulings (such as APAs).
The discussion draft, however, again discriminates against cooperative compliance in all its forms, as follows:

26. In each case, the objective of these disclosure initiatives is, to a greater or lesser extent, to require, or incentivise taxpayers and their advisers to provide tax authorities with relevant information on taxpayer behaviour that is either more detailed, or more timely, than the information recorded on a tax return. These other disclosure and compliance initiatives have different objectives to mandatory disclosure and are not exclusively focused on identifying the tax policy and revenue risks raised by aggressive tax planning. They therefore typically lack the broad scope of a mandatory disclosure regime (capturing any type of tax or taxpayer) or the focus on obtaining specific information about promoters, taxpayers and defined schemes. The key feature that distinguishes mandatory disclosure from these other types of reporting obligations is that mandatory disclosure regimes are specifically designed to detect tax planning schemes that exploit vulnerabilities in the tax system while also providing tax administrations with the flexibility to choose thresholds, hallmarks and filters in order to target transactions of particular interest and perceived areas of risk.”

And it moves on to state:

“(i) Mandatory disclosure applies to a broader range of persons

27. Because mandatory disclosure regimes apply to all taxpayers (both large and small) and not simply those who choose to disclose through a voluntary compliance measure, they have a broad scope and can capture the largest possible set of taxpayers, tax types and transactions. Mandatory disclosure regimes also include third parties involved in the design, marketing, or implementation of tax planning schemes. In contrast to voluntary disclosure initiatives, which only incentivise a taxpayer to disclose details of their tax planning arrangements, mandatory disclosure is compulsory, so that any scheme targeted by the regime is required to be disclosed by all taxpayers and their advisers. Ruling regimes, for example, can provide tax administrations with useful information on transactions being undertaken by taxpayers and how taxpayers are interpreting and applying the law. However because rulings regimes are voluntary compliance initiatives, they will apply to a smaller number of self-selected taxpayers.
28. While an effective co-operative compliance programme or targeted questionnaires can provide a source of information on tax planning schemes, neither of these disclosure initiatives target the same range of taxpayers or the advisers and other third parties responsible for the design and implementation of such schemes. Although taxpayer surveys and questionnaires can reach a wider group of taxpayers than a cooperative compliance regime, they can only cover selected risks and the information obtained on those risks will depend on the design of the questionnaire. The effectiveness of questionnaires will also depend on the powers of the tax administration to require taxpayers to respond.

What becomes apparent, particularly as the report presents a comparison of such compliance practices, is that the main difference perceived by the drafters of the document has to do with “who” is required to disclose. In particular, tax advisors and “promoters” would be included only in MDR, hence the preference of tax authorities to adopt these rules. Not to mention that “all transactions” which possibly exploit “vulnerabilities of the tax systems” (i.e., flaws in the design of tax laws) would be reportable.

The disclosure of promoters may be ultimately moot particularly to curb BEPS, and may simply represent an incentive for sophisticated “tax planners” to operate within law practices around the world, which benefit from greater confidentiality protection (i.e., “attorney-client privilege”) as compared to accounting firms and other multidisciplinary practices. That would be the case in most if not all jurisdictions involved. Accordingly, by imposing limitations that alter the competitive landscape of the market for these services, it is expected that such services would simply become “pricier”, as a demand for such services that identify flaws in the design of tax laws or opportunities for material tax minimization (whether or not “aggressive”) would continue to exist worldwide; hence, the attorney-client privilege would justify the charging of even higher fees for such type of (legal) tax planning advice.

Again a proper distinction between legitimate “tax avoidance” (which may or may not include “aggressive tax planning arrangements”), and “tax evasion” (which may or may not include “aggressive tax planning arrangements”), is simply lacking in the discussion draft, as it portrays a libel against any and all such practices by commonly and interchangeably referring to both as “tax strategies” or “schemes”.

Secondly, the scope of the discussion draft should again have remained focused on the anti-BEPS mandate, which, as it turns out, was limited to Chapter IV:

"IV. INTERNATIONAL TAX SCHEMES

A. Application of existing disclosure rules;

B. Recommendation on an alternative approach to the design of a disclosure regime for international tax schemes: (i) New hallmarks based on identification of cross-border tax outcomes; (ii) Broad definition of arrangement that includes offshore tax outcomes; (iii) No threshold requirement; (iv) Limitations on disclosure; (v) Disclosure obligation on both taxpayer and the promoter or material adviser; (vi) Information required."

This report from Brazilian Industry, therefore, will not dwell on the “pros and cons” of the multiple MDR that exist around the world, and on the attempt of the discussion draft to develop a general rule of mandatory disclosure of uncertain tax positions (as does the discussion draft in two-thirds of its length and in 17 out of its 21 consultation questions).

Instead, it is the view of Brazilian Industry that the general approach of the discussion under Action 12 must be redirected towards:

(a) the development of new MDR in tandem with the development of unilateral and multilateral cooperative compliance practices, such as the development of multilateral ruling procedures (or at a minimum the more prevalent adoption of APAs) and “mutual transparency” between taxpayers and tax administrations in all OECD Members and G20 countries engaged in the BEPS Project (starting with Brazil);

And

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2 Although it is recognized that the “design principles” recited in the document are appropriate and should be pursued, i.e., (i) Mandatory disclosure rules should be clear and easy to understand; (ii) Mandatory disclosure rules should balance additional compliance costs to taxpayers with the benefits obtained by the tax administration; (iii) Mandatory disclosure rules should be effective in achieving the intended policy objectives and accurately identify relevant schemes; (iv) Information collected under mandatory disclosure should be used effectively.
(b) the development of new MDR standards under the realm of the BEPS Project should be focused on areas that raise BEPS concerns.

The BEPS Project should not be used as a mere platform for countries that are not committed with its main outcomes, and that may use the BEPS and OECD “brands” to pursue incoherent national policy goals that reduce international investment and international cooperation. The Project should not serve as a “platform” for countries that are not generally aligned with the principles of the OECD Model Convention pre-BEPS and that will remained not aligned with the new principles of the OECD Model Convention to “justify” unilateral policies using language from the BEPS reports, or using the work of OECD delegates and the resources of the OECD. Countries that do not generally follow OECD Transfer Pricing Guidelines (pre and post BEPS), and countries that are not committed to the outcome of Action 14 (enhanced Mutual Agreement Procedures, use of MAP Arbitration beyond Europe) should not be allowed influence in particular BEPS discussions that are taken out of context. Yet in this particular project Brazilian Industry sees the entire discussion derail out of context, and urges the Project delegates to observe their mandate arising from the BEPS Action Plan of 2013.

Otherwise, the preliminary comments issued by BIAC in respect to the comparison of MDR standards embedded in the report and the still very tentative definitions of “international tax schemes” by the discussion draft are consistent with the views of Brazilian Industry. The expectation is that a new discussion draft will in the future enhance the contents of Chapter IV so as to warrant a more in-depth review and commentary.

II. Enforcement and Interpretation Issues Affecting Industry within Brazil

(a) Inbound FDI – Brazilian-Source Income of Foreign Investors

Within Brazil, the degree of entity-level and transaction-level Mandatory Disclosure is, quite likely, the highest and most burdensome in the world. The highly-technological “Orwellian” tax reporting and disclosure system

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3 New principles that are expected to represent the final result of the BEPS Project and which will be crystallized in the Multilateral Instrument under Action 15, and in post-BEPS versions of the OECD Model Convention.
currently in force in Brazil controls on a transaction-by-transaction level purchases of inputs and sales of outputs (within the country and across borders) with massive data-points on the parties involved, the nature of transactions, the nature of inputs and outputs, etc., and in fact it is completely tied to processes of shipment, issuance of bills of lading and the like. Electronic recordkeeping and online submission of financial records covers all financial accounting books, all financial accounting entries, and financial accounting statements, all banking and financial transactions, and all imports and exports of goods, services, and intangibles. All inputs, outputs, tangible and intangible, and all transactions have a predetermined “fiscal classification” and electronic form of (online) reporting. Some records are submitted contemporaneously with the transactions carried out (and some transactions require prior registration), while most financial statements and records are submitted periodically (i.e., monthly, quarterly, or annually).

The design of the Brazilian tax system, nonetheless, includes a myriad of transactional-level taxes with multiple “general rules” and several industry-specific, taxpayer-specific, transaction-specific, or even geography-specific “exceptions” to the general rules. Given the multitude and complexity of the system (not to mention the size and nature of the tax burden), compliance is therefore a massive challenge. Accordingly, the design of the system is often incoherent and flawed, and inconsistencies are triggered as different tax policies interact over-time under the rule of different governments, and under the influence of different interest groups.

Great uncertainty in the interpretation and application of the rules is a result of such uniquely complex and intricate system. Multiple interpretation possibilities arise more often than in many other countries across the world, and it is relatively more difficult to ascertain the true spirit of Brazilian tax laws that are internally incoherent or inconsistent. Penalties are typically very high, and the environment is quite adversarial as the level of cooperation and trust between taxpayers and the tax administration is quite low\(^4\), and the general interaction between civil society and the government is quite utilitarian, with an under-developed

\(^4\) Rudimentary ruling procedures exist, albeit not sufficiently transparent and unbiased. No settlement of controversies exists and instead “tax amnesty” programs are typically used. The process of administrative disputes of tax assessments is relatively well-developed (particularly as compared to other emerging economies or developing nations), however over time one can observe it is not entirely and consistently transparent and unbiased.
sense of state-building, and in the area of tax this is quite visible, most unfortunately.

Legitimate tax avoidance (under whatever euphemism is preferred by the reader, i.e., tax minimization, strategic tax management), therefore is a necessary practice for any person or any enterprise in Brazil. Perhaps more prevalent than in many other countries. Similarly the “incentive” and adversarial culture referred to above creates an environment wherein “tax evasion” persists (including illegitimate and aggressive “tax arrangements”), not only in relation to the shadow economy.

Nonetheless, in spite of all entity-level and transaction-level disclosure, Brazilian taxpayers are not (yet) required to mandatorily report their “uncertain tax positions” or their “interpretation” of specific transactions that may be viewed by the Brazilian tax administration as undesirable (whether legitimate or illegitimate). Accordingly, if through the BEPS Project the OECD condones the application of broad MDR of all “uncertain tax positions”, all “tax strategies”, or all “tax avoidance” practices, separate and aside from “cooperative compliance” practices and not conditioned to “enhanced services” by tax administrations, this could have a significant impact for all businesses that operate in Brazil. This includes inbound-MNEs as well as Brazilian MNEs, in respect to their operations, transactions, assets, income, and personnel located in Brazil.

The negative tax environment that exists in Brazil is one of the main reasons for Brazil not to participate in global value chains as much as it could, for Brazil not import or develop as much technology as it could, and for Brazilian businesses (of all kinds and sizes) not grow as much as they could, and thus for Brazil as a Nation not to grow and develop its economy and its people as much as it could.

Brazil’s insular interpretation of international tax laws is but one additional hazard of its adverse tax environment. Unfortunately, this major “opportunity cost” is apparently not as visible to the Brazilian authorities as it is to Brazilian Industry. This unawareness certainly misleads the stance of the Brazilian Authorities that are engaged in the BEPS Project too. There seems to be an opportunistic approach in the sense that the main outcomes of the BEPS Project will not likely be adopted in Brazil (e.g., transfer pricing, MAP) whilst some of the language, and some of the reports produced under the BEPS “halo” effect can be “cherry-picked” and adopted
in Brazil to increase tax enforcement of current policies. In the area of MDR this is very much expected.

(b) Outbound FDI – Brazilian MNEs Foreign Source Income

Brazil is uniquely positioned at a disadvantage as a country with the combination of its rejection of OECD Transfer Pricing Methods and Guidelines and the ineffectiveness of Action 14. It is evident that as per the GAAR debate under Action 6, the MDR debate Action 12, the PE debate under Action 7, and all transfer pricing reforms related to Actions 8-10, a greater share of the profits from Brazil’s exports of commodities (and exports from diverse industries) would be attracted overseas to high-tax countries in Western Europe, North America, Japan, China and India, without a corresponding increase to Brazilian tax revenues if Brazil does not change its transfer pricing rules. As such, Brazilian MNEs that operate global value chains with significant footprint in several high-tax countries would have more of their profits attracted to these nations post BEPS.

Brazilian MNEs operate under a worldwide income tax system at a high statutory rate (34%) and a ruthless anti-deferral statute (albeit with foreign tax credits). Therefore in the absence of Brazil’s engagement in MAP (and MAP Arbitration) it is quite likely that the BEPS Action Plan will erode the tax base within Brazil and increase the relative amount of foreign tax credits that would have to be granted by the Federal Revenue of Brazil, while multiple new instances of double-taxation, conflicts of source and qualification are likely to arise post BEPS.

III. Enforcement and Interpretation Issues Affecting Brazilian Industry in China, India, and in Developing Countries

It is notorious that China and India have aggressive Transfer Pricing practices and equally aggressive policy interests with regard to the reform of Transfer Pricing rules under Actions 8, 9 and 10, and also of PE rules under Action 7, whilst unilateral GAAR initiatives in the area of tax treaties is encouraged under Action 6. Many developing countries could follow in their footsteps post BEPS and adopt not only UN-recommended practices but more aggressive, subjective, and unilateral post BEPS measures to assess the existence of PEs and the allocation of profits out of Brazil and into such PEs, particularly if additional information is reported in the forms
prescribed under Action 12 and Action 13 (on country-by-country reporting).

Brazilian Industry, i.e., Brazilian-based exporters and Brazilian-headquartered MNEs, therefore should expect a significant risk of double-taxation (Brazilian tax “plus”) and of litigation in China, India, and many developing nations, if PE concepts are enlarged under Action 7 – and even more if the Arm’s Length Principle of Treaty Article 9 is significantly changed under Actions 8, 9, and 10 of the BEPS Project.

In fact, it should be in the interest of the Brazilian tax authorities to avoid such an enlargement of base in high-tax countries as it would not increase Brazilian tax revenues on inbound FDI while it has the potential to significantly increase foreign taxes imposed on outbound FDI and exports (therefore to significantly decrease Brazilian tax revenues collected from Brazilian exporters and from Brazilian MNEs).

At a minimum, the engagement of Brazilian Tax Authorities in MAP (and even the adoption of MAP Arbitration) would be particularly necessary in light of Brazil’s trade flows and investment flows with China and India.

IV. Enforcement and Interpretation Issues Affecting Brazilian Industry in Europe and North America

One would expect the issue to be less severe for Brazilian Industry in North America and Western Europe as compared to China and India (and other developing countries), particularly as such nations already have more developed and sensible MDR and cooperative compliance programs. Further, such nations embrace MAP and even MAP Arbitration, and are less likely to depart from the arm’s length principle in transfer pricing (provided the Arm’s Length Principle is not significantly changed under Actions 8, 9 and 10 of the BEPS Project and provided such new principles are not interpreted inconsistently between major OECD Member countries).
Dear Dr. Pross,

Please find enclosed our comments regarding the BEPS Action 12: MANDATORY DISCLOSURE RULES.

The Federal Chamber of Tax Advisers represents the interests of more than 94,000 tax advisers in Germany vis-à-vis the Bundestag, the Bundesrat, the federal ministries, the top echelons of the civil service, the courts and the institutions of the EU and OECD.

The main duties of the Federal Chamber of Tax Advisers are to represent the entire profession at national and international level, to participate in the drafting of the laws of the profession and in consultations on tax laws and laws in all other legislative areas of the profession.

Yours sincerely

Jörg Schwenker
Geschäftsführer

Encl.
BEPS Action 12:
MANDATORY DISCLOSURE RULES

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30 April 2015
General Remarks

First of all, we would like to strengthen that Bundessteuerberaterkammer supports every measure to prevent tax evasion. Nevertheless we are critical of some proposed measures.

The examples provided by the OECD are based on countries like the United Kingdom, the US, Ireland, Portugal, Canada and South Africa. These are – except Portugal (a civil law country) – all members of the Anglo-Saxon case law tradition.

However, the above mentioned countries have another tradition of taxation; taxpayers are required to complete a self assessment tax return.

Therefore the role of tax advisers and taxpayers in these countries is widely different from the one in, for example, continental-European countries like Germany and France.

In Germany, tax advisers are an independent body of the administration of justice. Thus German tax advisers are obliged to fulfill their duties in a narrow range, being controlled by a consistent oversight over tax advisers.

German tax advisers are subject to professional secrecy. The connection between the taxpayer and his tax adviser is strictly confidential.

Between the tax adviser and the taxpayer a relationship of trust and confidentiality reigns.

Bundessteuerberaterkammer as a public body wishes to emphasize the differences between legal tax advice and criminal tax evasion. According to German Law, a tax adviser can be obliged to resign from his mandate if he recognizes that his client is committing illegal tax evasion. On the other hand – and also required by German Law – a tax adviser is obliged to inform his client in order to achieve every legal tax advantage.

For example although direct taxes are not harmonized, the ECJ argued in its judgement C-196/04 – Cadbury/Schweppes – that only wholly artificial arrangements are illegal in cross-border structures.

According to the ECJ a restriction of freedom of establishment is therefore possible in cases of a ‘letterbox’ or ‘front’ subsidiary.

Please let us emphasize another point in this discussion:

During the last few years Germany has already changed its tax law in order to prevent tax evasion, for example by implementing an interest barrier preventing overwhelming interest deductions from the tax base, implementing the AOA (Authorized OECD-Approach) and developing modern transfer pricing documentation rules.
Questions for Consultation

Question Nr. 1:
Does mandatory disclosure have any other impacts on disclosure and taxpayer compliance not covered in this chapter?

As described above, the legal situation in Germany seems to be very different than, for instance, in the UK. Both the taxpayer’s and the tax adviser’s situation is not comparable in these countries.

Question Nr. 3:
Are there any other considerations, not mentioned above that arise with option A or option B, if so, what are they?

a) General considerations on “Who has to report”

Concerning the obligation of the “promoter” to disclose, the following should be noted from the German tax advisers’ point of view. As a preliminary remark, it must be pointed out that by far the largest number of tax advisers are not involved in the tax schemes in question and therefore, as a general rule, cannot be considered as “promoters” in the sense of the OECD proposals.

Most generally, according to German law, tax advisers are legally bound to confidentiality (§ 57 [1] StBerG). Any violation of this obligation is punishable as a criminal offence (§ 203 [1] Nr. 3 StGB, German Penal Code).

Confidentiality is a fundamental principal of the tax advising profession. It includes all information that is revealed to the tax adviser or that the tax adviser takes note of in the context of exercising his profession. The confidentiality even extends to information concerning personal and private matters of a client.

In addition – and with particular importance to the OECD’s proposals – it has been confirmed by a court judgement of the German supreme fiscal court that the obligation of confidentiality also covers the identity of the existing and the prior clients of a tax adviser (Bundesfinanzhof – BFH, 14 May 2002, IX R 31/00). This ruling emphasizes the importance and the extensive application of the confidentiality principle in Germany.

The obligation of confidentiality continues to exist beyond the legal relationship between client and tax adviser for an unlimited period of time.

It should be noted furthermore, when reflecting upon the tax adviser’s obligation to disclose, that German tax advisers have a special position which is guaranteed by law:
They are not only acting on behalf of their clients, being exclusively subject to their will and wishes, but however, in the exercise of their profession, the German law requires them to be an “independent part of the tax administration and justice” (“Organ der Steuerrechtspflege”) and imposes certain obligations on them such as to exercise their profession conscientiously and in due care (§ 57 Abs. 1 StBerG, § 1 BOSTB). Therefore, tax advisers play a **key role in the tax collecting process**. In accordance with this special position, they are denied – in comparison to regular market participants such as their clients – to commercially advertise their services (§ 57a StBerG, § 9 BOSTB).

Due to this dual position, the state and the tax administration have developed a certain confidence in the tax adviser’s work. This brings benefits for the state: It eases the administrative burden for the tax authorities and ensures a stable tax revenue.

However, this system might fall when breaking the confidentiality link between the tax payer and the tax adviser:

The relationship between the client and his tax adviser is, naturally, always characterized by a particular relationship of trust because the tax adviser has extensive insight into all financial details of the client. This requires absolute secrecy of tax advisers with respect to third parties. If tax advisers would be obliged to disclose those information, which in all cases is confidential according to German law (see above), this would break the confidentiality link between the taxpayer and his tax adviser and substantially destroy this relationship of trust that is fundamental for a good cooperation.

The tax payer himself then might no longer be willing to inform the tax adviser about all his tax matters if he had to reckon that this information could be revealed to third parties at any time without his prior authorization. Furthermore, this may lead to the situation that tax payers recruit more in-house tax advisers and design the schemes in-house.

**Due to their legal obligation of confidentiality, tax advisers should not face any obligation to disclose information that fall under the professional confidentiality.**

**b) Considerations on Option B**

Alternatively, we submit the following considerations on the OECD proposals that foresee a primary obligation of the “promoter” as a general principle (Option B):
Although it is to be welcomed that “legal professional privileges” shall be taken into account, we would like emphatically to stress – again – that the confidentiality obligation towards the client **also covers the identity itself of the client**, both the currently existing and the former clients of the tax adviser.

According to Chapter III., point 70 (recital 13) of the proposals, legal privilege in many jurisdictions does not extend to the identity of the parties involved. It should be borne in mind, however, that the legal situation in Germany is fundamentally different since the identity of the tax payer undoubtedly falls under the confidentiality obligation of the tax adviser.

As a consequence, the proposed model of a “primary obligation of the tax adviser” – in the unlikely event of being a promoter – which shall pass over to the scheme user where the tax adviser asserts legal professional privilege cannot work in the framework of the above-mentioned German jurisdiction, because, since the identity of the tax payer will always fall under the confidentiality rules, the tax adviser will always be in a position to assert legal professional privilege. Accordingly, there is no point in implementing a disclosure obligation of the tax adviser as a general principle because, according to German law, this principle would never apply since the obligation to disclose would **always pass on to the scheme user**.

Correspondingly, a German tax adviser is not allowed by law to disclose any names or other data concerning his clients (see Box 9, Nr. 158/166). This is absolutely forbidden and punished by law.

Equally, as a consequence, a German tax adviser will not be allowed to publish a listing of his clients. Such a requirement would be in full contradiction to German law.

**In Germany, the identity of the client is always covered by legal professional privilege. Therefore, Option B with it’s general principle/exception-scheme would not work in Germany because the general principle would never find application.**

c) **Considerations on Option A**

Concerning Option A, it is striking that the aspect of legal professional privilege of the promoter is not considered in the statements of the OECD. After all, we are talking about fundamental professional provisions of general application. Since the action of disclosure itself stays the same in both options, legal professional privilege shall not be arbitrarily applied in Option B, but not in Option A. This would constitute a clear contradiction.
E. What other obligations should be placed on the promoters or users

Once again we would like to stress the importance of professional secrecy in our professional law.

**Question Nr. 13:**
What might prevent the automatic provision of client lists to the tax administration and how could this be dealt with?

As mentioned above, and as a consequence of professional secrecy, a German tax adviser shall not disclose any names or other data concerning his clients. This is absolutely forbidden and punished by law.

Therefore, a German tax adviser will not be allowed to publish a listing of his clients. Such a requirement would be in full contradiction to German law.

F. Consequences of compliance and non – compliance

**Issue of self-incrimination**

Our Constitutional Law and the Human Rights Charta protect everyone from self-incrimination (Principle of Nemo tenetur se ipsum accusare). Every person has the right to claim privilege.

Transferring the obligation to disclose to another person in order to circumvent the legal privilege doesn’t make sense because it doesn’t protect the constitutional rights effectively.

In some cases it may be difficult to draw the line between cases involving a risk of self-incrimination and “ordinary” cases aiming at schemes being in a legal surrounding. We doubt if the fundamental rights will always be observed.

**Question Nr. 18:**
Do you think that the Recommendations will be effective to capture international schemes, and, if not can you suggest alternative approaches?

In many cases it is nearly impossible to get the information, even from a member of the same tax group. But no one should be punished for not being capable to fulfil his duties in the case of failure.

These problems may arise especially in cross-border schemes.
Question Nr. 21: Do you think that the Recommendations will impose an undue compliance burden on taxpayers? If so, why?

Yes and additional administrative burden will lead to competitive disadvantages. Furthermore, as described above, the different situation in most continental-European countries is not sufficiently taken into account.
BUSINESSEUROPE

Achim Pross
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30 April 2015

Submitted by email: mandatorydisclosure@oecd.org


Through its members, BUSINESSEUROPE represents 20 million European small, medium and large companies. BUSINESSEUROPE’s members are 41 leading industrial and employers’ federations from 35 European countries, working together since 1958 to achieve growth and competitiveness in Europe.

BUSINESSEUROPE is pleased to provide comments prepared by the members of its Tax Policy Group, chaired by Krister Andersson, on the OECD Discussion Draft on BEPS Action Point 12: Mandatory Disclosure Rules (hereinafter referred to as the Draft).

General comments
BUSINESSEUROPE believes that access to comprehensive and relevant information on potentially aggressive and abusive tax planning strategies can be very effective for tax authorities in enforcing national and international tax rules. Also, BUSINESSEUROPE recognises that mandatory disclosure rules can have a deterrent effect on the use of tax avoidance schemes.

However, the scope of the mandatory disclosure that the Draft proposes appears to be so wide that it is doubtful it could achieve these goals. The proposals in the Draft would capture so many transactions and generate so much data that it would be unlikely that tax authorities could meaningfully process it. The vast majority of this information would most likely not reflect situations of tax avoidance, but perfectly normal and justifiable instances of non-aggressive tax planning.
In fact, the Draft seems to assume that tax avoidance is the rule rather than the exception. This assumption is not supported by any quantitative analysis and is in the opinion of BUSINESSEUROPE an unfair representation of reality.

**Effectiveness of mandatory disclosure rules**

Furthermore, casting such a wide net in combination with high penalties on non-disclosure could very well trigger a conservative response from business in the sense that disclosure would go far beyond the set hallmarks. This would also make it very difficult for tax authorities to properly and effectively sift through all the information.

It is therefore in the interest of both business and governments to be very precise in formulating the hallmarks and that the OECD shows some restraint by recommending that governments limit the initial hallmarks to those schemes that are most egregious, and lack substance and an underlying commercial purpose. The OECD should refrain from attempting to design a catch-all measure from the outset. This is necessary to provide a solid and sustainable basis for mandatory disclosure rules that are effective in reducing the number of aggressive tax planning schemes which, of course, can still be further developed and honed in the future.

In addition, it is questionable to what extent countries will be able to react more quickly to undesirable tax schemes if they receive information sooner. This would only be the case insofar as barring the tax scheme does not require any change of legislation. Otherwise it would require countries to very quickly change a country's laws at the first indication of an undesirable tax scheme (even before the courts have had a chance to rule on such a scheme) which would result in either legal uncertainty due to constant, symptom-driven changes in legislation at random times throughout the year. The danger is that there are unintended consequences which inadvertently target transactions with a clear commercial purpose and substance, harming investment.

Such instability of legislation would be very detrimental to the investment climate. The end result would be much more likely that a fair amount of time would still need to pass until effective legislative action could be taken.

**Coordinate mandatory disclosure rules with cooperative compliance**

Secondly, BUSINESSEUROPE is of the opinion that – for improving the effectiveness of mandatory disclosure – the approach of the OECD should also include elements of positive reinforcement rather than just recommending implementing additional reporting requirements and subsequent penalties for non-compliance. This would also be consistent with the remarks in the Action
Plan and this Draft that the work will be coordinated with the work on cooperative compliance.

It stands to reason that companies that are engaged with their national tax authorities in cooperative compliance are exempted from these mandatory disclosure rules, since under cooperative compliance companies and tax authorities already mutually agreed to share this type of information. Moreover, such an exemption would encourage both more countries to develop successful cooperative compliance arrangements and more companies to enter into cooperative compliance arrangements with their national tax authorities and thus realising the OECD objective to further develop cooperative compliance\(^1\) and improving compliance and greatly enhancing the possibility of meaningful exchange of information between tax authorities.

Adding this positive element to the recommendations would not only improve the effectiveness, it would also go a long way towards reducing the amount of unnecessary data that would be shared and greatly contribute to the acceptance of these measures by business that are in the majority tax compliant and thus, for whom these requirements would only mean an added administrative burden.

**BEPS needs a holistic approach**
BUSINESSEUROPE calls upon the OECD to also in this context make it explicit that the BEPS project means to come up with holistic recommendations to strengthen the international tax rules. Therefore, the recommendations of the other Action Points have to be factored into the ultimate formulation of the hallmarks. This means that aggressive tax planning schemes that have been effectively made impossible by other BEPS actions do not need to be included in mandatory disclosure rules and recommendations on issues that are covered sufficiently under for instance Action Point 5 on the disclosure of tax rulings, or Action 13 under the Transfer Pricing Documentation and/or Country-by-Country Reporting should not need to be reported again under this Draft. This would put an undue onus on business.

**International exchange of information**
Lastly, Section IV deals with international tax schemes and the question how to make mandatory disclosure more effective in an international context. BUSINESSEUROPE notes that the OECD fails to elaborate on the question of

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\(^1\) See the 2013 OECD report on Co-operative Compliance: A Framework. From Enhanced Relationship to Co-operative Compliance
how the disclosed information is shared amongst tax authorities through automatic exchange of information. BUSINESSEUROPE would like to point out that proprietary information that would be exchanged should be subject to strong safeguards of protection and that therefore the access to this information should, at least, be limited to those countries that have a direct interest in the international tax scheme and have, in fact, implemented the OECD recommendations.

**Hallmarks**

BUSINESSEUROPE strongly objects to using hypothetical generic hallmarks. To uphold legal certainty taxpayers should be judged on their actions, not on what they might have done or what the expectation is that others would have done. This type of second guessing leads to too much uncertainty for taxpayers.

BUSINESSEUROPE expects that the generic hallmarks regarding confidentiality and premium fee are primarily aimed at deterring promoters from using these aspects in their arrangements. We feel – if that is indeed the goal – that it would be much more efficient and effective if national governments were to engage the promoters directly on these points to try and reach an agreement on where these aspects could be warranted and where they are not.

BUSINESSEUROPE believes that specific and objective hallmarks are a way to keep the disclosure regime both up to date and to keep the number of transactions that require mandatory disclosure targeted on those that are most likely to result in aggressive tax planning. There should, however, be a mechanism in place to ensure that the list of specific hallmarks would not grow endlessly resulting in the situation that all transactions fall within their scope.

**Penalties**

BUSINESSEUROPE feels that penalties for non-compliance should be relative to the offence. This means that it can be justified that the penalty for failure to disclose a scheme is increased by repeated non-compliance, but should not be proportionate to the tax savings or promoter’s fee.

BUSINESSEUROPE would be willing to engage in a constructive dialogue with the OECD on Mandatory Disclosure Rules.

On behalf of the BUSINESSEUROPE Tax Policy Group
Yours sincerely,

[Signature]

James Watson
Director Economics Department
CBI RESPONSE TO THE OECD PUBLIC DISCUSSION DRAFT ON BEPS ACTION 12: MANDATORY DISCLOSURE RULES

1. The CBI is pleased to comment on the OECD’s Public Discussion Draft on Action 12: Mandatory Disclosure Rules.

2. As the UK’s leading business organisation, the CBI speaks for some 190,000 businesses that together employ around a third of the private sector workforce, covering the full spectrum of business interests both by sector and by size.

3. The CBI continues to support the BEPS programme to update international tax rules to reflect modern business practice, tackle abusive tax structures and target the incidence of double non-taxation. However, we are concerned that if complexity and uncertainty are not avoided, the outcome will be an increase of double taxation and resulting legal disputes, which could have a substantial and negative impact on cross border trade and investment, but also on tax administrations with limited resources.

Overview

4. The CBI supports the use of disclosure regimes, similar to the UK Disclosure of Tax Avoidance Schemes (DOTAS) rules, as a feature of modern tax systems. Disclosure regimes should be designed so as not to create a disproportionate compliance burden on businesses.

5. As outlined in the OECD discussion draft, the UK DOTAS scheme has been in place for over 10 years. The rules are not seen as a major burden to business and are generally accepted by UK business – though we do have some concerns regarding some recent features such as accelerated payments for registered schemes. We would support final recommendations that are consistent with the general operation of the UK rules to be established as a global standard as this would help provide some consistency, recognising that there will necessarily be differences in approach caused by different tax systems and cultures. Our comments are therefore based on outlining our experiences and thoughts from a business perspective as to the key features of the UK regime and then how the rules can be extended in an international context.

6. The key features of the UK DOTAS system from a business perspective are as follows:
   - A promoter-led scheme where businesses are generally only required to add the scheme number onto their tax return.
   - Specific hallmarks are limited to a narrow set of issues which are of greatest concern to UK Government
   - Main benefit test hallmark to cut down the number of disclosures and consequently eliminate the
threat of fines and penalties on commercial/non-tax driven transactions.

- There should be no assumption of either innocence or guilt on the submission of a scheme and notification on a tax return (though this has been diluted recently with accelerated payments). It should just reflect that hallmarks have been met – the tighter and narrower the hallmarks, the greater the deterrent of having a scheme number is likely to be.
- The acceptance that over time that the number of disclosures should fall.

7. The extension of the rules to international tax schemes should, to the extent they are not already covered in domestic mandatory disclosure regimes, be a completely separate regime to ensure important thresholds in domestic regimes are not lowered as part of the expansion.

8. We believe that greater detail needs to be provided on the extent of the proposed mandatory international disclosure regime, in particular as to the proposed nature of the new hallmarks, since the Discussion Draft simply provides examples. This should be subject to a further consultation with business, with the aim of arriving at a workable approach in relation to what would potentially be a novel set of obligations. We can see that suitable hallmarks could be developed to capture the examples referred to in Chapter IV of the Discussion Draft and some of the other structures BEPS is trying to prevent, but have some doubt that the principle could be extended to all other matters covered in the BEPS project.

9. The primary responsibility for disclosing under any mandatory international disclosure regime should be with the promoter, to the tax authority where a tax advantage (to be defined) is achieved. Taxpayers should then just include a reference/scheme number on their tax returns. Taxpayers should only disclose where there is no promoter, or the promoter is outside the jurisdiction and has not made a disclosure.

10. Countries should only implement mandatory international disclosure regimes once they have implemented the recommendations from the BEPS project (or at the same time if adopted as part of a multilateral package). This should reduce the compliance burden so only international tax avoidance schemes, if any, which arise after BEPS is implemented need to be disclosed.

11. Any mandatory international disclosure regime should focus on specific and clear hallmarks, which define the key objective or features of the schemes which are to be disclosed. The hallmarks should be based on the relevant avoidance and issues set out in the final recommendations of BEPS, though as noted above, we have some doubt the principle could be extended to all matters covered in the BEPS project. Notification should only be required if a structure achieves something substantially similar to what the relevant BEPS Action was aiming to prevent. The hallmarks should also specifically identify material jurisdictions, such that notification should only be required in those jurisdictions.

**Detailed Comments**

12. The UK DOTAS regime was introduced in 2004 and we understand has been considered a success by HMRC. As outlined in the Discussion Draft, hundreds of tax planning options have been closed down by legislation following disclosure (which has likely contributed to the UK having the longest tax code in the world). At the same time, the reporting and compliance requirements for many businesses has remained minimal, with most of the burden falling on promoters. Overall, the DOTAS scheme is now accepted as part of the UK tax regime, it is reasonably well understood and strikes a proportionate balance between providing the tax authorities with information whilst not being seen as a major compliance burden.

13. The DOTAS scheme has improved transparency between taxpayers and tax authorities and is now generally seen in the UK as a deterrent to entering into schemes that would require disclosure. This is achieved by the scope of scheme that is required to be notified being sufficiently targeted, such that companies providing a scheme number on their tax returns are in the significant minority. The CBI does not support aggressive tax planning (any more than tax evasion) and believes a mandatory disclosure regime that focuses specifically on aggressive tax planning is appropriate in modern tax systems.
a UK perspective, the CBI therefore would support recommendations that are consistent with the general operation of the UK rules. The comments below focus on our experience of the UK DOTAS regime and may therefore not answer the specific questions raised in the Discussion Draft.

Chapter II – Overview of Mandatory Disclosure.

14. The most critical feature of a Mandatory Disclosure regime is that there is neither a presumption of guilt or innocence. If a scheme is disclosed, it should not be presumed that the taxpayer has any significant doubt over the technical validity of the scheme – it is purely a reflection that the scheme has met one of the hallmarks. Equally, when a taxpayer enters into a scheme and receives a scheme number, it should be made clear this is not a scheme authorised by the tax authorities (in fact, if the mandatory disclosure regime is developed correctly, it should be an indicator that the scheme is likely to either be challenged or tax rules be amended so it is not effective in the mid-to-long term).

15. The objectives of a mandatory disclosure regime can change and evolve over time. As outlined in the Discussion Draft, the number of disclosures under the UK regime (in relation to domestic and international schemes) has reduced over time from an initial spike. If during the early period a number of schemes are being notified, the deterrent effect may be diluted as many taxpayers will require notification. One objective in an early period could be to identify the main planning techniques, determine which ones do not fit within the Government policy, and to legislate to prevent these schemes from being used going forward. It is also noted in the early periods, the number of hallmarks can be fewer to manage the flow of disclosures.

16. We do understand that mandatory disclosure regimes are a significant burden for tax authorities to administer. Tax authorities setting up disclosure regimes must ensure that they have sufficient staff to deal with both the policy and administration of the disclosures received. To be effective, when it is required, action must be taken against schemes which are disclosed (either legislative to prevent the structure going forward and/or tax authority audit/legal action to challenge the taxpayer’s position). There is also a need for a constant ongoing review and maintenance to ensure the regime remains up to date.

17. Over time, the number of disclosures should fall as behaviour changes and the tax rules in avoidance areas have been updated to address the schemes disclosed which do not conform to government policy. More specific hallmarks can be introduced to cover the areas of greatest concern to Government policy makers. This should enable greater focus on those promoters who continue to market schemes and taxpayers who continue to use schemes requiring notification. With a much smaller number of notifications, the deterrent aspect becomes significantly greater as both the risk of challenge/audit and the chance of tax legislation changing to make the scheme ineffective should be significantly increased.

18. As the DOTAS scheme has matured, so has the general approach of HMRC and UK policy makers. For example, the situation outlined in paragraph 46 of the discussion draft is a good example of how the tax authorities can prevent schemes from even being marketed to companies. However, the accelerated payment notices outlined in paragraph 51 were an unwelcome addition to the regime, because as noted above, receiving a scheme number should not lead to a presumption that a scheme represents aggressive tax avoidance and should be closed. This will be even more difficult to administer in international schemes where it is unclear in some scenarios which tax authorities should be entitled to the payment and therefore if recommended, should be restricted to domestic regimes only.

Chapter III – Options for a model mandatory disclosure rule

19. The CBI supports the UK model of promoter-based disclosure. When evaluating generic hallmarks such as “confidentiality”, “premium fee” and “mass-marketed schemes”, a promoter is much better placed to understand the market than a taxpayer. The taxpayer can only judge what he would be prepared to accept, rather than a broad understanding of the marketplace. It also places the greatest compliance
burden on the promoters or creators of tax schemes to undertake the analysis. Under DOTAS, the promoter has to provide the scheme number for taxpayers to include in their return. This is a manageable compliance burden for business. The main exception to this is when the taxpayer itself has developed the scheme, in which case there is not a promoter, and the taxpayer must make the required disclosure.

20. As outlined in paragraph 74 of the Discussion Draft, if taxpayers have a primary obligation to disclose the details of the scheme in all cases, then the administrative and compliance costs for taxpayers, and also maybe tax authorities will increase. As outlined in paragraph 59, the distinction between promoter-based and transaction approaches may not in reality be that significant. Therefore there does not seem to be a case for the increased compliance costs and burden.

21. We agree with the final recommendation in paragraph 76 regarding situations when a taxpayer should have primary responsibility to disclose, even in a promoter-led regime.

22. The Discussion Draft outlines various definitions of promoter or material adviser, identifies some common principles in Box 2 on page 28, and recommends that countries adopt a definition encompassing the principles identified. The principles listed refer to general terms such as design, organisation or management. We believe that there is a further important principle which should be identified here, namely that the design, organisation, management, etc. must relate to the tax aspects of the scheme in order for a party to be considered a promoter or material adviser. Hence, by way of examples, an adviser which only provides advice on a non-tax matter, or a bank which only determines the arrangements by which it obtains security for a normal commercial loan, should not be required to disclose any scheme which their client may be undertaking. The obligation to disclose should fall on the party which has knowingly promoted the scheme, or on the client in the cases covered by paragraph 76.

23. We believe that the threshold main-benefit test is an important feature of the UK DOTAS regime. It does prevent over-reporting and therefore has greater impact on the transactions which do get reported, including increasing the likelihood of deterrent of entering into a reportable scheme at all.

24. We would welcome further work to establish de minimis filter in addition to the threshold test. A de minimis filter is a clear objective test that provided it is drafted clearly (including guidance on issues such as (i) whether it is a company benefit or group benefit, and (ii) is the benefit an annual test or a test for the life of the structure etc) should be easily administered.

25. The UK DOTAS scheme was initially based around more generic tests, with further specific hallmarks added later. The generic hallmarks on confidentiality and premium fee are acceptable when the scheme is a promoter-based scheme. In a promoter-based scheme, promoters should know if they are charging success based fees and insisting on confidentiality clauses. As noted in Chapter II, the generic tests are not as well suited to a transaction-based scheme, as taxpayers do not have sufficient information on what the market is prepared to pay, or terms they are prepared to accept – the taxpayer can only judge by its own actions.

26. The hypothetical hallmarks outlined in paragraphs 110 to 114 inclusive of the Discussion Draft do give businesses a significant degree of uncertainty in relation to tax planning, or even normal tax management, which is developed in house. These are features that we would not recommend form part of a global set of standard rules. They are very subjective in nature and do significantly increase the burden for businesses.

Chapter IV – International Tax Schemes

27. We believe that greater detail needs to be provided on the extent of the proposed mandatory international disclosure regime, in particular as to the proposed nature of the new hallmarks, since the Discussion Draft simply provides examples. This should be subject to a further consultation with business, with the aim of arriving at a workable approach in relation to what would potentially be a
novel set of obligations. We can see that suitable hallmarks could be developed to capture the examples referred to in Chapter IV of the Discussion Draft and some of the other structures BEPS is trying to prevent, but have some doubt that the principle could be extended to all other matters covered in the BEPS project.

28. As outlined in the Discussion Draft, there are potentially a number of different factors which need to be considered when looking at international schemes. We would therefore recommend that an international disclosure scheme should be operated under a separate regime from domestic rules. This is to ensure that the scope of both regimes are as tight and narrowly focused on the risks involved in each one.

29. The CBI believes that the proposed recommendations in the discussion draft would be too wide ranging. We recommend the following key features are incorporated into a regime for reporting international tax schemes:

- We believe that a “main benefit” test threshold can and should be maintained – geographic restrictions on where the tax advantage arises can be removed. This is an important threshold to ensure day to day commercial transactions should generally fall outside the scope. (see para 30 below)
- We would also welcome the introduction of sensible monetary de minimis limits to reduce the disclosure of immaterial structures by taxpayers. (see paragraph 31 below)
- We consider that the approach outlined in paragraph 232 is potentially workable where reportable transactions are based on specific, and clear, hallmarks which achieve the same or similar consequences to a listed transaction. The listed transactions should define the key objective or features of the scheme. These listed transactions should be the critical feature of the regime as they should be used to help define what an international tax advantage is for the main purpose test, and also to determine in which jurisdictions a transaction should be listed. (see paragraph 32 below)
- The scheme should be reported in the jurisdictions clearly specified under the listed transactions in the specific hallmark. This may be in one, or more than one jurisdiction, depending on the structure the BEPS Action plan was attempting to prevent. However, there are practical challenges to consider in relation to the approach to reporting. (see paragraph 33 below)
- The regime should be a promoter-based regime, with the primary responsibility only switching to taxpayers in the situations outlined in paragraph 76 of the Discussion Draft. A promoter-based regime should alleviate some of the concerns over identifying the company within a group to whom a tax advantage arises. The promoter should receive a standardised scheme number which should then be disclosed by taxpayers using the scheme (i.e. where the tax advantage potentially arises) in their tax return(s). (see paragraph 34 below)
- The international regime should only apply to (i) existing schemes that continue to work which BEPS legislation was intending to stop, or (ii) in relation to new schemes designed to get round new BEPS legislation. (see paragraph 35 below)

Due to the timeframe of the consultation document, we have not had time to fully develop the detail of the framework above, but as noted above, we would be willing to engage with the OECD to help design and draft more comprehensive rules and guidance which builds on the framework outlined above.

30. The CBI does not believe that removing the threshold condition would “streamline” the disclosure requirement. We do acknowledge that many countries do not like subjective tests, however, removing the threshold requirement would require significant tax input into a number of commercial transactions which would only normally be reviewed (to consider the tax outcome) as part of the year end reporting and compliance process. If a main benefit test is excluded, the notification period should be significantly extended in line with the filing of tax returns for the period in question.
31. As outlined in paragraph 24 above, we would welcome a review regarding the introduction of sensible monetary thresholds alongside a main purpose test to see if they can be implemented without creating a significant burden. These should be applied to taxpayers who may be required report a scheme number. For example, a promoter may have a scheme number as a scheme is capable of being implemented by a large number of taxpayers, but each taxpayer would only have to disclose the scheme number, it if the benefit to the company or group when implemented exceeded the monetary threshold.

32. The critical aspect of the international disclosure regime should be to determine what an international tax advantage/scheme/hallmark should be. As with the UK DOTAS approach, once the regime became targeted and the number of taxpayers submitting scheme numbers was reduced, it then becomes more of a deterrent as the chance of both challenge and legislative change are real. Therefore, we do recommend the hallmarks are specifically targeted at BEPS.

The BEPS project has spent over two years defining and reviewing international tax avoidance. We therefore recommend that hallmarks should be based on the relevant avoidance and issues set out in the final recommendations of BEPS. As explained above we are not convinced that mandatory disclosure is required in relation to all matters covered by the BEPS Actions, and believe there should be further consultation on the appropriate hallmarks as the OECD’s view develops. For example, and as outlined in the Discussion Draft, a suitable hallmark for BEPS Action 2 could be to notify any DD and D/Ni schemes which remain or become possible because the Action 2 recommendations do not apply to a particular set of circumstances. It appears reasonable that the test should be extended, as outlined in para 232 of the Discussion Draft, to transactions that are expected to achieve the same or similar consequences to a listed transaction. It also seems appropriate to require notification of structures that achieve an outcome which the BEPS project intends, but fails, to prevent. This does require that the outcome that BEPS is intended to prevent is more clearly defined than is the case some of the current BEPS discussion drafts. Given the ongoing work on the scope of a number of Actions, it is not possible to draft many of the hallmarks at present. We are willing to engage with the OECD later in 2015 and early 2016 when final recommendations have been made to assist in targeting the hallmarks at the intended BEPS outcomes.

The hallmarks should also identify which jurisdictions are directly affected (a “material jurisdiction”). For example, in Action 2, a DD hallmark should specifically state that the material jurisdictions are the two countries in which a deduction is claimed. A D/Ni hallmark should specifically state that the material jurisdictions are the state where the tax deduction is taken, and the state where recipient of the income is located. In contrast, for in relation to other hallmarks which may get developed, it may be appropriate that only one jurisdiction is notified.

33. Disclosure should be made in each material jurisdiction (but in no other jurisdictions). However, there must be a standard reporting format and scheme number system so duplicate copies of the same scheme can be sent to more than one country with only minimal additional burden.

34. By clearly identifying material jurisdictions in the tax advantages/schemes/hallmarks, we would then recommend a promoter-based scheme (with a switch to primary reporting to the taxpayer only in situations outlined in paragraph 76 of the Discussion Draft) for the reasons outlined in relation to mandatory disclosure regimes more generally in the first part of this response. If there is a promoter/material adviser to the scheme in a material jurisdiction, then the obligation for disclosure should be on that firm. It should be clear that there can be a different promoter or material adviser if there is more than one material jurisdiction. Only the relevant taxpayer, identified in the hallmarks, in the material jurisdiction(s) would then be required to disclose the scheme number on their tax returns.

A promoter-based scheme has the significant advantage that only taxpayers who actually implement schemes would need to disclose anything, significantly reducing the burden on most businesses. It also alleviates some of the concerns over which group entities would be required to disclose and has the
advantage that earlier disclosure can be made to tax authorities (both regarding the trigger point, but also in that the “tax analysis” would be notified even if the first company to implement it was under a de-minimis and was not required to disclose the scheme number on its own tax return). The recommendations in paragraph 255 regarding certification are unlikely to be viable in many situations, however, this would be alleviated with a promoter-based scheme.

There are some practical challenges, however, which need some further consideration. For example a taxpayer that is in a different jurisdiction from the promoter may not be sufficiently aware that a hallmark is met. Subsidiaries, even if wholly owned, may not be privy to the necessary information to make a disclosure. Equally it does not seem appropriate as a matter of law to impose a reporting obligation on a promoter in a jurisdiction in which it is not resident.

35. The CBI recommends that the timing of the scheme should not be earlier than the implementation of the BEPS Action Plans in jurisdictions so that schemes and structures which are no longer affected would not need to notify. As noted above, disclosure regimes are more effective when they are targeted and act as a real deterrent. Having thousands of disclosures which many tax authorities may not have the ability to process will not achieve the same impact as just having schemes disclosed which attempt to undermine the BEPS project.

35. We trust that you will find the above comments helpful in understanding the potential impact of the proposals outlined in the Discussion Draft. We remain committed to ensuring that each BEPS Action achieves its stated goals, whilst ensuring that genuine business transactions are not unduly impacted to which this Action forms a key part.

36. We remain at your disposal should you wish to discuss the issues we have raised in this paper in more detail. Please contact neil.anthony@cbi.org.uk for more information.
BEPS Action 12: Mandatory disclosure rules  
Response by the Chartered Institute of Taxation

1 Introduction

1.1 The Chartered Institute of Taxation (CIOT) is pleased to respond to the Public discussion draft published on 31 March 2015 on BEPS Action 12: Mandatory disclosure rules (Discussion Draft).

1.2 The UK Disclosure of Tax Avoidance Schemes (DOTAS) regime has been successful as one element in a strategy to reduce abusive tax avoidance schemes from the UK. The regime works best in identifying mass marketed pre-packaged schemes. However, the rules impose a compliance burden for promoters and for companies with in-house tax departments, whose commercial affairs happen to need tax advice. Significant work may be needed by in-house teams to confirm whether a disclosure has to be made. The Discussion Draft is right to identify balancing additional compliance cost with the benefits obtained by the tax administration as a design principle.

1.3 In this regard the additional information which will be available to tax administrations, as a result of other BEPS actions (e.g. Country by country reporting) and generally as transparency with regard to tax increases globally (e.g. Tax Information Exchange Agreements), should be considered when considering what other information would be useful to tax administrations to respond to tax risks posed by tax planning schemes.

1.4 International mandatory disclosure rules should be aimed at artificial and abusive schemes, categorised by hallmarks similar to those in the UK DOTAS regime. This means the rules would not capture the types of international tax planning tools that have been identified as issues which are being looked at by other BEPS actions, for example hybrid mismatch arrangements. It would be very difficult to devise hallmarks which meet the principle of being clear and easy to understand and that would capture tax planning tools which take advantage of mismatches in tax regimes, but could not be regarded as abusive or aggressive in any single territory. We suggest, it
would be a mistake to attempt this. Since these types of planning are being addressed by other parts of the BEPS project, it is not necessary for them to also be addressed by mandatory disclosure rules.

2 Section II. Overview of Mandatory Disclosure

2.1 The Discussion Draft sets out some key design principles which it suggests should be reflected in mandatory disclosure rules. We agree with these principles.

2.2 (i) Mandatory disclosure rules should be clear and easy to understand

2.3 Clarity will be particularly important in relation to determining what is required to be disclosed. Any generic or specific hallmarks must be very clearly described. Tax administrations should also ensure that they provide meaningful examples of the types of transactions that fall within each hallmark.

2.4 Clarity could be further improved by tax administrations providing examples of what is not required to be reported, that is what is considered to be ordinary tax planning. Detailed guidance (including examples) should be prepared by tax administrations outlining the types of transactions that are considered routine and not subject to disclosure rules. These examples and guidance should be prepared in consultation with taxpayers and advisers and should be made available prior to mandatory disclosure rules coming into effect.

2.5 Ongoing publication of reporting information by tax administrations will also be important. The publication of details of the type of schemes which have been disclosed by taxpayers would help to provide clarity for all taxpayers.

2.6 (ii) Mandatory disclosure rules should balance additional compliance costs to taxpayers with the benefits obtained by the tax administration

2.7 Countries should be encouraged to engage in consultation with taxpayers and tax advisers prior to introducing any mandatory disclosure rules. The introduction of mandatory disclosure rules imposes a significant administrative burden on tax advisers (e.g. providing training to all staff on the details of the regime and developing procedures to ensure that any potential disclosure requirements are addressed). Such consultation is important to ensure that final legislation is appropriate for the jurisdiction and for promoters and taxpayers to be in a position to comply with the rules from the outset.

2.8 Consultation on any subsequent changes to a disclosure regime will also be vitally important. Any changes to a disclosure regime will impose an additional compliance burden on tax professionals (e.g. to update procedures and provide training to all staff). Further, the consequences (both financial and reputational) of failing to make a disclosure can be severe for tax advisers and as such adequate time should be given for any changes to a disclosure regime to be properly considered by taxpayers and their advisers before they are introduced.

2.9 The rules adopted by any country should reflect the compliance environment in that jurisdiction. For example, we note that the Discussion Draft does not make any recommendation as to whether a 'main benefit' threshold should be included in mandatory disclosure rules. The absence of a 'main benefit' threshold in a regime might cause particular difficulties for countries where there is an established General Anti-Avoidance Rule (GAAR) which has a similar requirement. We make some
further comments on thresholds below.

2.10 Consideration should also be given to the need for transitional arrangements and grandfathering provisions to address schemes that are already in place that may be reportable under new mandatory disclosure rules.

3 III. Options for a model mandatory disclosure rule

3.1 The discussion document recognises that disclosure does not necessarily imply aggressive avoidance, but in practice there are negative consequences in the UK and some other jurisdictions of transactions being reported. In the UK reputational, taxation and commercial consequences include Accelerated Payment Notices, issues for companies seeking Government contracts and the High Risk Promoter regime. These consequences ought to be carefully examined - it is vital that the regime should only apply to its intended targets, and that taxpayers do not face negative consequences as a result of badly targeted hallmarks.

3.2 A. Who has to report

3.3 We suggest that the obligation to report should only ever rest with one party. We are of the view that the primary obligation to disclose should rest on the promoter. Where the promoter has disclosed a scheme, the taxpayer’s obligation should be limited to including the scheme reference number in its return. A dual reporting regime would give rise to significantly greater costs for the tax administrations, taxpayers and promoters.

3.4 The suggestion that dual disclosure reduces the risk of inadequate disclosure because, both sets of information can be checked against one another (paragraph 73) is not convincing as, in practice, the information provided by the taxpayer will generally be prepared by the promoter as well.

3.5 We accept that there are circumstances where the taxpayer would be placed under an obligation to disclosure: where there is no promoter, the promoter is offshore or the promoter has legal professional privilege.

3.6 The Discussion Draft suggests a period of 30 to 45 days for disclosure. These seem to be sensible time frames. We suggest that very early identification (e.g. within 5 days) of new schemes is not as relevant in cross-border situations as it is in relation to domestic situations when the law can more easily and quickly be changed.

3.7 B. What has to be reported

3.8 We do not agree that a threshold test cannot sit alongside a de minimis test. We suggest that countries should be free to include either or both of these tests to narrow the ambit of mandatory disclosure rules and ensure that the rules are properly and better targeted. Including these tests would also reduce the compliance burden of all involved.

3.9 We do not agree with the suggestion in the Discussion Draft that a de minimis threshold could imply that tax avoidance in small amounts was acceptable. As stated in the Discussion Draft, mandatory disclosure rules are intended to ensure the provision of timely and relevant information regarding tax schemes; they are not concerned with the legality or acceptance of arrangements. Mandatory disclosure regimes are not meant to advance or replace tax returns, but are intended to be an exceptional measure to limit severe damage to state revenue. Such damage does
not arise from minimal tax savings.

3.10 **C. Hallmarks**

3.11 A key aspect of the model mandatory disclosure rules is that both generic and specific hallmarks must be very clearly described in order to avoid uncertainties arising in practice.

3.12 With regard to a generic hallmark around contingency/premium fees, mandatory disclosure rules should not seek to discourage tax advisers from charging fees that reflect the quality of advice given and the value of the matter. Therefore the mere amount of a fee, without any contingency element, should never give rise to a disclosure obligation.

3.13 Similarly, mandatory disclosure rules should not discourage tax advisers from offering good services to their client. This may include contractual protections such that a tax adviser commits himself to argue the case before a tax administration, without extra charge, if the tax administration does not agree with a tax return or proposed arrangement. This may include administrative proceedings or even litigation. This case should be distinguished from a contingency fee or a money-back guarantee. We suggest that contractual protections should not give rise to a disclosure obligation where they might entail extra work for the tax adviser, but without affecting the amount of fees the client has to pay for the advice.

3.14 **D. When information is reported**

3.15 We agree that the trigger for disclosure by a promoter should be the ‘making available’ of a scheme, as a promoter may not necessarily know the date of the implementation.

3.16 We also agree that the making available requires both (1) the putting in place of all the necessary elements for the implementation of the scheme and (2) the communication to the client that the client may consider entering into transactions. This should be clear in any mandatory disclosure rules. Mere preliminary or preparatory communication should not trigger an obligation to disclose.

4 **IV. International Tax Schemes**

4.1 The Discussion Draft acknowledges that there are differences between domestic and international schemes and that this makes international schemes more difficult to tackle. However, the Discussion Draft does not adequately recognise the very real difficulties which will arise in practice in both defining reportable schemes and identifying who should report it.

4.2 The draft provides that promoters, advisers and other intermediaries would be expected to provide information within their knowledge, possession or control. It is suggested that an intermediary might be identified as the primary reporter or having an equal obligation with the taxpayer. Such a requirement would raise particular difficulties in relation to international tax arrangements where the description of a reportable arrangement is outcome focused. Also, international transactions often develop by the interaction of different group members based in a number of jurisdictions. Such a scenario entails a number of different advisors potentially also being involved. So at the start of a transaction no single person is aware of the whole arrangements thus making disclosure rules very difficult to apply in such circumstances.
4.3 Therefore the expectation that promoters will be aware of the full consequences of tax planning within multinational groups is misplaced. It is very unlikely to be the case in the common and mainstream situations of international tax advice where several advisers have been involved in bespoke tax planning for a group on its commercial affairs. Frequently there will be a mixture of firms of accountants, lawyers and other intermediaries involved, each responsible for only part of the transaction; even separate firms within the same network of firms.

4.4 With regards to taxpayers with cross border arrangements while the Discussion Draft identifies that a taxpayer may play only a minor part in an arrangement, it assumes that such a taxpayer will be sufficiently aware of the material tax consequences for any one of the parties to the transaction. The draft provides that such a taxpayer needs to identify the parties that would need to disclose, placing it under an obligation to obtain details from other group members, but to a level which is rather unclear.

4.5 We assume that mandatory disclosure rules would only require one disclosure in one territory for a particular scheme, rather than multiple reporting to multiple tax authorities?

4.6 The Discussion Document suggests that reporting will be required of ‘key provisions of foreign law relevant to the elements of the disclosed transaction’. However, in making this disclosure advisers (or taxpayers) will be wholly reliant on information given from advisers in those overseas territories - they will not, even in the largest firms, have the expertise to verify whether that analysis is complete or accurate.

4.7 Additionally, the Discussion Draft suggests that there should not be any ‘main benefit’ threshold on the disclosure of international tax schemes. In our view the absence of appropriate thresholds for international schemes would lead to the over-reporting of non-abusive tax advice. This would result in a high compliance cost for both tax advisers and tax administrations. If too many disclosures are made of routine tax planning advice tax administrations will not be in a position to adequately identify where genuine concerns arise.

4.8 There may also be issues arising from international tax schemes in that two countries even with identical mandatory disclosure rules may well interpret them differently.
5 The Chartered Institute of Taxation

5.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 17,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

The Chartered Institute of Taxation
30 April 2015
Re: Action Plan on Base Erosion and Profit Shifting
Action 12 – Mandatory Disclosure

Chartered Professional Accountants of Canada (CPA Canada) is pleased to present its recommendations related to Organisation for Economic Co-operation and Development’s (OECD) Public Discussion Draft – BEPS Action 12: Mandatory Disclosure Rules (“discussion draft”).

Harmful tax practices hurt the global economy, and we welcome the OECD’s coordination of international efforts to prevent it. We also appreciate that the world’s tax authorities require information to review tax avoidance strategies to determine if they are abusive. However, the OECD should take care to avoid proposing measures that could increase the difficulty and cost for law-abiding taxpayers who make every effort to comply with complex, interrelated international tax systems.

We believe that the OECD could address the lack of comprehensive data available to tax authorities for their tax law enforcement purposes without unduly burdening taxpayers by implementing the following recommendations, discussed in the body of this letter:

- Consider existing domestic anti-avoidance rules.
- Consider tax authority capacity of each country in weighing the benefits and costs of imposing a mandatory disclosure regime on all OECD members.
- Defer further action on mandatory disclosure until the outputs of the other Actions in the OECD’s Action Plan are finalized.
- Propose disclosure only after the plan has been implemented. Earlier disclosure, if required, should be the obligation of the promoter.
- Only require users of a tax scheme to report it if the promoter is not resident in the jurisdiction requiring disclosure or reporting by the promoter is not possible.
• Keep the proposals tightly focused on instances of aggressive avoidance schemes and require disclosure from the promoters, except in limited circumstances.
• Limit disclosure to new or innovative aggressive tax planning arrangements only.
• Propose disclosure only where tax avoidance is a main benefit of the arrangement, and include a de minimis test to reduce the compliance burden.
• Identify reportable schemes through the use of objective tests/hallmarks, and not hypothetical tests.
• Encourage governments to obtain data through any information exchange agreements that are in place before requesting it from the taxpayer.
• Ensure reporting by advisers other than promoters is not required.
• Ensure that disclosure requirements are not proposed that would conflict with domestic legal professional privilege.
• Limit mandatory disclosures to bare facts only (excluding third party analysis and processed facts).
• Keep the compliance costs and business impact for the majority of compliant taxpayers and their advisors at the forefront of the OECD’s deliberations at all times.

We have sent a copy of this letter to senior officials at Canada’s Department of Finance and the Canada Revenue Agency. We would like our recommendations on the OECD’s mandatory disclosure proposals to be also considered by Canada’s federal government as it develops its policy responses to the outcome of the OECD’s BEPS project.

Our views were developed in conjunction with members of CPA Canada’s Industry Tax Committee. Consisting of senior tax executives from large Canadian businesses, this committee is a knowledge resource that enables CPA Canada to consider the perspectives and needs of accountants working at industry organizations when providing input on tax administration, policy, education and accounting matters.

The views in this submission represent the position of CPA Canada; our views do not necessarily represent those of individual committee members. We thank these individuals for contributing their insights to this important debate. Committee members are listed in Appendix A.

Is mandatory disclosure the optimal approach?

Overall, we are not convinced that the OECD needs to or should propose a mandatory disclosure regime. At most, the OECD should provide guidance for countries to consider in developing domestic disclosure regimes.
First, we question whether the proposals would meet their intended purpose. Early identification of new schemes is best served in domestic situations as the tax administrations can respond promptly as information is provided, including by proposing and enacting legislative changes if necessary. In cross-border situations, this may not be possible as the information could be provided to another jurisdiction and the affected jurisdiction might not receive the information promptly. Thus, the principle benefit of a mandatory disclosure regime — that is, upfront information that facilitates a quick response — would not be realized for cross-border arrangements.

Second, the costs of such a regime may well outweigh its benefits, especially in countries that already impose a general anti-avoidance rule (GAAR). Canada, like some other countries, has a robust general anti-avoidance rule, introduced in 1988, along with tax shelter reporting rules, a reportable transaction regime, promoter penalties and various other disincentives for engaging in the type of arrangement that would need to be disclosed under the OECD’s proposals. Canada’s rules have been successful in eliminating many of the more egregious and abusive schemes that might otherwise exist and require disclosure under the new regime. Guidance on the application of these rules has been developed over time by the Canada Revenue Agency and through the courts, and the rules are relatively well understood by taxpayers and their advisers. Imposing another layer of reporting would add significant additional compliance but probably result in few additional disclosures.

What works in one jurisdiction, however, is not necessarily the right solution for all jurisdictions. Challenges will arise for taxpayers and advisers in countries that do not currently have a disclosure regime, at least in the early days, when taxpayers and their advisers will be starting from scratch to understand a new regime and apply it to particular facts and circumstances.

Third, it is uncertain whether all other countries will have the capacity to put in place the appropriate tax administration processes to use the information gathered effectively and on a timely basis. If the scope of the proposals is drawn too broadly, tax administrations could be swamped with more information than they can effectively review, potentially reducing the possibility of targeting aggressive schemes. Unless tax administrations are able to effectively manage and exploit the information gathered, the additional administrative and compliance costs for all taxpayers and their advisers, not just tax scheme users and promoters, would be needlessly burdensome.

We urge the OECD to carefully consider the different contexts of each country and the benefits and costs of imposing such a regime on all OECD members.

Interaction with other Actions

Many of the examples of reportable transactions used in the discussion draft are or would be addressed by existing domestic anti-avoidance measures and/or proposals arising from other BEPS actions (e.g., transfer pricing documentation, hybrid arrangements), which are not yet complete.
We recommend that every effort should be taken to avoid duplication and overlap across all of the OECD’s BEPS proposals. Further action on mandatory disclosure should be deferred until the outputs of the other Actions in the OECD’s Action Plan have been finalized and confirmed.

**Specific disclosure rules – flexibility versus consistency**

While the discussion draft’s proposal to allow flexibility to apply specific disclosure rules may be helpful, this would create additional administrative and compliance burden. Confusion could also result where promoters/advisors and users/taxpayers need to follow different specific disclosure rules for different tax authorities on the same international tax scheme. We recommend that all countries be encouraged to apply consistent disclosure rules to the same international tax scheme.

**When information is reported**

The discussion draft’s proposals would require disclosure of a potentially aggressive tax strategy when “made available for implementation” or when “a firm approach/marketing contact” is made. In our view, this timing is much too early, especially if users/taxpayers would be required to provide the information. Large international companies are often approached by promoters of tax planning schemes, and most of them are not implemented upon subsequent due diligence or for other reasons not related to the tax plan itself.

Requiring disclosure when marketing contact occurs would create compliance burdens for the users/taxpayers, even for schemes that they have not implemented. Further, the connection of a taxpayer’s name to a proposed tax arrangement may damage the taxpayer’s goodwill with the tax authorities in cases when the taxpayer did not follow the tax advice. Disclosure of a scheme should not be required unless and until the plan has been adopted.
**Deadline for reporting**

Some domestic mandatory disclosure rules require reporting within a relatively short period of time (e.g., within 5 days). In an international environment, a longer lead time would be needed since it is extremely difficult to obtain such information in such a short time period, even if information is contained within a corporate group. Also, if the information has to be obtained from an external source, disclosure may not be required until a later date (if at all). The OECD will also need to address the timing of the reporting where an international tax scheme is implemented on a phased approach in different countries.

**Who has to report**

The proposals would require reporting by both promoters/advisors and users/taxpayers to allow the tax administrations to check the accuracy and comprehensiveness of the information reported. While such verification is important, dual reporting would significantly increase the administrative and compliance costs for all reporting parties.

In our view, to the extent a mandatory disclosure regime is adopted, it should be tightly focused on instances of aggressive avoidance schemes and should require disclosure from the promoters of such regimes. Maintaining a narrow scope would ensure that the administrative burden faced by the vast majority of compliant taxpayers is minimized where possible.

Further, as noted in the paper, if the users/taxpayers are likely to take the matter to court, some of the information provided may be self-incriminating or protected under legal privilege. We recommend that, for users/taxpayers, mandatory disclosure be required only where:

- The promoter is not resident in the country requiring disclosure
- There is no promoter or the taxpayer uses multiple advisors to implement an international tax scheme, or
- The promoter or taxpayer does not have the right to assert legal professional privilege.

To the extent that the users/taxpayers list and scheme reference numbers would be used to link promoters/advisors and users/taxpayers, this would be a strong deterrent to users/taxpayers.
What has to be reported

Reducing duplication and overlap

Many of the examples provided in the discussion draft are longstanding aggressive tax planning schemes of which many tax administrators are already well aware. We recommend that the OECD work with the tax administrators to prepare an annual list and brief description of the tax planning schemes that have caught the interest of the revenue authorities. Tax administrators could use such a listing to determine whether they need to:

- Request additional information from their counterpart in the other country to determine any potential tax leakage
- Change the law to eliminate the scheme, or
- Request additional information from promoters/advisors and users/taxpayers.

To reduce the tax administration and compliance burden and to focus limited resources for all parties concerned, any reporting by promoters/advisors and users/taxpayers should be limited to new or innovative aggressive tax planning arrangements that have not previously been disclosed, are not on the OECD annual list of known or existing aggressive tax planning schemes, or have been subject to tax authority requests for specific information.

Where information on a scheme has been provided previously (e.g., multi-year plan), the promoters/advisors and users/taxpayers should be allowed to make the disclosure by attaching previously provided information.

Objective tests/hallmarks versus hypothetical tests

Complying with international mandatory disclosure rules would be difficult and complex even with the application of objective tests/hallmarks. We strongly object to the use of hypothetical generic hallmarks. They would add much more uncertainty and increase the potential for disputes between promoters/advisors and users/taxpayers and tax administrations. Further, taxpayers should be judged by their actions, not by what they might have possibly done. For example, the reference to premium fees and whether a promoter could have, but did not, charge a premium fee would produce high uncertainty about the actual conduct of the parties, putting their constitutional rights and legal certainty in jeopardy.

We recommend the use of objective tests/hallmarks to provide greater certainty and ease of application.
Safe harbour

The discussion draft does not recommend the inclusion of a test to require a disclosure only where a main benefit is tax avoidance or where the tax benefit is material. Further, the discussion draft does not define any threshold for materiality or suggest how a taxpayer would be in a position to determine and validate the materiality of a transaction to an unrelated counterparty to a transaction.

We recommend that the OECD propose disclosure only where tax avoidance is a main benefit of the arrangement. We also recommend including a de minimis test or other filter in order to reduce the administrative burden for tax authorities and the compliance burden for taxpayers, especially for smaller businesses and their advisors.

Exchange of information disclosed

The OECD will need to address how the information gained through mandatory disclosure will be shared among the tax authorities. Additional administrative and compliance costs would need to be incurred if the promoters/advisors and users/taxpayers are required to report in each country when the hallmarks/tests are met.

As an alternative, the parent company could be required to report the information on behalf of its consolidated group (to be defined), based on accounting GAAP of the parent company. Each country involved could then request information under the Exchange of Information procedure.

Where information exchange agreements are in place, we recommend that governments should seek to gain information through the agreement before requesting information from the taxpayer.

Confidentiality concerns

Impact of public disclosure

A number of tax administrations are introducing measures to toughen the consequences for tax evaders and those who help them. These measures include publicly naming evaders and enablers of evasion (e.g., United Kingdom) and disclosing taxpayers’ tax reported information (e.g., Australia).

However, some international tax schemes may not ultimately be found to constitute tax avoidance or evasion. Therefore it is important to ensure that the information on complex tax schemes provided under mandatory disclosure is not prematurely disclosed to the public before the promoters/advisors and users/taxpayers have fully exercised their right to fair and due processes in all relevant jurisdictions. In our view, the complexity of managing such disclosure and the reputational risk for taxpayers outweigh any perceived benefits of public disclosure.
If public disclosure is ultimately proposed, procedures should be established to ensure that any publicly available information is reported in ways that do not mislead the public or allow for the misinterpretation of complex tax information.

Confidentiality and legal professional privilege

Regardless of the outcome of an investigation, the OECD should support measures that ensure taxpayers have the right to consult with qualified advisers on a confidential basis.

We are concerned that targeting confidentiality of tax advice as a trigger for disclosure would cause considerable problems with respect to legal professional privilege. In many cases, a professional advisor who is not a promoter will learn of a tax structure in passing. For example, they may be asked to provide their professional opinion about the idea. At that time, the professional has command over the plan and the data. Under the current proposals, this fact would create many issues regarding privilege and other relevant ethical rules. These rules need to be respected and should not be overridden by a mandatory disclosure.

Additional confusion may arise due to the different approaches of countries toward “privilege” of certain professionals that may be subject to mandatory disclosure.

In the United Kingdom, these problems were resolved by imposing the obligation to disclose on the taxpayer, rather than the professional adviser, and, as discussed below, by restricting the disclosure to the facts rather than the advice.

In our view, where reporting is required, the promoter and, in certain cases noted earlier, the taxpayer implementing the transaction should be the party obliged to report – and not a secondary advisor. Taking this approach would minimize confusion resulting from differences between countries and avoid creating questions as to whether privilege applies or not.

Disclosure of facts and opinions

If the stated purpose of identifying and understanding international tax schemes is to be met the question is raised whether tax authorities would obtain this understanding from the facts or the opinions of third parties. Tax authorities are obliged to interpret and apply the law in relation to the facts presented.
Therefore we support the view expressed by the Global Accounting Alliance (GAA) in its submission on Action 12 that any disclosure regime should entail the disclosure of facts only. In addition to the challenges and concerns of legal privilege, the opinion of third parties also leads to concerns of hearsay evidence and seeks to impose some purpose or intention understood by a third party on the relevant taxpayer.

Where required disclosures involve processed facts and not bare facts, such request should as a matter of principle be subject to limitation and reasonability statements by the OECD as it is overly burdensome on taxpayers. We emphasize the example provided in the GAA’s submission by its member institute in South Africa regarding the introduction of an obligation to provide supplementary declarations, whereby data has to be processed and reconciled in a form and manner as stipulated by the local revenue authorities. The requirement has created a tremendous administrative burden on taxpayers, requiring them to incur additional cost to change or acquire new recordkeeping systems to extract and provide the relevant data and reconciliations.

Transitional period

Where mandatory disclosure has prompted a decision to change a tax law to close a perceived tax loophole, we recommend that any transitional rules provide for a reasonable time period to unwind the arrangement due to the complexity of unwinding an international tax structure (e.g. 3 – 5 years).

Further, relief should be provided in cases where the taxpayer experiences significant financial hardship as a result of unwinding the structure. For example, consideration could be given to allowing taxpayers to pay the tax over a number of years (e.g., 5 years).

Weighing the impact on compliant taxpayers and their advisers

In closing, we wish to emphasize that most tax planning involves nothing more than entering transactions such as asset sales timed properly to incur capital losses and offset realized capital gains. Any fair analysis must acknowledge that the overwhelming majority of the transactions entered into by taxpayers and the tax advice given by tax professionals about such transactions is appropriate. Tax minimization is a basic taxpayer right.

Many perceived “tax shelters” serve the important purpose of delivering economic incentives to taxpayers as specifically provided for in the tax law. These include tax-advantaged retirement savings and education plans, life insurance on key business partners and the development of manufacturing facilities and housing. Others enable business units to merge and grow to remain competitive. Still others postpone tax collection to avoid undue economic hardship on taxpayers.
It is therefore critical that the OECD keep the compliance costs and business impact for the majority of compliant taxpayers and their advisors at the forefront of its deliberations.

We thank you and your OECD colleagues for considering our recommendations in this important area.

Yours truly,

Gabe Hayos
Vice President, Taxation
Chartered Professional Accountants of Canada

c.c.:
- Andrew Marsland, Senior Assistant Deputy Minister, Tax Policy Branch, Department of Finance Canada
- Brian Ernewein, General Director, Department of Finance Canada
- Lisa Anawati, Director General, Canada Revenue Agency
- Guy Bigonesse, Director, Aggressive Tax Planning Division, International and Large Business Directorate, Canada Revenue Agency
Appendix – CPA Canada Industry Tax Committee

Committee members

Pier Fiorino, CPA, CA, Chair  Telus
Wayne Tunney, FCPA, FCA, Past Chair  BCE Inc. and Bell Canada
Felicity Bandic, LLB, MTax, CPA, CMA  Silver Standard
Angelo Bertolas, CPA, CGA  TD Bank
Maurice Fréchette, CPA, CGA  Power Corporation of Canada
Rob Jeffery, CA  Sobeys Inc.
Pierre Lafontaine, CPA, CA  Bombardier Inc.
Michael Myskiw, CPA, CA  Tim Hortons
Brian Mustard, CPA, CA  SNC Lavalin
Rob Dhindsa, CPA, CA  Rogers Communications Inc.
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CPA Canada

Gabe Hayos, Vice President, Tax
Vivian Leung, Principal, Tax Education
Bill Dobson, Special Advisor
The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Its functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe. The CFE is registered in the EU Transparency Register (no. 3543183647-05).

AOTCA (The Asia-Oceania Tax Consultants’ Association) was founded in 1992 by 10 tax professionals’ bodies located in the Asian and Oceanic regions. It has expanded to embrace 20 leading organizations from 16 countries/regions.

AOTCA and CFE unite almost 500,000 individual tax professionals in 37 countries (19 OECD member states).
Introduction

This is a joint Opinion Statement of the Asia-Oceania Tax Consultants’ Association (AOTCA) and the Confédération Fiscale Européenne (CFE), the European federation of tax advisers, responding to the OECD discussion draft on BEPS Action 12 (Mandatory disclosure rules) of 31 March 2015\(^1\) (hereinafter: the Discussion Draft). If you should have any questions on the comments below or on AOTCA or CFE, please contact Rudolf Reibel, CFE Fiscal and Professional Affairs Officer, at the CFE office: brusselsoffice@cfe-eutax.org.

The Discussion Draft sets out the key principles that should underpin the design of a mandatory disclosure regime (MDR) and options for the modular design of a MDR. It also includes a discussion of international tax schemes and how these could be covered by a MDR. According to the Discussion Draft, an MDR should:

- be clear and easy to understand,
- balance additional compliance costs to taxpayers with the benefits obtained by the tax authority,
- be effective in achieving the intended policy objectives and accurately identify relevant schemes, and
- result in effective use of the information collected.

Part I of this Statement contains comments relating specifically to the chapters of the Discussion Draft. We felt the need not to limit our response to the questions of the discussion draft but also give our views on the recommendations made and on aspects that should be included in a final document. Our comments relating on these further aspects are in Part II of this Statement. The following comments take into account the experience of our member bodies which operate in countries which have MDR’s in place\(^2\).

Part I: Comments relating specifically to the chapters of the Discussion Draft

Who should report (question 3):

The obligation to report should rest with one party only.

The Discussion Draft recommends that the primary obligation to make a disclosure should be on the promoter. The disclosure would shift to the taxpayer if the promoter is offshore, there is no promoter (scheme developed in-house) or the promoter asserts legal privilege. However, the Discussion Draft also suggests the possibility of a MDR providing for dual disclosure i.e. requiring both the taxpayer and the promoter to separately make the required disclosures.

CFE and AOTCA recommend that the obligation should only ever rest with one party and a MDR should not impose an obligation on both the promoter and the taxpayer in respect of the same

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\(^2\) These are, at least, Ireland, Korea, Portugal and the UK.
disclosure, since this would lead to a superfluous compliance burden. We support the view that the primary disclosure should rest on the promoter. Where the promoter discloses, the taxpayer should only be required to mention the MDR reference number, where applicable. A dual reporting regime is likely to give rise to significantly greater costs for the tax authority, taxpayers and promoters. The consideration that if both the promoter and the taxpayer were required to report, both sets of information could complement each other and be checked against one another (as mentioned in para 73 of the discussion draft) is not convincing, as in practice, the information provided by the taxpayer will generally be prepared by the promoter as well. In this case, therefore, there would be no risk of inconsistencies among reported data.

In some jurisdictions, legal professional privilege may not be available to all tax advisers who do not hold a separate legal qualification. It is important to ensure a level playing field between promoters who can claim such privilege and those that cannot. Therefore it seems justified to require disclosure from the taxpayer where the tax adviser asserts legal privilege.

What should be reported (questions 4-8):

Provide clarity for promoters and taxpayers on what should be reported

Any generic or specific hallmarks that are included in a MDR must be very clearly described to avoid uncertainties when applying the rules in practice. Tax authorities should also ensure that they provide meaningful examples of the types of transactions that are disclosable under each hallmark.

This can be supported by also providing clarity on what is NOT required to be reported, i.e. legitimate tax planning. Also information which is in the public domain through seminars, articles etc. should be excluded from the reporting requirement.

Detailed guidance (including examples) should be prepared by tax authorities outlining the types of transactions that are considered routine and not subject to disclosure rules. These examples and guidance should be prepared in consultation with taxpayers and advisers and should be made available prior to the MDR regime coming into effect.

Ongoing publication of reporting information by tax authorities is also important. The publication of details of the type of schemes which have been found to be disclosed by taxpayers would help to provide clarity for all taxpayers.

Prevent over-reporting and limit compliance burden

An appropriate disclosure threshold should be included. The absence of an adequate threshold could lead to the over-reporting of schemes which would result in increased compliance costs for taxpayers, tax professionals and tax authorities and reduce the value of the reports to the tax authority.

The Discussion Draft names main benefits and de minimis thresholds as two possible ways to limit the amount of arrangements to be reported. Under a main benefit threshold, a tax advantage must be, or might be expected to be, the main benefit or one of the main benefits of
an arrangement in order for the arrangement to be disclosable. Such a test compares the value of the expected tax advantage with any other benefits likely to be obtained from the transaction and has the advantage of requiring an objective assessment of the tax benefits. A *de minimis threshold* is a monetary value for the tax benefit or feature of the arrangements, below which those arrangements would not have to be disclosed.

*A de minimis* threshold is essential to ensure that the MDR does not become unworkable through over-reporting and to limit the compliance burden for all parties involved. The purpose of any MDR is to prevent severe damage to the state revenue. Such damage does not arise from tax savings which are not material. The suggestion in the Discussion Draft that a *de minimis* threshold could imply that tax avoidance in small amounts was acceptable appears ill-conceived. As stated correctly various times in the Discussion Draft, a MDR does not concern the legality or acceptance of arrangements but merely ensures the provision of timely and relevant information.

The absence of a main benefit test may lead to difficulties in applying generic hallmarks framed by reference to the behaviour of promoters. These have in some cases been described in subjective manner that has made it difficult for advisers to show that even bespoke commercially driven advice is not within the reporting scope.

The Discussion Draft refrains from recommending that any disclosure threshold should be included in an MDR but recommends that a *main benefit* and a *de minimis threshold* should not be combined.

In our opinion, there is no reason why these thresholds should be mutually exclusive and a country should not be discouraged from applying both.

**Fee-related hallmarks**

Contingency/premium fees (paras 97-100): A mandatory disclosure regime should not seek to discourage tax advisers from charging fees that reflect the quality of advice given and the value of the matter. In many tax advisers’ professional codes, the value of the matter is an important element in determining the price of tax services. While there may be cases where limits to price competition can be justified (e.g. for consumer protection, social reasons or in legal aid matters), MDR serve a different purpose and therefore should not seek to restrict price competition between advisers. Therefore the mere amount of a fee, without any contingency element, should never give rise to a disclosure obligation.

Contingency fees may also be commonly used in situation completely unrelated to abusive or innovative tax schemes. Countries should provide for certain exclusions/exemptions where

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3 para 89 of the discussion draft
4 According to a survey undertaken for CFE in 2008, the relevant professional codes for tax advisers in Belgium, the Czech Republic, France, Ireland, Luxembourg, the Netherlands (NOB and FB –now RB), Romania and the UK (CIOT) provide that fees should reflect the importance or value of the matter. In Germany, such provision is in the law (§ 10 Steuerberater-Vergütungsverordnung (remuneration regulation for tax advisers)).
5 For example, a contingent fee structure is commonly applied by tax advisers in Hong Kong in dealing with settlement of field audit or investigation cases.
such hallmark is adopted to cater for the market situation, without any aggressive tax planning risk.

Contractual protection (para 101): The Discussion drafts remarks that contractual protection (to be understood as a protection provided by the promoter to the client other than professional indemnity insurance to carry the risk of failure of a transaction or arrangement, e.g. by agreeing to pay back fees, to pay penalties or to provide assistance in the course of a possible dispute) can be equivalent to a contingency fee and thus trigger a disclosure obligation.

We would like to remark that a MDR should not discourage tax advisers from offering good services to their client. This may include that a tax adviser commits himself to argue the case before the tax authorities, without extra charge, if these should not agree with a tax return or proposed arrangement. This may also include litigation. Such case should be distinguished from a contingency fee or a money-back guarantee. We propose that contractual protection should not give rise to a disclosure obligation where it might entail extra work for the tax adviser, but without affecting the amount the client has to pay to the adviser.

Hypothetical hallmarks

There is a legal certainty concern where hypothetical hallmarks are applied. We see a risk that the tax administration will reach conclusions which are completely different from the actual practice of promoters, because the assessment what a promoter would have concluded will be made by a tax official who usually lacks practical experience on promoter pricing policies, market practices and engagement letters. This makes the hypothetical hallmarks even more theoretical.

Hypothetical criteria are also unnecessary: Already the use of a hallmark which requires the actual inclusion of a confidentiality or contingency clause will discourage promoters from using such clauses. If promoters or advisers agree with the client on a confidentiality clauses or a contingency fee but fail to disclose the scheme, they will lose the possibility to enforce in court the confidentiality or the contingency part of the fee, because they will risk that their failure to report will become public and they will be sanctioned.

When information is reported (questions 9-11):

We agree that for promoter disclosure, the making available should be the decisive date, as the promoter may not necessarily know the date of the implementation which may be months after the making available. As the case may be, the taxpayer may not be the promoter’s client any more at that stage.

We also agree that the making available requires both (1) the putting in place of all the necessary elements for the implementation of the (deemed) aggressive tax planning scheme and (2) the communication to the client that the client may consider entering into transactions. This should be clear in any MDR. Mere preliminary or preparatory communication should not trigger disclosure.
Although it may seem obvious, the OECD should state clearly that an obligation to provide client lists should only cover those clients to whom a reported scheme has been provided. Any obligation to disclose other clients should be excluded.

**Procedural and tax administration matters (questions 14-17):**

For the purpose of a mandatory disclosure rule, it is sufficient that the functioning of the (deemed) aggressive tax planning scheme is disclosed. Any requirements to disclose the correspondence between the taxpayer and the promoter, adviser or intermediary or any preparatory documents (i.e. opinions, memoranda), would be disproportionate. The exclusion of disclosure of the said correspondence would also allow overcoming any legal privilege issue.

**International tax schemes (questions 18-21):**

The Discussion Draft suggests that the hallmarks of reportable transactions should focus on particular cross-border outcomes (generic or specific) that give rise to concerns for the tax authority in the country requiring disclosure. It proposes that there should be a disclosure obligation on taxpayers, promoters, advisers and intermediaries within its jurisdiction, when information on a scheme is within their knowledge, possession or control. If relevant information is held offshore, the Discussion Draft considers that the person required to report should to identify the person who is believed to hold the information and certify that a request for this information has been sent.

**Defining a reportable international scheme**

Such a requirement would raise particular difficulties where the description of a reportable international tax arrangement is outcome focused, as it is based on the assumption that all parties to transactions and promoters involved would have sufficient oversight of the material tax consequences for any one of the parties to the transaction, even in another jurisdiction.

While this may be the case in closely controlled situations it will rarely be the case where the dealings are at arm's length or near arm's length. For example, where there is common ownership but in one jurisdiction the ownership is less than a controlling interest.

Indeed it is very common in international tax advice that several advisers (e.g. a mixture of firms of accountants, lawyers, or other intermediaries) have been involved in bespoke tax planning for a multinational enterprise (MNE) on its commercial affairs. A MNE may also seek advice from a number of sources before deciding on how to progress its particular objectives. It is likely that none of the advisers may be involved in the entire arrangement or be aware of the ultimate decision that MNE has made.

This element, while identified in the discussion draft, seems to be severely understated. The Discussion Draft does not discuss this matter in detail and further importance should be provided to this area.

The Discussion Draft suggests that there should not be any main benefit threshold on the disclosure of international tax schemes. The absence of appropriate thresholds for international schemes could lead to the over-reporting of advice by promoters. Even if a sufficiently high
monetary threshold is introduced, as the Discussion Draft recommends (paras 242, 244), a considerable compliance burden would remain, as it would require that the tax benefit for any arrangement is assessed, even if the arrangement does not have a tax advantage as a main benefit. This would result in a high compliance cost for both tax advisers and tax authorities. If too many disclosures are made of routine tax planning advice tax authorities will not be in a position to adequately identify where genuine concerns arise.

Who is to disclose and penalties

We agree with the Discussion Draft that a country should not oblige taxpayers and promoters, advisers or intermediaries who are outside their jurisdiction to disclose. This would not only create enforcement problems but in most cases also the issue that the country requiring the disclosure and the person asked to provide information come from different legal systems and speak different languages, making communication very burdensome and error-prone. We also agree that a domestic taxpayer should not be asked to force an offshore promoter, adviser or intermediary to disclose, as the taxpayer will generally not have any legal means to obtain disclosure. As a consequence, a taxpayer cannot be sanctioned for the promoter’s failure to provide this information. This should be expressly stated in the final recommendations.

Other impacts on disclosure and taxpayer compliance (question 1)

Effect of MDR on tax ruling requests

A MDR, as defined in the Discussion Draft, will generally not contain a feedback mechanism within a reasonable timeframe. For the taxpayer, a MDR would create a burden without providing for a benefit through an increase in legal certainty. This may have the effect that many disclosures would be accompanied by a private ruling request. Where a MDR fails to limit the number of reportable arrangements, the increase in requests for rulings could exhaust the revenue's resources.

Risk of prejudice

Whether a scheme has to be reported will depend on whether defined hallmarks are met. This should be an objective assessment not containing any moral judgment. The question whether a reportable scheme will be qualified as tax avoidance, as abuse or as being aggressive and should therefore be unacceptable is a separate question. For the acceptance of a MDR by the taxpayer and in order to prevent exaggerated action of tax authorities, it is essential that these two questions are clearly distinguished. We urge the OECD to make a clear statement in this regard in their final recommendations. This relates especially to cases in which MDR may raise issues of self-incrimination of taxpayers and their advisers. This aspect is not sufficiently dealt with in the Discussion Draft.

Part II: Further aspects which should be considered in recommendations:

Meaningful consultation should be entered into with tax professionals and taxpayers
Countries should be encouraged to engage in consultation with taxpayers and tax advisers prior to introducing any MDR. The introduction of an MDR imposes a significant administrative burden on tax professionals (e.g. providing training to all staff on the details of the MDR and developing procedures to ensure that any potential disclosure requirements are addressed). Such consultation is important to ensure that final legislation is appropriate for the jurisdiction and for promoters and taxpayers to be in a position to comply with the MDR from the beginning.

Consultation on any subsequent changes to an MDR regime is also vitally important. Changes to the MDR will impose an additional compliance burden on tax professionals to update procedures and provide training to all staff. The consequences (both financial and reputational) of failing to make a disclosure can be quite severe for tax professionals and as such adequate time must be given for any changes to the MDR to be properly considered before they are introduced.

**Measure cost and benefits of MDR**

The Discussion Draft concludes that there is sufficient evidence that existing MDR’s have met some of their key objectives, without identifying and quantifying the compliance burden on advisers and businesses in these jurisdictions. More emphasis needs to be placed on measuring the cost of implementing and maintaining a MDR, also for the tax administration. It is suggested that each country implementing such a policy be required to report annually on a quantifiable cost/benefit basis.

A sound impact assessment of the costs and benefits of introducing a MDR may question the overall necessity of introducing a mandatory disclosure regime in jurisdictions that do not have a complex corporation tax system, offer limited tax incentives and provide for transparent tax reporting and filing requirements.

The MDR adopted must be appropriate for the compliance environment in that jurisdiction

The rules adopted by any country should reflect the compliance environment in that jurisdiction. For example, we note that the Discussion Draft does not make any recommendation as to whether a main benefit threshold should be included in a MDR. The absence of a main benefit threshold might cause particular difficulties for countries where there is an established General Anti-Avoidance Rule (GAAR) which has a similar requirement.

A transition period and grandfathering of existing arrangements should be considered

Consideration should also be given to the need for transitional arrangements and grandfathering provisions to address schemes that are already in place that may be reportable under the new MDR.

No retroactivity of legislation

As the Discussion Drafts points out, a government’s possible response to the reporting of a scheme which it finds unacceptable is the enactment of legislation to close off the scheme. This

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6 This is the case for Hong Kong where for this reason, mass-marketed abusive tax schemes are uncommon.
however should have effect only for the future. We believe that organising one’s tax affairs is a fundamental right and the protection of legitimate expectation follows from the rule of law. Therefore, it is generally inappropriate for tax legislation to be retroactive. The final OECD recommendation should contain a clear statement against retroactivity.

An exception can be justified only where the taxpayer cannot legitimately expect that the scheme will remain valid, which is the case after a clear public statement by the tax administration.

ANNEX: Questions in the Discussion Draft

1. Does Mandatory Disclosure have any other impacts on disclosure and taxpayer compliance not covered in this Chapter?

2. Are there any practical issues that arise from the perspective of the promoter or taxpayer that are not covered in this Chapter? If so what are those issues and how could they be dealt with?

3. Are there any other considerations, not mentioned above that arise with option A [i.e. obligation on both] or option B [i.e. either on taxpayer or promoter], if so what are they?

4. Are there any other features common to promoted schemes that could be included in generic hallmarks?

5. What is the best way of capturing those transactions where the promoter’s benefit is priced into the return on the transaction itself (rather than through a separate premium fee)

6. Are there any other specific hallmarks which should be considered but are not covered in the documents?

7. Have you encountered any practical and administrative difficulties in applying generic and specific hallmarks in practice? If so why have these arisen and how could they be overcome?

8. Does a hypothetical test effectively address one-off or tailored transactions? Are there any other ways in which such transactions could be captured by a mandatory disclosure regime?

9. Do any practical problems arise from an earlier reporting date and short timescale. If so what are those and how could such issues be dealt with?

10. What further information or detail is needed in respect of the concept of availability or is this clear?

11. Are there any other practical issues that arise from setting the reporting period, if so what are they and how can they be dealt with?

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7 See also Article 18 of the draft Model Taxpayer Charter, published by AOTCA, CFE and STEP (Society of Trust and Estate Practitioners) in 2013, see: http://www.cfe-eutax.org/sites/default/files/Model%20Taxpayer%20Charter,%20preliminary%20report,%20text.pdf.
12. Are there any other ways in which to identify scheme users other than scheme number or client lists?

13. What might prevent the automatic provision of client lists to the tax administration and how could this be dealt with?

14. Do you think that the proposed disclosure form (in Boxes 10 and 11) will be appropriate to provide tax administrations with the information necessary to understand the reportable transaction?

15. Are there any other information powers that would be necessary in the context of obtaining information from a promoter or advisor?

16. Is there any additional information that should be reported to the tax administration?

17. Do any problems arise in practice in providing the information set out at Box 10 and 11. If so what are those and how could they be dealt with?

18. Do you think that the Recommendations will be effective to capture international schemes, and, if not can you suggest alternative approaches?

19. Are the purpose and meaning of the terms used in the chapter clear, if not what further clarification is necessary?

20. Are there any other examples of international tax schemes which should be disclosed under MDR?

21. Do you think that the Recommendations will impose an undue compliance burden on taxpayers? If so, why?
Mandatory Disclosure Rules - Action Item 12

A Representation
Mandatory Disclosure Rules

**Background**

On 31 March 2015, the Organization for Economic Co-operation and Development (‘OECD’), as part of its work on the Action Plan to address Base Erosion and Profit Shifting (‘BEPS’), released a Discussion Draft (Action 12) titled “Mandatory Disclosure Rules”. This Action is focused on the usefulness of disclosure initiatives in addressing the lack of comprehensive and relevant information available to tax authorities on tax planning strategies adopted in many countries and soliciting inputs on a number of issues.

It seeks to develop recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the costs for tax administration and business.

This Discussion Draft provides an overview of existing mandatory disclosure regimes in certain countries viz. UK, US, Ireland, Portugal, Canada and South Africa and sets out recommendations for a modular design of a mandatory disclosure regime, including recommendations on rules designed to capture international tax schemes.

We recognize the efforts of OECD towards tackling the issue of tax avoidance schemes by way of bringing in mandatory disclosure rules. However, in view of the existing Indian tax system and the legal and economic environment in India, we foresee certain practical challenges. Accordingly, we wish to bring to notice the concerns and recommendations for your kind consideration.

1. **Significant sensitive information required to be disclosed**

As per the Discussion Draft, significant confidential information is required to be disclosed. Such information, amongst others, would include:

- Scheme’s details: each element in the transaction from which intended tax effect arises;
- Details of all parties to transaction etc.

The Discussion draft has included ‘confidentiality’ as a hallmark for mandatory reporting of the scheme. In other words, it would require a transaction/ scheme to be disclosed (before
implementation) to tax authorities, if such transaction/ scheme is proposed to be entered into by a taxpayer under conditions of confidentiality.

Concerns

Insisting the taxpayer (promoters/ users) to mandatorily disclose such significant information about any scheme, even before its implementation, could breach the confidentiality aspect. Typically, a taxpayer mentions the clause of ‘confidentiality’ to guard against price rigging, unhealthy speculation in market etc. However, such wide disclosure would expose the promoter/ taxpayer to such risks which may impact the overall usefulness of the scheme even when it is not for tax avoidance purposes.

Recommendations

a) The Group may consider not placing confidentiality as a hallmark since at times, such clause forms part of the scheme in a routine manner alongwith other clauses.

b) Even if the Group considers that this hallmark would be required to achieve the overall purpose of disclosure rules, additional clarity should be brought in to identify as to when the clause of confidentiality actually leads to the motive of tax planning/avoidance. In the event, confidentiality clause forms part of the scheme in a generic manner to safeguard the disclosure of financial information etc., then it should be kept out of the reporting ambit.

2. Applies to a broader range of persons

As per the Discussion Draft, mandatory disclosure regimes apply to all taxpayers (both large and small). It covers the largest possible set of taxpayers, tax types and transactions. It also includes third parties involved in the design, marketing or implementation of tax planning schemes.

Concerns

a) This may lead to multiple reporting of the same information either by the promoter, taxpayer or adviser.

b) Even a small taxpayer with not very significant business operations would come under the disclosure net if it contemplates to enter into scheme.

c) Typically, third parties (lawyers, solicitors, attorneys) are hired by the promoters to assist them in drafting a scheme. Casting the obligation on the third parties would be unfair to their business as this could lead to breach of trust.
Recommendations

a) The Group may consider placing responsibility to disclose a transaction primarily on the promoter. Typically, it is the promoter who has the vested interest in the scheme and who is involved in the designing, marketing, organizing of the scheme. Thus, the responsibility to disclose the information should be only of the promoter.

b) Fixing the responsibility on one group would avoid duplication of reporting and thereby save administrative costs.

c) The Group may consider fixing an overall limit above which a promoter/ taxpayer would be required to disclose a scheme. This may also include range wherein the promoters / taxpayers may categorize industry wide. Such parameters should vary from industry to industry.

3. Time period involved

As per the Discussion Draft, the taxpayer/promoter would be required to mandatorily disclose the scheme and related information before the tax authorities. Such information could be required to be disclosed when the scheme is “available for implementation” or when the scheme is implemented by the users.

Concerns

The major concern in disclosing the scheme when it is “available for implementation” is that in the event the concerned authorities believe the scheme to be a tax avoidance, then the review at their end or pronouncing such scheme as fraudulent should happen in a stipulated time period.

Recommendations

A time frame (like 30 days/ 60 days etc.) should be clearly provided to the designated authority to review the scheme before its implementation - else it may lead to indefinite delay in implementation.

4. International tax schemes

As per the Discussion Draft, the jurisdiction which has ‘substantive connection’ with the scheme requires mandatory disclosure. Further, there should not be any requirement of disclosure on persons who are not subject to tax in the reporting jurisdiction.
It further requires the countries to develop specific hallmark that focus on particular cross-border tax outcomes that give rise to revenue concerns in the reporting jurisdiction.

Concerns

a) The meaning of ‘substantive connection’ leads to ambiguity. It is unclear whether a stipulated percentage of shareholding or the revenue earned from a specific jurisdiction would mean substantive.

b) It may lead to multiple disclosures in various countries, since a scheme may have substantive connection in various countries. This would enhance the compliance costs significantly for a multinational group as a whole.

c) There may be a possibility that a scheme whose main purpose is not to obtain tax benefit (like in case of re-domiciliation) may have ancillary benefit of tax savings in some other countries.

Recommendations

The definition of ‘substantive connection’ should be clearly defined to avoid confusion and duplication in reporting. Where the purpose of the scheme is not to derive tax advantage, such cases should specifically be carved out from multiple reporting in all countries.

5. Other important aspects

a) As per the Discussion Draft, the term ‘scheme’ is not defined. Therefore, varying interpretation may be possible and even a typical business transaction such as contract manufacturing, which may have potential tax savings for the taxpayer may also get covered.

b) Such mandatory disclosures should only be applicable in cases of tax avoidance with a definite threshold.

c) As per the Discussion Draft, the responsibility of disclosing the scheme vests with the promoter or taxpayer or both. The definition for these should be drafted carefully. For instance in India there are various directors – Whole time director, managing director etc. It is to be seen that it would be whose responsibility to report.

d) Hallmark for contingency fee – At times, the scheme has a component of “success fee” which essentially may not be in the nature of any “premium” charged. Such fees at times is payable on successful implementation of scheme and to ensure the
implementation in a time bound and defined manner which essentially may not be linked with tax benefits getting accrued. Thus, contingency fee/ premium fee should not be kept as a hallmark in every scenario.

e) The Group may consider providing guidelines on forming/ constituting a separate body altogether for assessing and analyzing the schemes. The experience of information sharing with tax administration especially the one which has the responsibility to do the tax audit / assessments are not very encouraging in developing countries like India. Hence, a dedicated body should be able to assess the scheme objectively. This could also ensure the confidentiality of a transaction.

f) With reference to cross border schemes, where a transaction is proposed to be executed in a controlled group, which may not have a domestic tax advantage or taxpayer is not a party, the Action Plan should also spell out the exchange of information between the countries on such reporting by MNE.

g) In the event, a scheme is considered as a fraudulent or a device to evade taxes, then can the taxpayer/ promoter contest the case before any authority. Some separate designated authority should be constituted for resolution of issues.

h) The Group may consider excluding such transactions from the ambit of mandatory disclosure where GAAR is already invoked. Overlapping with GAAR provisions should be avoided.

The Confederation of Swedish Enterprise is Sweden’s largest business federation representing 49 member organizations and 60 000 member companies in Sweden, equivalent to more than 90 per cent of the private sector.

The Confederation of Swedish Enterprise is pleased to provide comments on the OECD Discussion Draft entitled "BEPS Action 12: Mandatory Disclosure Rules" 31 March 2015 - 30 April 2015 (hereinafter referred to as the Draft).

General Comments

The Confederation of Swedish Enterprise appreciates the opportunity to provide comments on the OECD discussion Draft.

We are concerned about a number of issues in the Draft. To start out, the Draft contains a number of proposals but very little guidance. Considering the additional compliance burden an introduction of Mandatory Disclosure Rules (MDR) would entail for taxpayers, it is essential that the OECD provides sufficient guidance to tax administrations in order for the nationally implemented requirements to be clear and precise.

Another concern with the Draft is the wide hallmarks proposed to determine when a tax scheme must be disclosed. This comes as no surprise since the Action Plan on BEPS states that the definition of “tax benefit” under Action 12 should be wide to capture international tax schemes.

Although that may very well be the case, the fact that the definition is so wide will also lead to that a huge number of transactions, being of little interest from a BEPS perspective, also will have to be reported. This will not only increase the
An essential objective of a MDR is to work as a deterrent. However, if the sheer volume of data received prevents a tax administration from processing the information in an efficient way this may cause the deterrent effect to be weakened instead of strengthened.

To illustrate this, it can be mentioned that, in 2009, the Swedish National Audit Office conducted an evaluation on how the Swedish Tax Administration processed information gathered from the automatic exchange of information system. It was found that the information was poorly and ineffectively processed by the tax administration. As a consequence, a lot of information was never used. The Swedish National Audit Office According found that this lack of effective processing of information diminished the tax administration’s ability to maintain the deterrent effect of the information exchange system and in the long run the ability to secure tax revenues.¹

Consequently, should countries decide to introduce MDR, the Confederation of Swedish Enterprise would strongly advocate a more narrow definition of hallmarks, thereby lowering the compliance burden for taxpayers and allowing tax administrations to focus on relevant tax schemes.

A reference point in this respect could be a threshold similar to what is found in national General Anti Abuse Rules (GAARs). This would leave taxpayers and promoters with only one definition to monitor, instead of two or more. This would also enhance the deterrent effect of the MDR, since taxpayers and promoters know that if the tax scheme is such that it needs reporting, there is also a clear risk of the GAAR being applied on the tax scheme. Narrowing the definition, similar to the relevant GAAR, would also ensure that the information disclosed is indeed relevant for the tax administration to look at. The downside is that the thresholds in GAARs normally tend to be rather vague. Naturally a clear and precise rule would be preferable. Nonetheless, GAAR type definition would definitely be preferable compared with the proposed approach in the Draft.

The introduction of a MDR will significantly increase the compliance burden for taxpayers. According to the Draft a key design principle when introducing a MDR is that “Mandatory disclosure rules should balance additional compliance cost to taxpayers with the benefits obtained by the tax administrations”. Consequently it is important to coordinate Action 12 with Action 13 in order to avoid duplicating requests for information. The confederation of Swedish Enterprise urges the OECD to take this into consideration when formulating the hallmarks. Information that has already been disclosed under other action points should not have to be reported

¹ Riksrevisionen, Internationell Skattekontroll Skatteverkets informationsutbyte med andra länder, RiR 2009:24.
again. Considering the scope of the BEPS project we are concerned about the overall effect of the additional compliance cost that will be imposed on taxpayers. Proportionality must be upheld not only in relation to the individual action points but also in relation to the combined effect of all actions.

Sweden does not have MDR, but taxpayers still have extensive obligations to disclose relevant information to the Tax Administration. Balancing the additional compliance cost to taxpayer with the benefit obtained by the tax administration, it can be questioned whether it is justifiable for countries like Sweden to introduce MDR.

**Thresholds and Hallmarks**

The Draft proposes a number of hallmarks in order to identify tax schemes that should be disclosed. In addition different thresholds are also discussed. One of the thresholds suggested is a *main benefit test* or a *one of the main benefits test*. As we have stated previously in our comments to Action 6, we believe that such wording is too unclear and subjective and will open up for arbitrary assessment. Should however a benefit test be applied, we would strongly recommend that the *main benefit test* is chosen. A threshold focusing on *one of the main benefits* is far too vague and would result in a disclosure rule that is far from what is stated as one of the design principle in the Draft; namely that a MDR “should be clear and easy to point to understand”.

Among the hallmarks discussed a *hypothetical generic hallmark* is mentioned. The Confederation of Swedish Enterprise strongly objects to the use of such a hallmark. The legal certainty for taxpayers is jeopardized if a hypothetical generic hallmark is used. Instead taxpayers should be judged by their actions and not by what they might have done. Especially the mentioning of the possibility for a promoter to charge a premium fee when they did not is greatly worrying, as this would involve far too much second guessing and undermine certainty for taxpayers.

Another hallmark mentioned is for *loss transaction*. The Confederation of Swedish Enterprise believes that a loss transaction hallmark that includes acceleration of losses as one of the standards will give rise to major difficulties. Determining if a loss has been accelerated is not easy and such a rule will therefore further increase uncertainty for taxpayers.

**Penalties**

The Confederation of Swedish Enterprise is of the view that penalties for non-disclosure should not be proportioned to the tax savings or tax liability. In a lot of situations it is impossible to determine how extensive the tax benefit of a tax scheme is or might be. This would depend on how the tax scheme is used and will surely
lead to disputes between taxpayers and tax administrations regarding how the tax benefit should be calculated. Therefore we propose a fixed amount to be applied to reduce any risk of disputes.

**International Tax Schemes**

The Draft does in section IV deal with the disclosure of international tax schemes. This chapter also gives rise to a number of concerns.

The Confederation of Swedish Enterprise believes that before a MDR is implemented, a clear and unequivocal design of the international disclosure chapter must be provided. This is not the case with the current Draft.

The Draft recommends that taxpayers that are not a direct party of the cross-border outcome should be obliged to disclose a cross-border arrangement. In our view, this seems overly zealous and go beyond what is necessary to target BEPS issues. It should be sufficient that only parties directly involved in the transaction have a reporting obligation.

The Draft does not elaborate on how the disclosed information is to be shared among tax administrations. Disclosed propriety information needs to be subject to strong safeguards of protection and the access to such information should be limited to countries that have a direct interest in the international tax scheme. That the country have implemented the OECD recommendations could be another requirement to gain access to the disclosed information.

On behalf of the Confederation of Swedish Enterprise

April 29, 2015

*Krister Andersson*

Head of the Tax Policy Department
Response to the consultation on mandatory disclosing rules of the OECD.

The Consejo General de la Abogacía Española¹ is a public law body acting as the representative, coordinator and executive of the 83 Colegios de Abogados (representing over 150,000 lawyers and 100,000 non-practicing lawyers). It is the organization responsible for managing professional lawyers’ practice and acts as the watchdog for the correct performance of the legal profession and the defence of fundamental rights of citizens.

Introduction:

From a purely national perspective, the discussion draft presented includes a terminological mistake which could lead to conclusions that are both illegal and unconstitutional.

Primarily, it should be assumed that the term “promoter” as defined in box 2 (draft definition of promoter) and also the term “taxpayer” are not including “abogados”, the legal profession, in the provision of advise or even less in the provision of legal advice. The definitions in Canadian, US or South African law do not correspond nevertheless with the conclusions extended by the OECD (which seem to include the advice). Therefore, taking that into account as well as the reference to “the promoters assert legal professional privilege”, we would like to further clarify this statement to avoid any misconception despite the fact that the reporting of the operation is primarily on the taxpayer before even raising the issue of the “promoter”. In any case, disclosure cannot legally be the responsibility of the independent legal adviser. The duty to preserve professional secrecy is regulated in the Constitution and the disclosure of information received within the exercise of the legal profession constitutes a crime subject to prison sentencing in the Criminal Code.

From a European perspective, as CCBE indicates in its draft paper, “terminology is not always clear, it seems that the draft encompasses lawyers and legal advice when discussing different features of mandatory disclosure”. The role of “abogados” in society and the regulation of professional secrecy is not concurrent with the one of UK and Irish professions and their regulation of disclosure and legal professional privilege seems to be the only logic lying under the OECD proposals. This probably leads to the conclusion of a biased model proposal.

¹ Due to the short delay for response, the present views do not represent the views of the organization but only of the Spanish Delegation in CCBE as well as the experts consulted. In particular, the CGAE’s EU Office would like to thank Rafael Gil March and Marta Isern for their contributions.
1) The legal profession is and should remain legal.

Legal professions are *de iure*, by definition, legal. As a consequence, Abogados are obliged to respect the law in all the areas of their professional activity, including tax advice. If their advice is within the terms of the law it constitutes a legal advice, which is also the very source of a citizen right. There can be no rights and no Rule of Law if the citizen is not entitled to know his own rights. If, on the contrary, an advise is illegal then the lawyer will be committing a tax offence or a crime and has no legal privilege or professional secrecy as he is not acting under his capacity as a lawyer but as co-author or accomplice or any relevant figure under the respective national criminal law.

2°) Tax offences are not covered by professional secrecy.

When a lawyer acts outside of his professional mandate (by breaching the law), he/she is not covered by professional laws. The information in his/her hands is not protected by professional secrecy. He is not acting as an external advisor for his client but with a mandate which is not protected with the trust that the regulations establish for the professional relation when protecting the trust is part of the protection of the privacy, the right to access to a lawyer and to receive legal advice. Rule of Law is clearly undermined both directly and indirectly by illegal activities. In those cases, their professional organizations are the first entities with the strongest and clearest interest to persecute them and expel the offenders from the Legal profession.

3°) The condition of Lawyer should prevail.

In this sense, even if the advice on taxation issues is shared with other professions such as economists the condition of lawyer has to prevail over the one of tax advisor as the practise of Tax Law is an unquestionable field of activity of the legal profession as stated in the Estatuto General de la Abogacía, the national legislative framework for the profession of Abogado.

4°) The Anti-money laundering legislation.

Under the new AML regulation, tax crimes are brought into the definition of money laundering thus, if a lawyer is brought towards a tax planning that includes a suspicion of money laundering activities he/she is already obliged to respect the AML directives and the national implementing laws. In that sense, whilst legal advice is excluded of the directive, the Spanish legislator has introduced the word advice in the transposition laws. Therefore, it has created two different categories of advice (legal advice and non-legal advice). Although at first sight this could be a solution to address the problem (a differentiation between two categories of advice) this creates legal uncertainties for practitioners, clients and authorities. Therefore the only feasible and valid solution remains at the level of the
professional regulation. Furthermore, another element to take on account on this respect is that the risk analysis of an operation does include the possibility of future procedures closely related to the issue of the right of defense.

4°) Transparency requirements.

Transparency needs originate in a failure in trust of societies. Undermining the trust of the society in their independent legal professionals, their longstanding and well-functioning legal institutions and the legal certainty of the framework in which they lawfully operate does not help the political aim of fighting tax evasion. On the contrary, it further undermines the public trust and the Rule of Law.

5°) The State’s political willingness or the will for a “police State”

The experience in several countries and at European Commission level itself after the Luxleaks scandal proves that the positive trends in combatting the avoiding tax evasion and tax crimes mainly require a real political willingness to fight it by using appropriate political, diplomatic and legal actions. Tax harmonisation is obviously more of a solution than suspending the freedom of movement of capitals or hindering citizen’s rights. At the same time, modifying the operating legal framework of independent legal professionals may have indirect and undesired consequences for society, which history has proven that those can include –amongst others– favouring a growing number of deregulated providers undertaking organized illegal activities.

6°) Aggressive tax planning.

The concept of agressive tax planning is vague and undetermined if left to the interpretation or arbitrarious determination by administrations. On the other hand, along the lines of the OCDE proposal of objectivation of the concept, runs also a risk of unnecessary criminalization of conduct hindering fundamental rights.

7°) Cooperation between administrations.

Along the lines of previous comments, the national administrations of those countries that admit agreements and rulings should take the lead in declaring them to the administrations of the countries of the companies that are involved in those agreements. This angle of the solution would probably obtain complete and unanimous support of the legal profession regulators worldwide.
The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The OECD discussion draft refers to Action 12 of the Action Plan on Base Erosion and Profit Shifting and states that countries - when adopting mandatory disclosure rules - will need to decide whether or not they introduce a dual reporting requirement that applies to the promoter and taxpayer or whether they introduce a reporting obligation that falls primarily on the promoter. Where the primary reporting obligation falls on the promoter, the draft recommends that the reporting obligation switches to the taxpayer where (i) the promoter is offshore; (ii) there is no promoter; or (iii) the promoter asserts legal professional privilege.

Although terminology is not always clear in the OECD discussion draft, it seems that the draft encompasses lawyers when discussing different features of mandatory disclosure and this is why the CCBE has decided to reply to this consultation.

The CCBE would like to draw the OECD’s attention to a number of issues relating to the legal profession which are of utmost importance when discussing issues such as mandatory disclosure:

- A lawyer is a "person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters".\(^1\)

- When advising and representing clients, **lawyers play a fundamental role in ensuring the protection of human rights and fundamental freedoms.**\(^2\)

- The use of the term ‘promoter’ is misleading and can create false assumptions as far as lawyers are concerned. **Lawyers are not ‘promoters’** (of tax schemes) - lawyers provide legal advice to their clients on different legal matters, including tax matters or defend clients, having regard to the laws and rules in force within a certain country.

- **European lawyers** - when advising and representing clients - **are subject to core professional principles**, which are essential for the proper administration of justice, access to justice and the right to a fair trial, as required under the European Convention of Human Rights.

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2. "In a society founded on respect for the rule of law the lawyer fulfills a special role. The lawyer’s duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer’s duty not only to plead the client’s cause but to be the client’s adviser. Respect for the lawyer’s professional function is an essential condition for the rule of law and democracy in society." See Article 1.1 of the CCBE Code of Conduct for European Lawyers. See also: Council of European Recommendation on the freedom of exercise of the profession of lawyer 25 October 2000 and United Nations Basic Principles on the Role of Lawyers.
• The **right and duty of the lawyer to keep clients’ matters confidential and to respect professional secrecy** is one of the core principles of the European legal profession. Without the certainty of confidentiality there can be no trust. This has been recognised by European and international legal instruments as well as by jurisprudence both at European and national level. According to the European Court of Human Rights, it is a fundamental right of citizens enshrined in the European Convention of Human Rights which can be breached only in exceptional circumstances.

• All European countries have provisions in order to ensure the protection of the right and duty of the lawyer to keep clients’ matters confidential and to respect professional secrecy. The countries differ in the methods by which this protection is achieved. In some states legal duties are expressly imposed upon the lawyer and corresponding rights are expressly conferred. In other states, protection is achieved by the creation of duties, rights or exemptions from the ordinary rules of law. The nature and extent of these rights, duties, and exemptions, vary from country to country. However, by whatever means protection is achieved, and whatever its nature and extent, its purpose is the same in all states. The purpose is, first, to protect every person who requires the advice and assistance of a lawyer in order to vindicate his or her rights and liberty and, second, to ensure the fair and proper administration of justice. This cannot be achieved unless the relationship between the lawyer and his client is a relationship of confidence.

• There is no professional secrecy when the lawyer uses it for illegal purposes.

The OECD discussion draft is largely based on terminology and concepts used in common law countries ('legal professional privilege'), thus ignoring the principles and concepts of continental Europe and civil law countries ('professional secrecy'). The CCBE would like to comment in particular on the following parts of the discussion draft:

• "(…) the existing legislation recognises that legal professional privilege, as recognised under the UK and Irish law, may act to prevent the promoter from providing the information required to make a full disclosure (13). [Footnote 13: Except for those cases where litigation is in actual contemplation, legal privilege generally only applies to confidential legal advice given to the client by the professional adviser and does not extend to documentation prepared in the ordinary course of the transaction or to the identity of the parties involved.]"

It is important to note that in continental Europe and civil law countries, professional secrecy goes beyond the so-called 'litigation privilege' and 'legal advice privilege' of common law countries, covering also documentation prepared in the course of a transaction or legal advice. In these jurisdictions, the facts on which legal conclusions are drawn may be covered by professional secrecy, and may consequently not be disclosed to a tax authority. In some countries, in addition, the name of the client is protected by professional secrecy. Thus, the scope of professional secrecy is more extensive than that of legal professional privilege.

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4 See Council of European Recommendation on the freedom of exercise of the profession of lawyer 25 October 2000: 6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law.
5 See United Nations Basic Principles on the Role of Lawyers: 22. Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.
7 The principle has different origins: in common law countries it has developed through case-law; in continental Europe and civil law countries, it is sometimes contained in the Constitution, criminal law, procedural laws or the laws governing the lawyers’ profession / the Bars and Law Societies. It is also reflected in the different national codes of conduct for lawyers.
9 See page 27 of the OECD discussion draft.
• "(...) the client has the option of waiving any right to legal privilege (...)"  

Contrary to common law jurisdictions, professional secrecy cannot always be waived by the client in continental Europe and civil law countries, in which case the lawyer is unable to disclose information and documents provided by his or her client or forwarded by him or her to his or her client. Moreover in some European countries a breach of professional secrecy is a criminal offence. In some civil law countries, even if the client were to decide to waive professional secrecy, it is the lawyer who will need to decide in the last resort about disclosure taking into account the client’s best interests.

• "The legal professional asserting legal privilege must advise clients of their obligation to disclose and must also advise the tax administration that the legal professional’s obligation to disclose has not been complied with because of the assertion of legal professional privilege."  

This implies that a lawyer would be required to advise the tax authorities that he or she was not able to disclose information because of the assertion of legal professional privilege or professional secrecy. This also implies that a lawyer would not remain independent of State authorities, which is contrary to the core principle of independence of the legal profession. A lawyer may not allow his or her independence to be compromised by a State authority or any other powerful interests. Hence a lawyer cannot be compelled to tip off clients to tax authorities. Besides, as stated above, in a number of European countries lawyers cannot give their client’s name, as it is covered by professional secrecy, and thus, the lawyer is not authorised to provide any information to the tax authorities.

In conclusion, the CCBE urges the OECD to take into account these comments in future discussions and position papers. The CCBE, for the reasons indicated, strongly opposes any option that would put an obligation of disclosure of tax schemes on lawyers acting as legal counsel in tax matters.

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10 See page 27 of the OECD discussion draft.
11 See page 27 of the OECD discussion draft.
Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration

By email: MandatoryDisclosure@oecd.org

30 April 2015
Our Ref: WJID/ SJC/ T AP(1)

Dear Sirs,

Re: Mandatory Disclosure

We welcome the opportunity to comment on the Public Discussion Draft published on 31 March 2015. Our comments are made from the perspective of the UK.

The UK has had domestic disclosure rules since 2004 which, as noted in the Discussion Draft, have been effective in meeting the desired objectives. Many of the concepts set out in the paper are based on these UK rules and, in responding to the specific questions raised, we have shared our practical experience of applying them.

We have set out our detailed response to the Discussion Draft questions in the appendix to this letter. The two main points that we would highlight are as follows:

Interaction with existing domestic anti-avoidance provisions

A mandatory disclosure regime could be of no/limited benefit in a country that has a far-reaching General Anti-Avoidance Rule (GAAR), or similar legislation. The Discussion Draft notes that the definition of a reportable arrangement could be broader than the definition of a tax avoidance scheme covered by the GAAR, but this may not always be possible. The GAAR definition could already be broad and using a wider definition may result in a disclosure regime that lacks focus. In such situations it will be important to ensure that the compliance burden for advisors and taxpayers under a mandatory disclosure regime is proportional to the expected benefits.

International tax arrangements

We agree that domestic disclosure rules could be extended to cover international tax arrangements but for this to be effective the hallmarks will need to be carefully considered and designed.

Mandatory disclosure rules could be used to collate information about known international arrangements—for example, to allow for costings to be prepared and legislative changes to be considered—which should be relatively straightforward. The more challenging aspect will be defining criteria that will capture useful information about new/currently unknown international arrangements. Using the existing UK mandatory disclosure model, there are two possible approaches:

1. prescriptive hallmarks—for example, along the lines of the UK leasing hallmark; or
2. wider, potentially hypothetical, hallmarks—for example, along the lines of the UK Premium Fee hallmark.

A hypothetical approach is likely to be too wide for international tax arrangements and tax authorities could receive more information than they could effectively process. At the same time taxpayers and
advisors would be faced with an onerous, and perhaps unnecessary, compliance burden. We believe that the preferable route, which is more likely to achieve the desired objectives in a targeted manner, would be to use relatively prescriptive hallmarks that reflect the key areas of concern of the relevant tax authority.

If you would like to discuss any of the points raised in this letter, please do not hesitate to contact either me (bdodwell@deloitte.co.uk) or Simon Cooper (sjcooper@deloitte.co.uk). We would be happy to speak at the public meeting on 11 May.

Yours faithfully,

W J I Dodwell
Deloitte LLP
1. Does mandatory disclosure have any other impacts on disclosure and taxpayer compliance not covered in this Chapter?

The Discussion Draft notes that ruling regimes and co-operative compliance programmes typically lack the broad scope of a mandatory disclosure regime and do not focus on obtaining specific information about promoters, taxpayers and defined schemes. We agree with this comment. However, the interaction between mandatory disclosure and rulings etc. needs to be considered. Disclosure of an arrangement does not necessarily mean that it involves tax avoidance (page 8 of the Discussion Draft) and therefore we would recommend that countries do not introduce a general rule that would prevent result in arrangements being excluded from a ruling regime or co-operative compliance programme. In the UK it is possible to seek clearances (under a non-statutory clearance procedure) for reported transactions with the UK tax authorities. In this case, reference needs to be made in the clearance application to the arrangement having being reported under Disclosure rules.

2. Are there any practical issues that arise from the perspective of the promoter or taxpayer that are not covered in this Chapter? If so, what are those issues and how could they be dealt with?

The UK tax authorities, HM Revenue & Customs (HMRC), have issued comprehensive guidance on the UK mandatory Disclosure of Tax Avoidance Scheme rules (DOTAS). This guidance is particularly useful in understanding HMRC’s view on the operation of the rules and the remit of the hallmarks. HMRC have also operated in an open manner to encourage compliance with DOTAS. These factors have helped to alleviate many of the practical issues that could have arisen from the introduction of DOTAS, which is widely drawn legislation that includes a number of hypothetical tests.

Consideration also needs to be given to how information can be best shared with the tax authorities in a secure manner. Client lists, if used, could contain a great deal of confidential information and a standard format needs to be introduced - especially if there are to be plans for international exchange of information. This might need to include a standardised electronic template.

Any limitations on the sharing of information under a mandatory disclosure regime would also need to be considered in each country. A possible example of where a restriction could be placed on information being shared could be where legal professional privilege is applied.

3. Are there any other considerations, not mentioned above that arise with Option A or option B, if so what are they?

As set out in the paper there would need to be a definition of ‘promoter’ or ‘adviser’. Box 2 on page 28 includes an extract from the UK legislation but there are some key parts missing. In particular:

- The person needs to be providing the advice in the course of a ‘relevant business’, which, in the UK, is defined as a trade, profession or business which involves the provision to other persons of services relating to taxation or is carried on by a bank.
- There are exclusions in the UK rules for persons that may provide a wide range of services, including tax advice, where a non-tax department- for example, an accounting team- provides technical input to a third party but is not involved in the tax design of the arrangement. There are also exceptions where tax advice is provided but that advice is benign and that advisor is not leading the design of the tax arrangement.
From the Discussion Draft it would seem that regimes which may require disclosure by the promoter and the taxpayer often allow disclosure by one party to frank the obligation of others. If Option A were to be followed, we think that this is a sensible approach. In connection with mass-marketed arrangements it may be necessary to consider the position of introducers i.e. individuals or firms which market the arrangement without being involved in the design.

4. Are there any other features common to promoted schemes that you believe could be included in generic hallmarks?

We have no comments.

5. What is the best way of capturing those transactions where the promoter’s benefit is priced into the return on the transaction itself (rather than through a separate premium fee)

In many cases the promoter of an arrangement will have no direct involvement in the arrangement itself and therefore its only remuneration would be the fee that it receives for the tax advice which it provides. However, this may not always be the case and the original UK rules included a provision which would capture arrangements involving off-market terms for financial products. This was in addition to the Premium Fee test.

6. Are there any other specific hallmarks which should be considered but are not covered in the documents?

We have no comments.

7. Have you encountered any practical and administrative difficulties in applying generic and specific hallmarks in practice? If so, why have these arisen and how could they be overcome?

We have set out below some of the matters that we have had to consider in respect of the existing UK disclosure regime, and how these have been approached:

- Hypothetical hallmarks – such hallmarks could require a promoter/taxpayer to consider the whole tax services market, which will not be possible in practice. In order to apply such hallmarks with any degree of certainty there needs to be guidance, or some other form of agreement with the tax authorities, on their practical application. For example, in the UK technical guidance notes, case law or past correspondence with the tax authorities can be used to evidence that no promoter would want to keep an arrangement confidential from the tax authorities.

- Confidentiality- it is common practice for advisors, and not just tax advisors, to include confidentiality terms in their letters of engagement with clients. The primary purpose of these terms is to provide protection for the adviser in case clients chose to share the advice with others. They can also be used to protect client data shared with an adviser in the course of an engagement. It may be possible in some countries for these terms to be turned-off if they would result in the disclosure of an arrangement, which would be of no interest to the tax authorities. However, it would be better if this issue could be avoided in the first place by clearly linking any confidentiality condition to the tax analysis underlying the arrangement and the promoter’s desire to continue to sell the arrangement.

- Contingent fees- the contingent fee hallmark in the UK was changed so that Disclosure does not apply where the fee is contingent upon a tax advantage as a matter of law. The reference to as a matter of law is important and excludes arrangements that were not the focus of this hallmark. The most common example of these were arrangements covering employees – for example, employers offering low emission cars to employees for which the employer would be able to claim accelerated tax
deductions. Employers often wish to pay for this advice based on employee take-up, which would indirectly make the fee contingent on the tax saving. These arrangements, which clearly technically work as a matter of law since they rely on the simple application of a UK statutory rule, are of no interest to the UK tax authorities and were therefore excluded from the UK disclosure regime.

As set out in our response to question 2, the UK tax authorities publish detailed guidance on the application of the UK disclosure rules, and have an open relationship with promoters who want to comply with the rules but may be struggling with their practical application.

8. Does a hypothetical test effectively address one-off or tailored transactions? Are there any other ways in which such transactions could be captured by a mandatory disclosure regime?

Other than the standardised tax product and the loss scheme hallmarks, which requires there to be an expectation that more than one individual will implement the same, or substantially the same, arrangement, all of the existing UK hallmarks, not all of which include hypothetical tests, could apply to one-off transactions. It is made clear that the focus of the UK regime is not solely on mass-marketed arrangements, which may only account for a small part of the tax market.

9. Do any practical problems arising from an earlier reporting date and short timescale? If so, what are those and how could such issues be dealt with?

The UK already works on a very short reporting timescale. Promoters will need to establish in-house systems to be able to meet their disclosure and reporting requirements. The time needed to put these systems in place needs to be factored into the timing for introducing a mandatory disclosure rule.

10. What further information or detail is needed in respect of the concept of availability or is this clear?

This is a concept with which UK advisors are familiar; we think its meaning is clear.

11. Are there any other practical issues that arise from setting the reporting period? If so, what are they and how can they be dealt with?

See 9 above. We have no additional comments.

12. Are there other ways in which to identify scheme users other than scheme numbers or client lists?

The UK uses scheme numbers and client lists. The extent to which scheme numbers can effectively be used could depend on the existing tax reporting regime in the jurisdiction. In the main the UK has a self-assessment regime which requires returns to be filed on a regular basis. (The most notable exception is stamp duty land tax, which is a tax on transactions for which a return may not need to be filed). These reporting regimes allow the tax authorities to easily identify taxpayers that have implemented disclosed arrangements and assess the effect on their tax affairs. If a country did not have such reporting requirements, the use of client lists alone may be more appropriate. However, as recognised at page 52 of the Discussion Draft, it could also be possible to develop a standalone reporting form for scheme users. We comment on this more at question 14 below.
13. What might prevent the automatic provision of client lists to the tax administration and how could this be dealt with?

We assume if this were to be made a statutory requirement there should be no issues in most jurisdictions but the position would need to be confirmed in each country and, in particular, the interaction with any legal professional privilege rules.

The mechanism for providing this information should also be carefully considered to ensure that it can be provided to the tax authorities in a timely and secure manner.

14. Do you think that the proposed disclosure form (in Boxes 10 and 11) will be appropriate to provide tax administrations with the information necessary to understand the reportable transaction?

We would make the following comments in respect of the draft disclosure form for scheme users:

- It is not clear how much information would need to be provided in respect of the scheme and each element in the transaction. If there is also a reporting requirement on the promoter, and this includes details of the arrangement, we assume that minimal details may be required. If the user is required to provide scheme details, individuals, in particular, could struggle to comply with this requirement and it would therefore generally be better to put the primary obligation on the promoter.

- It is noted that details of all parties to the transaction could be particularly useful where bespoke arrangements are being reported. We do not understand this reference and, without further information, we would question what useful information this requirement would provide. If this is an intra-group arrangement, details of the parties involved would be available and could be useful information. If the arrangement were, for example, structured as an investment into a partnership which provided a tax loss for the partners, the partners may not have information about each other. Even if they did, putting a reporting requirement on each partner to provide details about other partners is likely to be of very limited benefit.

We would make the following comments in respect of the draft disclosure form for scheme promoters or advisors:

- Although it may be possible to include an initial list of clients, which may perhaps be one user at the outset, we would assume that reporting users would be a regular rather than one-off event. Regular periodic reports will allow information to be captured about additional users of the arrangement after it is first made available.

- Amount of expected tax benefit. It is unlikely that meaningful information could be supplied by the promoter unless it is expected that the arrangement will only be implemented by one user or a finite number of users who can be identified at the outset.

- Details of all parties to the transaction. The reporting of a number of implementations on one form could lead to confusion. We would therefore suggest that details of all parties to the transaction should only be considered for the scheme user form. However, as set out above, we would suggest that it would be better to place the primary obligation to disclose on the promoter or advisor who is likely to have the best understanding of the arrangement.

15. Are there any other information powers that would be necessary in the context of obtaining information from a promoter or advisor?

We have no comments.
16. Is there any additional information that should be reported to the tax administration?

We have no comments.

17. Do any problems arise in practice in providing the information set out at Box 10 and 12? If so, what are these and how could they be dealt with?

See our comment at question 14 above.

18. Do you think the recommendations will be effective to capture the international schemes, and, if not, can you suggest alternatives?

We understand the need to make the general framework wider - for example, by removing any domestic tax benefit filter - but an international regime will only be successful if the associated hallmarks are focussed and can be applied with a high degree of certainty. If the hallmarks are too narrow, they will not catch relevant information and, if they are too wide, there could be so much information that tax authorities are not able to easily and quickly identify what is useful and relevant from what is not. This is especially important as there are likely to be many more exchange of information requirements on tax authorities.

We assume that examples used in the discussion draft have been used to demonstrate the principles and therefore have been selected for their simplicity. However, considering each of these turn, it would be expected that a disclosure regime would provide little additional, useful, information other than the possible amount of tax at stake. This could be useful information but the additional cost of collating it through a mandatory disclosure regime would need to be weighed-up against the benefits.

**Example 1: Notional interest deduction**

As set out at paragraph 260, it could be that Country A is familiar with the tax treatment of interest free loans in Country B. Even if this were not the case, we question whether this information is of relevance to Country A. We would expect most countries to have transfer pricing rules that would impute interest income on the loan. (In addition, B Co could be a CFC of A Co which could negate the benefit of the deemed interest deduction). These transfer pricing rules could apply regardless of whether a deduction is being taken in the borrower jurisdiction. The information about the notional interest deduction in Country B, even if they did not already know about it, is likely to be of no/ little interest to the tax authorities of Country A.

**Example 2: Imported mismatch from hybrid financial instruments**

It is not clear from the example and, in particular, paragraph 263 why the imported mismatch rule does not operate to deny the entire deduction on the interest payment made by Borrower Co C. If this is due to a shortcoming in the legislation, using a disclosure regime to test it could be appropriate. However, it would be hoped that such a matter could be quickly resolved and that the hallmark could be withdrawn within a short period of time to avoid creating an unnecessary tax burden for advisors and promoters.

If the imported mismatch rule is operating as expected, and a full disallowance would not be the anticipated outcome, there would seem no need to include such an arrangement in a mandatory disclosure regime.
Example 3: Use of a client list

In this example, A Co transfers an asset to B Co and there is no tax on the transfer. B Co allows a tax deduction for the amortisation of the transferred asset. It is not clear why there are no tax consequences in Country A. This could be because:

- Country A does not impose tax on asset transfers of this nature or there is no profit/ gain on the transfer due to the asset's tax base cost. If this were the case, it would not be expected that a mandatory disclosure regime would provide any useful information. The possible exception would be if Country A was considering introducing a new rule which would tax gains on assets transferred to another country where a tax deduction would be available in respect of the asset and wanted to collate data to consider the position. Depending on the information provided through existing tax reporting regimes, this data may already be available and separate mandatory disclosure rules may be unnecessary.

- Country A and B are in the European Union and, as a consequence, the asset transfer is free from an immediate tax charge. This is not an anomaly in the tax regime of Country A and therefore we would not expect it to be covered by mandatory disclosure.

- Country A enters into an arrangement which results in local taxes being avoided on the transfer of the asset. The government of Country A could be interested in these arrangement, which may need to be disclosed under a domestic regime. There could be a number of reasons for transferring the client list to B Co, including the tax deduction available in Country B. However, it is not clear to us why the tax treatment of the client list in Country B would be of interest to the government of Country A. The possible loss of tax revenue to the government of Country A is the lack of tax on the asset transfer and not the amortisation in Country B.

19. Are the purpose of the meaning of the terms used in the chapter clear, if not, what further clarification is necessary?

The chapter is clear in as far as it goes. However, as set out above, the key will be the international tax arrangement hallmarks, which are not covered in the Discussion Draft. We would expect these hallmarks to be country-specific, although governments may work together on their development.

20. Are there any other examples of international tax schemes which could be disclosed under MDR?

We do not have information about the international tax arrangements that could be of interest to the UK government and therefore we cannot comment.

21. Do you think that the recommendations will impose an undue compliance burden on taxpayers and promoters? If so, why?

Without information about the international tax arrangement hallmarks we cannot comment. However, as discussed above (Q19), the arrangements set out there would impose a compliance burden without obvious tax authority benefit.
Comments on the Public Discussion Draft

BEPS Action 12: Mandatory Disclosure Rules

April 29, 2015

Committee on Fiscal Affairs (CFA), OECD
By email: MandatoryDisclosure@oecd.org

We are pleased to comment on the public discussion draft BEPS Action 12: Mandatory Disclosure Rules (the OECD draft) through the consultation taking place from March 31, 2015 to April 30, 2015.

This document may be posted on the OECD website. Full credit goes to Robert Robillard, DRTP Consulting Inc.¹

1. Introduction

It is with great interest that we read the OECD public discussion draft issued on March 31, 2015 on BEPS action 12 which pertains to mandatory disclosure rules. Annex VI of the draft provides with a specific set of “questions for consultation” (a summary that is). These questions are for the most part technical in nature.

This should come as no surprise since the philosophical foundations for mandatory disclosure rules shall remain unchallenged according to the OECD. Paragraphs 8 and 9 of the draft are indeed explicit on that matter. For instance, paragraph 9 indicates that “taxpayers agree to make full disclosure of material tax issues and transactions they have undertaken to enable tax authorities to understand their tax impact”.

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To which extent do “taxpayers” indeed “agree” with this process is certainly questionable. But we shall not dwell on this issue here. The rest of this text will instead provide some general thoughts and comments on the relevance of mandatory disclosure rules in a modern tax system entrenched in the core belief that BEPS is a tax compliance issue.

2. To self-assess or to mandatory disclose?

Most tax regimes around the world are based on self-assessment and voluntary compliance. As pointed out in paragraph 25 of the OECD draft, self-assessment is supplemented by “information and compliance initiatives”, usually with respect to precise categories of taxpayers or type of transactions, which are in fact part of the self-assessment process.

Any tax administration is then expected to enforce due diligence and compliance with the law by its “taxpayers”. This is in a nutshell what tax administrations are primarily meant to be. In Canada, paragraph 2 of Information Circular IC71-14R3 The Tax Audit reminds “taxpayers” of all shapes and sizes that “while there is, in Canada, a high standard of public compliance with the law, a self-assessment tax system can be maintained only through vigilant and continuous inspection of returns. The primary purpose of the tax audit is to monitor and maintain the self-assessment system. As such, it plays an important role in the achievement of the objectives of the Department which are to collect the taxes imposed by law through the encouragement of voluntary compliance and to maintain public confidence in the integrity of the tax system.”

This very notion of self-assessment initially precludes the necessity of any type of mandatory disclosure regime. Self-assessment in its most basic quintessence is about voluntary disclosure of one’s tax burden.

However, in line with the rule of law, self-assessment for tax purposes has long been meant to self-assess oneself in such a way as to minimize the actual tax burden. In Canada, as elsewhere, the merits and legitimacy of tax planning, whether domestic or international, has been widely recognized by case law: “Every man is entitled if he can to

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2 In Canada, the preamble of subsection 150(1) of the Income Tax Act indicates that “a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer”.

3 In Canada, for transfer pricing and international tax purposes, the T106 Information Return of Non-Arm’s Length Transactions with Non-Residents and the T1134 Information Return Relating To Controlled and Not-Controlled Foreign Affiliates forms immediately both come to mind.
order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax-payers may be of his ingenuity, he cannot be compelled to pay an increased tax."

From that perspective, any type of mandatory disclosure rules improperly infringes this enduring tax principle as it forces taxpayers to openly signal their strategies to the tax administrations. One of the questions that therefore arise is why is there a need in the first place for mandatory disclosure rules?

3. **How come mandatory disclosure?**

At first, any OECD member countries would forcefully proclaim that mandatory disclosure rules are rendered compulsory in international taxation by the alleged BEPS phenomenon. But the OECD draft on BEPS action 12 suggests a somewhat more disturbing and sinister objective for mandatory disclosure rules. It is indicated in paragraph 10 that “both mandatory disclosure and co-operative compliance are intended to improve transparency, risk assessment and ultimately taxpayer compliance. They do this is [sic.] in different ways and may be aimed at different taxpayer populations, for instance co-operative compliance programmes often focus on the largest corporate taxpayers. However, as mentioned later in this document, mandatory disclosure can reinforce the effectiveness of a co-operative compliance regime by ensuring that there is a level playing field in terms of the disclosure and tax transparency required from all taxpayers.”

The draft would therefore have the reader believe that mandatory disclosure is in fact a natural complement to self-assessment for some “categories of taxpayers”. Moreover, the OECD draft would like us to trust that mandatory disclosure rules are required to ensure a level playing field in the taxation arena. Finally, the draft suggests that mandatory disclosure rules are requisite to better risk-assess taxpayer compliance. Those statements indirectly imply, on the one hand, that some categories of taxpayers have gone rogue, in true unsubstantiated BEPS fashion, and surprisingly, on the other hand, that tax administrations are unable to properly enforce compliance in their respective tax jurisdictions.

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But isn’t it tax administrations role to make rules which may be enforced to start with? According to the OECD action plan on BEPS, the answer is affirmative: “every jurisdiction is free to set up its corporate tax system as it chooses. States have the sovereignty to implement tax measures that raise revenues to pay for the expenditures they deem necessary. [However] An important challenge relates to the need to ensure that tax does not produce unintended and distortive effects on cross-border trade and investment nor that it distorts competition and investment within each country by disadvantaging domestic players.”

Who should then be in charge of that alleged “important challenge” emanating from the existence of cross-border transactions?Remarkably, the OECD draft suggests that it should be the taxpayers involved in cross-border transactions by the obedience to mandatory disclosure rules, not tax administrations. It is an unsettling thought to consider that the burden of the inadequacies of any set of rules or of any set of interactions between various set of rules should be shouldered by the “taxpayers”.

This seemingly accelerating tax compliance trend directly contravenes at its core with the State sovereignty principle better known as the Westphalian sovereignty, as it was first defined in 1648. On that latter aspect of the issue, even the OECD member countries recognize the basic principle of Westphalian sovereignty, at least as it pertains to the potential implementation of a global formulary apportionment system. With respect to that controversial matter, paragraph 1.22 of the OECD Transfer Pricing Guidelines indicates that it would “require substantial international coordination and consensus” for any chance of a successful implementation.

Coming back to mandatory disclosure rules, it would now seem that they are meant to compensate for the lack of ability of tax administrations to properly enforce incoherent, usually artificially complex, and largely uncoordinated domestic tax rules with international tax principles. Mandatory disclosure rules are consequently framed to address the purported “natural” limitation of domestic tax rules and the suggested shortcomings of the international tax principles designed in the 1920’s.

However, we would posit that the remedies are in fact as clearly misunderstood as is the actual tax sickness in front of us. At its core, the alleged BEPS phenomenon, from which the purported need for mandatory disclosure rules arose, finds its source in the inherent

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and ever-increasing complexity of the domestic tax regimes (and multiplication of rules) all over the world.

Complexity, which is first created from an ever-increasing number of rules in domestic tax regimes and from the interaction of these regimes, ultimately feeds the creation of an even greater numbers of rules. This vicious circle has been going on for the last 60 years all around the world. It is precisely this artificially induced complexity by sovereign States all around the world which destroy any chance of a level playing field or for any sort of tax transparency between tax administrations.

4. Conclusion: Where to then?

As the mathematics and economics professor Donald G. Saari wrote in 1995:

“A lesson learned from modern dynamics is that natural systems can be surprisingly complex. No longer are we astonished to discover that systems from, say, biology (e.g., [GOI, Ma1, Ma2]) or the Newtonian n-body problem (e.g., [MM, Mo, Mk, SX, X]) admit all sorts of previously unexpected dynamical behavior. This seeming randomness, however, sharply contrasts with what we have been conditioned to expect from economics. […] what we do know indicates that even the simple models from introductory courses in economics can exhibit dynamical behavior far more complex than anything found in classical physics or biology. In fact, all kinds of complicated dynamics (e.g., involving topological entropy, strange attractors, and even conditions yet to be found) already arise in elementary models that only describe how people exchange goods (a pure exchange model).”

There is an insight articulated in comprehensible terms, unlike most available tax law, that may greatly benefit every BEPS aficionado who believes that “BEPS relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation [or] arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place.”

Getting on with the “program”, we obviously do not entertain any doubt whatsoever that the BEPS train will keep chugging along. After all, the OECD stated at the onset of the BEPS initiative that “if other taxpayers (including ordinary individuals) think that

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multinational corporations can legally avoid paying income tax it will undermine voluntary compliance by all taxpayers – upon which modern tax administration depends."

The fix is therefore clearly in: pay they shall, at any cost. The following is worth quoting one more time as it perfectly represents the BEPS initiative on our view:

– “Would you tell me, please, which way I ought to go from here?
– That depends a good deal on where you want to get to.
– I don't much care where.
– Then it doesn't much matter which way you go.
– So long as I get somewhere.
– Oh, you're sure to do that, if only you walk long enough.”

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April 29, 2015

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9 Lewis Carroll, Alice in Wonderland; the Cheshire Cat in answer to Alice’s questions...
European Business Initiative on Taxation (EBIT)

Comments on the OECD Public Discussion Draft BEPS Action 12: Mandatory Disclosure Rules

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

EBIT is grateful for this opportunity to comment on the OECD’s Public Discussion Draft on Action 12: Mandatory Disclosure Rules (the “Discussion Draft”).

- EBIT Members generally welcome the OECD’s efforts aimed at providing further detailed guidance on how a standard framework for Mandatory Disclosure Rules (MDR) could help to combat BEPS, although we have a number of concerns with the Discussion Draft, which we outline below.

- EBIT considers that the Discussion Draft should be more explicit as to whether the BEPS-44 should be obliged to implement MDR or whether this could actually remain optional.

- We believe that a proper gap analysis should be done first by the OECD around the adoption by the BEPS-44 countries of all the other BEPS Actions before any MDR can be implemented. We note the interlinkages of the MDR proposals with Action 5 (disclosure of rulings) and Action 13 (Transfer Pricing documentation and country-by-country reporting), which are not clearly dealt with in the Discussion Draft. This is bound to lead to unwelcome multiple and cross reporting requirements and duplication. EBIT Members urge the OECD to return to its original holistic view on BEPS, especially concerning MDR.

- EBIT suggests the OECD therefore defer the further development of the recommendations on MDR until the BEPS package as a whole has been implemented. This also makes sense given that the Discussion Draft is only based on inconclusive evidence of the success and merits of existing disclosure regimes, which in our view are based on limited available data. EBIT Members strongly believe that this is hardly a solid or proper basis for proposals which will have such far-reaching consequences for tax payers and tax administrations.

- Regarding the reporting of certain international tax arrangements, EBIT is concerned that the Discussion Draft does not differentiate between aggressive tax planning schemes and low-risk, benign transactions, and the need for advice in purely domestic and cross-border situations. This will lead to a disproportionate and excessive disclosure burden for benign transactions, which are the vast majority of cases. The MDR proposals will also lead to an unnecessary compliance burden, huge costs and capacity problems for many tax administrations which will have to review and analyse all disclosures (data overload). It is furthermore unclear to EBIT’s Members what the impact will be of MDR when the
EBIT comments on the OECD’s Public Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules

reporting obligation falls partially on both the taxpayer and the adviser. We believe the Discussion Draft therefore needs extensive further consideration in order to make MDR more targeted, effective, proportionate, and workable for taxpayers and tax administrations. EBIT also urges the OECD to explain how the disclosed information will be shared amongst tax authorities through automatic exchange of information and what safeguards are applied to protect commercially sensitive information in line with countries’ international obligations under EU law, the UN Charter of Human Rights, etc.

- EBIT notes that taxpayers and the BEPS-44 tax authorities have much more to gain from targeted MDR hallmarks and that these hallmarks should not be generic or even hypothetical, and should focus on and be limited initially purely to aggressive tax planning schemes which have no substance.

- EBIT Members welcome the reference in the Discussion Draft that work on MDR will be coordinated with the OECD’s work on Cooperative Compliance, although the OECD does not elaborate on this. Cooperative Compliance is a more positive, alternative way of enforcing compliance and transparency, and for mitigating BEPS, through the work of the OECD and the FTA. If tax authorities and tax payers engage in voluntary Cooperative Compliance, and tax payers subsequently move toward regulatory self-assessment en masse, the very rationale for implementing full-blown MDR will no longer be there. Companies engaging in disclosure under Cooperative Compliance schemes should be exempted from the MDR, otherwise this would lead to duplication. In EBIT’s view, the ongoing work by the OECD and FTA on Cooperative Compliance, which is progressing well as we understand it, would be another prudent reason to wait with the further roll-out of ambitious MDR as proposed in the Discussion Draft under the current tight BEPS Action Plan timeline. EBIT strongly believes that Cooperative Compliance has great potential to be a positive driver of change and to become the new norm internationally and MDR could act as a secondary line of defence against BEPS, provided the earlier mentioned concerns and suggested improvements as we noted above, are taken into account.

- Lastly, we would urge the OECD to make some reference as regards MDR in relation to the Human Rights Convention and the EU Charter of Human Rights, to which half of the BEPS-44 are subject.

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 – April 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.

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Comments on OECD Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules

Dear Mr. Pross:

EY appreciates the opportunity to submit these comments to the OECD on the Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules dated 31 March 2015.

We begin with overall comments regarding the design and development of a mandatory disclosure regime. We also include technical comments on some key aspects of the proposed model mandatory disclosure regime reflected in the Discussion Draft.

Overall comments on design and development of mandatory disclosure regime

The July 2013 BEPS Action Plan describes the OECD’s intention to balance the benefits of consistency with respect to mandatory disclosure regimes across countries with the need to accommodate country specific needs and risks. The approach to be pursued is described as one of “modular design.” The Discussion Draft builds on this by noting that “[t]he specific approach taken to introducing mandatory disclosure rules will vary from country to country.”

We agree that it is important for countries to take into account their own circumstances in developing a mandatory disclosure regime that is right for the country. Countries have very different traditions and practices with respect to the design and structure of their tax laws, with some countries using the approach of setting forth very detailed rules and other countries using the approach of laying out broad principles and illustrative examples. A new mandatory disclosure regime should be designed using an approach that is consistent with the approach used by the particular country for other aspects of its tax laws. This will be the
approach that the tax authorities and taxpayers and other stakeholders would be most familiar with. Moreover, use of a consistent approach would make it easier for the new mandatory disclosure rules to be meshed with the rest of the country’s tax laws.

Therefore, we believe that recommendations from the OECD with respect to a model mandatory disclosure regime should underscore the benefit of consistent approaches globally but should provide room for each jurisdiction to tailor such model to its own particular circumstances and needs.

Based on our experience with the mandatory disclosure regimes that are already in place in some countries, close consultation with stakeholders, including taxpayers, promotors and advisers, can contribute significantly both to the initial design of the country’s regime and to subsequent refinements of such regime. Consultations can help in terms of the practical application of a regime and the balancing of the burdens and benefits for the various stakeholders. Therefore, we encourage the OECD to recognize and promote consultation with stakeholders as a best practice in developing and tailoring a mandatory disclosure regime.

Finally, it is important to recognize that there are significant interactions among all the BEPS Actions, including Action 12. The design of the model mandatory disclosure regime should reflect the post-BEPS environment in which it will be implemented, with consideration given to the impact of the measures recommended under the other Actions. As noted in the Discussion Draft, a mandatory disclosure regime is a backstop to provide tax authorities with information regarding transactions or arrangements that are not captured by the measures developed under the other BEPS Actions. The disclosure requirements under the model mandatory disclosure regime also should be coordinated with the reporting and documentation required under other BEPS Actions, particularly Action 13. Therefore, we encourage the OECD to tailor the model mandatory disclosure regime to reflect the developments under the broader BEPS Action Plan.

**Technical comments on key aspects of proposed model mandatory disclosure regime**

The Discussion Draft reiterates the fact that requiring an arrangement or transaction to be disclosed should not be considered an indication that the arrangement has been approved by the tax authorities. It is at least as important that the mandatory disclosure rules make clear that required disclosure of an arrangement or transaction does not mean that the particular arrangement does not achieve its expected tax outcome or necessarily would be subject to challenge from a technical perspective under applicable law. We encourage the OECD to be explicit about this point in the output it produces under Action 12.

We are concerned that the use of a “main benefit test” as a threshold for required reporting under a mandatory disclosure regime necessarily introduces an inappropriate degree of vagueness and subjectivity to the determination of whether or not disclosure is required with respect to a particular arrangement or transaction. We have similar concerns about the use of the hypothetical application of hallmarks. At the same time, we recognize that these tests have played a role in some regimes where the countries’ tax law
reflects a broad principles-based approach rather than a detailed rules approach. However, we believe that a main benefit test threshold and hypothetical application of hallmarks should not be included as recommended approaches in the model mandatory disclosure regime.

With respect to the confidentiality hallmark and the premium fee hallmark, we believe that there is a significant risk that ordinary business arrangements could inadvertently be swept in by these hallmarks. Transactions that do not involve any significant tax planning that could raise concerns nevertheless often include confidentiality requirements for competitive or commercial reasons. Such confidentiality restrictions alone should not trigger a disclosure requirement. Similarly, premium fees are used for a variety of business reasons and such fees alone should not trigger a disclosure requirement. Therefore, we encourage the OECD to take particular care in crafting confidentiality and premium fee hallmarks for the model mandatory disclosure regime and to include a discussion about how they can be used most effectively while avoiding over-inclusiveness.

With respect to the timing of required disclosures, we believe it is essential to balance the desire for early disclosure with the need for rules that are practical. Requiring disclosure by promoters and advisors when an arrangement is made available to taxpayers would create significant uncertainty and development of a process to try to ensure that such a deadline is met would be burdensome. Such a requirement also would risk unnecessary and distracting disclosures of potential arrangements that are abandoned before ever being implemented. In our view, requiring disclosure by promoters and advisors based on when an arrangement is implemented would be more practical and would still ensure that information is provided to tax authorities promptly. For taxpayers, allowing disclosure with the annual tax return filing would be less burdensome than requiring a separate disclosure. We believe that such an approach would be appropriate, particularly in light of the fact that taxpayer disclosure would be only a backstop to promoter disclosure in cases involving a marketed arrangement and the promoter’s disclosure would be made earlier based on when the arrangement is implemented.

Our most significant concerns regarding the Discussion Draft relate to the proposed approach for disclosure of international tax schemes. We believe that the recommendations as currently crafted are overly broad and could sweep in a huge volume of ordinary business transactions in the global economy. It appears that virtually every divergence in tax treatment on a cross-border basis, whether as to tax rate or tax base or otherwise, could be subject to disclosure under the extraordinarily broad approach proposed. This volume of disclosure would not serve the stated objectives of mandatory disclosure rules, which are to obtain information about tax avoidance schemes early, to identify the schemes and their users and promoters, and to act as a deterrent of the promotion and use of such schemes. Indeed, disclosure of this volume would significantly detract from the effectiveness of the mandatory disclosure rules by burying the tax authorities in information. We believe a better approach would be to develop specific hallmarks for international transactions. Consideration also should be given to whether a hallmark based on the arrangement being promoted could be used effectively in this area to separate mass-marketed type arrangements, where
disclosure would be of the greatest value to tax authorities, from bespoke business planning arrangements, where disclosure would seem unnecessary and inappropriate.

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If you have questions or would like further information regarding any of the points discussed above, please contact Barbara Angus (barbara.angus@ey.com), Jim Tobin (james.tobin@ey.com) or me, Alex Postma (alex.postma@ey.com).

Yours sincerely
On behalf of EY

Alex Postma
Paris, le 28 avril 2015

Monsieur, Madame,

La Fédération Bancaire Française (FBF), organisme professionnel regroupant l'ensemble des établissements de crédit en France, est heureuse de l'opportunité qui lui est offerte de présenter ses observations dans le cadre de la consultation organisée par l'Organisation de Coopération et de Développement Économiques (OCDE) sur le document de discussion relatifs à l’action 12 du plan « BEPS ».

Ce document fait l’objet d’un certain nombre d’observations de notre part que vous trouverez dans la note ci-jointe, établie en anglais afin d’en faciliter la diffusion auprès des différents membres de l’OCDE et parties intéressées.

Nous restons à votre entière disposition pour tout renseignement complémentaire dont vous auriez besoin.

Je vous prie d’agréer, Monsieur, Madame, l’expression de mes salutations distinguées.

Blandine LEPORCQ
Directrice du département fiscal
APPENDIX: COMMENTS FROM THE FRENCH BANKING FEDERATION ON THE PUBLIC DISCUSSION DRAFT RELATING TO THE ACTION 12 "MANDATORY DISCLOSURE RULES"

Preliminary remarks:

We note that many questions in the Public Discussion Draft on BEPS Action 12 (Mandatory Disclosure Rules) are more of a matter of general policy and should be addressed by tax authorities themselves. Thus, we have not commented on all questions but have rather focused on certain important points for the banking sector.

In general, we regret the fact that focus is again given on what is just but another coercive measure, which would be added in tax systems which are often comprehensive enough. We believe there are already many tools for tax authorities to obtain early information, which however have an unexploited potential and are under-utilized.

Although the Draft Discussion does take them into account in a comparative chart (see Table 1\(^1\)), it does not explore the reasons why such tools do not give optimal results. For instance, rulings can be a very efficient tool provided certain conditions are met: taxpayers do take advantage of tax rulings when tax authorities commit to systematically answer and in a timely manner, something which is required by the ongoing business constraints. Tax rulings are often neglected because tax authorities do not take these commitments. Publishing such rulings could also create deterrence as regards the use of tax avoidance schemes.

We also note that adopting mandatory disclosure rules in tax systems where general anti-abuse rules (GAAR) provisions do exist and where tax audit practices are stringent may only deteriorate the position of the taxpayers by imposing an extra burden and coercive measure.

This is the case of France which has a long practice of the abuse of law principle ("abus de droit") and a well-established case law which allows both the companies and the tax administration to identify the conditions of the said principle.

Thus, we believe that rather than focusing on an additional coercive tool, Governments should develop or deepen the existing legal frameworks that would help tax authorities to obtain early information: in particular, they should favor frameworks that organize close relationships between tax authorities and taxpayers, based on ongoing dialogue (as it is the case in the United Kingdom for instance). As mentioned above, tax rulings may also be a very efficient tool provided the tax authorities commit to provide answers systematically and in a timely manner\(^2\).

Although we strongly stand against the introduction of mandatory disclosure rules for the above reasons, we would like to provide some comments on the Discussion Draft with respect to jurisdictions which would be keen on adopting such rules.

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\(^1\) rulings, additional reporting obligations, surveys, penalty reductions for early disclosures, co-operative compliance programmes.

\(^2\) Taking the French tax system as an example, we believe that Article L64 B of the French Tax Procedural Code which allows a taxpayer to avoid the consequences of an abuse of law by asking for a prior clearance from the tax authorities could be better tailored: in particular, the 6-month deadline for the tax authorities to answer (or not) appears much too long as regards business imperatives. The fact that the tax authorities are not required to provide an answer is also a shortcoming.
In particular, we believe that mandatory disclosure rules should be proportionate: they should be focused, simple and cost-effective, and should give a positive return to taxpayers, instead of a system where the entire burden is put onto taxpayers with no counterpart.
From an operational standpoint, mandatory disclosure rules might imply significant developments for companies and groups of companies leading to important additional costs\(^3\). Such projects, which may have an IT component, may entail significant resources for companies, and thus costs. These costs would of course be higher for large, international companies.

**Question 1 (p.24)**

As a general comment, we would like to underline that although mandatory disclosure rules are presented as being an efficient tool for tax administrations (i) to obtain early information about tax avoidance schemes, (ii) identifying such schemes, their users and promoters, (iii) as well as acting as a deterrent to these schemes, mandatory disclosure rules may also cause a significant imbalance between the tax authorities and the taxpayers. This is particularly true in tax systems where general anti-abuse rules (GAAR) provisions do exist and where tax audit practices are stringent: in such cases, adding a mandatory disclosure requirement would only deteriorate the position of the taxpayers by imposing an extra burden, without any positive return since tax administrations are not required to validate the schemes thus declared.

For example, we note that the UK tax system ensures that there is an on-going dialogue between the tax authorities and the taxpayers. In the US, there are no GAAR provisions. That explains why mandatory disclosure rules may have a specific utility in these types of jurisdictions. However, in jurisdictions with GAAR rules and extensive tax audit practice with no on-going dialogue process with tax authorities (as it is the case in France), introducing mandatory disclosure rules would only result in adding an extra layer of coercive legislation. In such jurisdictions, other means for obtaining early information should rather be explored (e.g. the UK-type of on-going dialogue with tax authorities).

Thus, we believe the introduction of mandatory disclosure rules should be carefully examined, taking into account the tax environment of each jurisdiction. Rather than focusing on an additional coercive tool, Governments should develop or deepen the legal frameworks that would allow tax authorities to obtain information: in particular, they should favor frameworks that organize close relationships between tax authorities and taxpayers based on on-going dialogue (as it is the case in the United Kingdom for instance). As mentioned above, tax rulings may also be a very efficient tool provided the tax authorities commit to provide answers systematically and in a timely manner.

For instance, we do believe that mandatory disclosure rules without any clearance will again increase the tax uncertainty prevailing in France.

**Question 2 (p.24)**

Applying mandatory disclosure rules would entail significant procedures and systems changes for taxpayers. In particular, the operational aspects should not be ignored as they may generate significant costs which may clearly outweigh the tax administrations’ expected benefits. Please also refer to our comments relating to questions 8-11.

**Question 3 (p.29)**

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\(^3\) such as (but not limited to) : training personnel, setting forth internal procedures to identify reportable schemes, implementing checks, organizing internal information flows to channel the relevant information subject to reporting, organizing the workflow with the tax authorities.
We believe the most appropriate system would be to require the taxpayer to disclose the schemes rather than the promoter, in particular because of the definitional issue around the concept of a "promoter". In addition, only the taxpayer is the final decision-maker which tax result is impacted.

However, in the instance where the requirement to disclose would be placed onto the promoter, the definition of a "promoter" should be very carefully considered: it should be sufficiently well drafted so as to include only the persons targeted (mainly advisor firms) and not inadvertently include other persons which may be only remotely or passively involved in a reportable tax scheme (bearing in mind that banks are not allowed to provide tax advice). If not defined precisely, the system would lack legal certainty and may even be challenged before constitutional courts.

Questions 4 - 8 (p.40)

We believe these questions are more of a matter of public policy, which should be addressed by tax administrations themselves.

Questions 8 - 11 (p.40)

Question 9

We believe that disclosure should occur at the same time the income return is filed so as to ensure lesser disruption with the ordinary course of business and limit the costs to put into place mandatory disclosure rules.

Question 11

More generally, we would like to make the following recommendations:

The mandatory disclosure rules should be proportionate: this means that the rules should be focused, simple and cost-effective. This notably implies that definitions must be precise. It also implies that consideration should be given to a positive return that taxpayers could legitimately expect instead of a system where the entire burden is put onto taxpayers.

Proportionality also means that there should not be a significant imbalance between taxpayers and tax administrations. We do not agree with the assertion in the report that disclosure should not imply any acceptance of the validity, or tax treatment, of the transaction by the tax authority.

Given the extra burden that mandatory disclosure rules would introduce, it would be clearly legitimate that tax payers to obtain a positive response:

- ideally through validation by tax administration: tax authorities should at least agree on providing rulings (possibly limited to the most sensitive transactions)
- or there should at least be a regularization period granted to taxpayers who have disclosed transactions which would later be challenged by the tax authorities: the rules should provide for a total penalty relief in such instances.

Finally, a proportionate system is one that does not solely focus on penalties. Yet, the Discussion Draft largely addresses the question of penalties (&180 to 198) which only aggravates the coercive aspect of the rules.

Questions 12 - 13 (p.46)

As regards question 12, we believe that reporting by the user is more efficient, in particular to avoid identification issues.
With respect to question 13, we note that certain legal constraints may prevent the automatic provision of client lists:
- data protection rules in particular may prevent the bulk transmission of personal data especially when related to a large number of individuals. In the EU, the Article 29 Working Group has several times reminded that such transmission, even if carried out with the aim of preventing tax evasion, must comply with the EU fundamental rights and should meet EU data protection standards, in particular the principles of purpose limitation and necessity.
- in addition, laws or requirements on business confidentiality should also be taken into consideration as they may prohibit the disclosure of all or part of the information expected by tax authorities.

Questions 14 - 17 (p.55)

We believe these questions are more of a matter of public policy, which should be addressed by tax administrations themselves.

However, we note that the Discussion Draft largely addresses the question of penalties (&180 to 198) whereas there is absolutely no discussion as to the positive return that taxpayers could legitimately expect. Again, we would like to stress the fact all the burden is put onto taxpayers.

Questions 18 - 21 (p.65)

We believe the recommendations on an alternative approach to the design of a disclosure regime for international tax schemes (&236 and following) are generally unsuited, disproportionate and may give rise to legal challenges on the ground of legal uncertainty.

First, we note that a "broad definition of arrangement" is considered which would "treat any arrangement involving a domestic taxpayer as a reportable scheme where that arrangement included a cross-border outcome". A taxpayer could be required to disclose even if they are not a direct party to the cross-border outcome but it would be sufficient to be involved. (&241 and 243). Besides the fact that defining "involvement" may raise significant difficulties and thus create legal uncertainty, we also wonder whether such a definition would be compatible with the fundamental freedoms of the EU as any cross-border scheme would be deemed suspicious.

Second, as regards to the question "what must be reported", we do not understand why the requirements would be different depending on whether there is a "group context" or not. It is relevant and obvious that outside the group context, a reporting taxpayer should not be required to provide any more information than the taxpayer would be expected to have obtained in the course of ordinary commercial due diligence. This is also true in a group environment.

Indeed, requiring a taxpayer to disclose a reportable scheme when the cross-border outcome occurred within the same control group may be totally unsuited and possibly disproportionate (&236 and 255): companies within a group, and moreover an international group, remain autonomous as regards their ordinary course of business. They may not share information on a usual basis and may even be prevented to do so by law. Therefore, there are many instances where a group company may not be aware of the transactions between other sister group companies, or may not be aware of the whole picture.

Equally, requiring taxpayers to identify persons with possession or control of the relevant information (&236 and 255), and to certify that a written request for that information has been sent to those persons appears to be disproportionate obligations which would outweigh the expected benefits. Here again, the taxpayer may be prevented to do so by law.
Dear Mr. Pross,

BDI refers to the OECD Discussion Draft “Mandatory Disclosure Rules (BEPS Action 12)” issued on 31 March 2015. We would like to thank you for the possibility to provide our comments that allow us to engage with you on these important issues.

General Comments

Respect Constitutional and Legally Protected Rights

We understand that governments see a need to fight abusive and aggressive tax structures in order to safeguard and protect the idea of a fair and equal tax system for every taxpayer and collect tax revenue to fulfil its governmental and social responsibilities.

It is questionable, however, if extensive mandatory disclosure rules (MDR) are a suitable means to capture such structures and at the same time honor constitutional and legal rights of tax advisors (promoters) and taxpayers, such as the right to Informational Self-determination and the legally protected relationship of mutual trust and confidentiality between the taxpayer and the tax advisor. These rights should be respected with regard to the interest of the government in early information about tax avoidance schemes.

1 BDI (Federation of German Industries) is the umbrella organization of German industry and industry-related service providers. It speaks on behalf of 36 sector associations and represents over 100,000 large, medium-sized and small enterprises with more than eight million employees. A third of German gross domestic product (GDP) is generated by German industry and industry-related service.
Avoid Duplication of Reporting Requirements

Also, such information could also be gathered in other ways. Mandatory Disclosure Regimes should therefore consider existing reporting requirements to avoid duplication, such as tax audits, ruling procedures or transfer pricing documentation. Furthermore, disclosure requirements would only be required, if domestic legislation is not structured to address tax avoidance schemes appropriately e.g. in the form of GAAR.

Focus on Approaches of Cooperative Compliance

Especially we would like to emphasize the possibility of improving the effectiveness of mandatory disclosure by including elements of positive reinforcement rather than just recommending implementing additional reporting requirements and subsequent penalties for non-compliance (e.g. the concept of Horizontal Monitoring in the Netherlands). This would also be consistent with the remarks in the Action Plan and this Draft that the work will be coordinated with the work on cooperative compliance.

It stands to reason that companies that are engaged with their national tax authorities in cooperative compliance are exempted from these mandatory disclosure rules, since under cooperative compliance companies and tax authorities already mutually agreed to share this type of information. Moreover, such an exemption would encourage more countries to develop successful cooperative compliance arrangements and more companies to enter into cooperative compliance arrangements with their national tax authorities and thus realising the OECD objective to further develop cooperative compliance and improving compliance and greatly enhancing the possibility of meaningful exchange of information between tax authorities.

Broad Definition leads to Substantially Increased Compliance Burden

A broad definition of “tax avoidance” as applied in the Draft in general seems to be inappropriate, as the Hallmarks, which separate acceptable tax schemes from “tax avoidance schemes” are able to stigmatize almost every business transaction as “tax avoidance scheme”. Features such as “confidentiality” and certain “fee structures” are typical for a multitude of tax advice and a multitude of arrangements between tax advisor and taxpayer and therefore not appropriate to identify a tax avoidance scheme.

Further, as the proposals in the Draft would capture so many transactions and generate so much data, it would be unlikely that tax authorities could meaningfully process it. Rather, tax administrations would be swamped with more information than they can effectively review, potentially reducing the possibility of targeting aggressive schemes.

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2 See the 2013 OECD report on Co-operative Compliance: A Framework. From Enhanced Relationship to Co-operative Compliance
Also, broad definitions as suggested by the Draft, new mandatory disclosure regimes will risk substantially increasing the compliance burden faced by the tax payer.

Respect further Compliance Obligations

In considering any additional tax compliance requirements such as MDR, it should be considered that companies operate in an environment of an increasingly fierce global competition. To successfully compete and at the same time fulfil broader obligations towards employees, shareholders and the society, careful planning of expenses including tax expenses is of vital importance. Tax planning and management of tax expenses form part of these broader obligations.

It must be ensured that mandatory disclosure rules and other anti-tax avoidance measures in the BEPS Discussion Drafts respect such further non-tax-driven compliance tasks. They must always be taken into account when governments think of further means of securing or increasing tax revenue.

Eliminate the Cause Instead of Curing the Effects

The felt need for always increasing transparency and disclosure regulations, which are prone to violate and restrict legally or even constitutionally protected rights of tax advisors and taxpayers, arises due to a lack of tax harmonization which is in the responsibility of the governments and tax policy makers globally.

A harmonized, fair and equal level playing field in tax legislation among countries, is the key to make tax planning and the development of so called “tax avoidance schemes” obsolete. The development of far reaching Mandatory Disclosure Rules, as suggested by the Draft, tries to capture a symptom, however, is not able to eliminate the root course of the problem.

Specific Comments on the Questions Raised in the Draft

CHAPTER II – OVERVIEW OF MANDATORY DISCLOSURE

Question 1: Does Mandatory Disclosure have any other impact on disclosure and taxpayer compliance not covered in this Chapter?

Comments

The key objectives of the proposed disclosure rules are:

- Obtaining early information about tax avoidance schemes
- Identifying the schemes, users and promoters of schemes
- Acting as deterrent to reduce promotion and use of avoidance schemes
a. Obligation towards shareholders, employees and society

From a governmental perspective it is understandable to fight potential loss in revenues by the development and adoption of tax schemes leading to a lesser tax payment by a taxpayer than the tax authorities initially anticipated or believe is the fair tax payment.

Nevertheless it has to be accepted that according to internationally accepted standards, taxpayers are allowed and expected to structure their business models, financing models, supply chain in a cost efficient manner, as long as these structures are compliant with existing laws.

The obligation of an executive board and the management of a company towards the company’s shareholders, owners, employees and the broader society, comprises not only tax compliance but also protection and increase of the shareholder value of the company, job security to employees, contribution to the economy of the company’s residence state. These objectives in turn require financial strength and prosperity of the company to provide innovation and invest in R&D in an always increasing global competition. Against this background careful planning of resources and expenses, among them tax expenses, is of vital importance.

Good tax management and planning of tax expense in this context is nothing else than good management and planning as can be seen with any other expense item in a company’s P&L statement. As such tax management and tax planning forms part of broader compliance requirements of a company’s management.

If designed in a too broad manner, Mandatory Disclosure Rules as proposed in the Draft run the risk of negatively and inappropriately impact on corporate governance compliance obligations. It seems that this type of broader compliance requirement has not appropriately been considered in the OECD Draft.

b. Perception of criminalization of taxpayers and promoters

The OECD draft promotes a wide definition of “tax avoidance”, without clearly defining the term “tax avoidance”. Instead the draft paper tries to determine certain reportable transactions, which are then being perceived as having been undertaken with the intention of tax avoidance.

The reportable transactions in turn shall be determined by defining and applying certain so called Hallmarks on basically any business transaction. If any such business transaction fulfils any Hallmark criteria, it shall fall into the scope of a reportable transaction. Hallmarks act as tools to identify the features of schemes that tax administrations are interested in. Two different types of Hallmarks are proposed:

- Generic Hallmarks: “requirement for confidentiality” or “payment of a premium fee”
- Specific Hallmarks: target areas of perceived high risk such as “the use of losses, leasing and income conversion schemes”.

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The OECD draft report does not consider any impact of such disclosure requirement on a company’s statutory accounting and reporting requirements according to IFRS.

The wide definition of tax avoidance firstly creates a perception of unlawful or at least unethical behavior of a taxpayer, although in most cases of leasing, loss utilization schemes or similar transactions there will be a valid business reason for any such transaction. The tax effect (if any), is just a side effect of a business need. This becomes obvious, since otherwise any such transaction, if deemed to be “tax avoidance” in most countries would already be captured by domestic GAAR rules.

Practically the perception of unlawful or unethical behavior created by any reported transaction under MDR, might have impacts on obtaining tax clearance certificates or fulfilling other requirements of a company in competing in public bidding processes. Applying any features of a reportable scheme with the intention of tax avoidance on just a simple business need, might have an impact on other compliance requirements such as sustainability reports, compliance with corporate governance reports etc., as it inappropriately suggests or indicates unethical or even unlawful behavior of a taxpayer.

**Question 2:**

*Are there any practical issues that arise from the perspective of the promoter or taxpayer that are not covered in this Chapter? If so what are those issues and how could they be dealt with?*

**Comments**

a. **Reasons for tax schemes to be resolved on political level**

Disclosure requirements as proposed in the Discussion Draft focus on international tax schemes. The problem here is that the focus is not on identification of any gaps in the domestic tax legislation in one and the same country but on identifying mismatches between two or more tax systems to avoid a double non-taxation. Against this background - as already pointed out -, disclosure requirements would only be required if domestic legislation is not structured to address tax avoidance schemes appropriately e.g. in the form of GAAR.

Further, one has to consider that the tax effect, which is deemed to be a tax avoidance scheme, in many cases occurs in the application of two or more domestic legislations in different countries, which intentionally provide a tax preference rule to the tax payer e.g. in order to support R&D activity in the respective country (e.g. through Patent Box regimes).

From a practical perspective that means, that a government wants to encourage a certain behaviour with a taxpayer (e.g. increased R&D activity or attraction of IP to the own territory) and on the other hand either stigmatizes this behaviour as a tax avoidance scheme, if a tax resident uses a similar scheme in a different jurisdiction. This however is an issue which is triggered by international tax competition among countries about attractiveness as investment location. Such issues cannot be resolved by a
taxpayer or promoter of a tax scheme. Practically these kinds of issues can only be mitigated on a political level with harmonization of tax rules.

b. Deterrence of disclosure

It is outlined in the Draft, that “taxpayers may think twice about entering into a scheme if it has to be disclosed and they know that the tax authorities may take a different position on the tax consequences of that scheme or arrangement.”

In our view an additional deterrence effect from disclosure rules is questionable as under IFRS accounting rules, taxpayers are only allowed to recognize the positive effect of any tax scheme, in case the probability of acceptance by the tax authorities is above 50%.

c. Mandatory disclosure rules should be clear and easy to understand

The Draft requires that mandatory disclosure rules should be clear and easy to understand to provide taxpayers with certainty about what is required by the regime. To effectively address cross-border tax avoidance schemes, mandatory disclosure rules are required in multiple jurisdictions, if a global company enters into a tax scheme. Similarly, in multinational groups of companies, each group entity participating in a tax scheme would have to report the whole scheme to its domestic tax authorities. Different group companies and transactions in different jurisdictions typically together form the scheme.

Therefore in implementing MDR, it is of highest importance, that there is a consistent definition of tax avoidance schemes in all countries and jurisdictions, in order to provide the taxpayer with the required clarity and certainty about what to report and avoid unintended non-compliance on the taxpayer’s side due to inconsistent disclosure requirements.

d. Mandatory disclosure rules should balance additional compliance cost to taxpayers with the benefits obtained by the tax administration

Mandatory disclosure rules in addition to existing disclosure rules and new rules as country-by-country reporting will drastically increase compliance cost on the taxpayers’ side. The Draft suggests, that there is an advantage for the taxpayer that tax audits will be conducted more efficiently and hence reduce cost.

A better approach would be to implement review schemes which are based on mutual trust and respect between tax administration and taxpayer such as Horizontal Monitoring Schemes (e.g. in the Netherlands) or ACAP program in Singapore.

Such schemes of cooperative compliance provide the tax authorities with the intended information about a taxpayers attitude and appetite towards real tax avoidance schemes, focus on areas of risk based on mutual coop-
eration and will reduce compliance cost on both sides, taxpayer and tax authorities.

e. Co-ordination with other disclosure and compliance tools

The Draft suggests that both taxpayers and promoters should have to report information early in the tax compliance process on tax planning schemes that raise particular tax policy or revenue risks.

If both, the promoter and the taxpayer have the obligation to report any such transactions, the definition of a tax scheme has to be defined clearly and precisely in order to avoid a different interpretation of a reportable transaction between taxpayer and promoter. Otherwise due to any ambiguous wide definition of a tax scheme, one party might deem a transaction reportable and the party might not deem it reportable. The party not deeming it reportable might then be suspicious of non-compliance with reporting requirements.

CHAPTER III – OPTIONS FOR A MODEL MANDATORY DISCLOSURE RULE

Question 3:
Are there any other considerations, not mentioned above that arise with option A or option B, if so what are they?

Comments

If at all, obligation to disclose any tax schemes should primarily be with the promoter. This is in line with existing disclosure schemes. This is only consequential if the focus is on disclosure of international tax schemes and if the focus is on tax schemes which are designed for mass deployment without customization for individual taxpayers.

Double disclosure requirements by promoter and taxpayer should be avoided in the interest of all parties including the tax authorities.

Further, tax authorities should publish negative lists about tax schemes which would not need to be disclosed, since the authorities already have sufficient information about the tax scheme.

Question 8:
Does a hypothetical test effectively address one-off or tailored transactions? Are there any other ways in which such transactions could be captured by a mandatory disclosure regime?

Comments

A hypothetical test asks the question (UK example), if “it might reasonably be expected that any promoter of the arrangements would wish the way in which any element of those arrangements gives rise to a tax ad-
vantage to be kept confidential from any other promoter” and “might it be reasonably be expected that a promoter would be able to obtain a premium fee form a person experienced in receiving services of the type being provided.”

Hallmarks of a hypothetical nature do not seem to be able to effectively address one-off or tailored transactions. Typically such tailored transactions are developed under fix engagements with fixed terms and conditions between advisor (promoter) and taxpayer. Therefore it is difficult to imagine a hypothetical nature in such arrangements or tailor made models.

Any such tailored tax schemes developed for a single taxpayer or transaction however do not seem to require an upfront disclosure under MDR, since either they are frequently communicated to the tax authorities in upfront ruling requests or due to their complexity will likely be obvious and be disclosed and reviewed in tax audits on an individual taxpayer basis.

**Question 12:**
*Are there any other ways in which to identify scheme users other than scheme number or client lists?*

**Comments**

One of the challenges tax authorities face, and which should be addressed by Action 12, is a lack of comprehensive and relevant information on potentially aggressive or abusive tax planning strategies. Access to such information, especially if this can be obtained at an early stage, shall provide the opportunity to respond quickly to tax risks either through timely and informed changes to legislation and regulation or through improved risk assessment and compliance programs.

The political intention of a mandatory disclosure scheme therefore should be to establish an early warning system for tax schemes and provide the tax authorities with an impression on how critical a tax scheme is in terms of avoided tax revenue.

In order to achieve this goal, it is sufficient if promoters of such tax schemes communicate the number of taxpayers having implemented such scheme. It is not required to communicate the names of individual taxpayers in the form of client lists. Against this background, a system of registration numbers, which would need to be entered into a tax return, is redundant and counter-productive, since it increases the administration efforts on the promoters’ side, the taxpayers’ side and the tax authorities’ side without any additional value in achieving the intended political goal to gain early information about mass-marketed tax schemes.

In order to accomplish this target of a country’s tax policy to establish an early warning system, focus should be on the identification and early disclosure of tax schemes itself and not on the users. Once the tax schemes have been identified, there are other means of identifying which user has implemented such a scheme and whether such a scheme has been imple-
mented for tax avoidance reasons or for business reasons with a valid business background.

Measures to identify scheme users in an early stage are therefore not necessary. Scheme users can be identified and the motive can be analyzed and discussed with the scheme user in a better and more cooperative way in a conventional tax audit or under horizontal monitoring schemes or by offering ruling models to the taxpayer. Especially horizontal monitoring schemes and ruling schemes have the potential to build trust between taxpayer and tax authorities and fulfil the intended goal of early information about tax schemes before these are implemented. Such ruling and horizontal monitoring concepts also provide the taxpayer with certainty about the acceptance of any tax scheme in taxpayer-specific circumstances.

**Question 13:**
*What might prevent the automatic provision of client lists to the tax administration and how could this be dealt with?*

**Comments**

In analyzing whether an automatic provision of client lists is an appropriate way to accomplish the political goal of implementing an early warning system about tax schemes, conflicting interest have to be balanced.

These conflicting interests are on the one hand the interest of the government to safeguard the principle of a fair and equal tax system for all taxpayers and on the other hand the constitutionally and by law protected relationship of mutual trust between the tax advisor and the client. Furthermore the constitutionally protected taxpayers’ right for Informational Self-Determination would be challenged.

Institutionalizing any tax advisor as a whistle-blower for the tax authorities would certainly seriously and negatively affect the legally protected relationship of mutual trust between the tax advisor and the client. As a consequence, constitutional law would be violated at least in such countries, which protect this advisor-client relationship and which protect the right of Informational Self-Determination.

**Question 14:**
*Do you think that the proposed disclosure form (in Boxes 10 and 11) will be appropriate to provide tax administrations with the information necessary to understand the reportable transaction?*

**Comments**

See comments to question 12: It should not be appropriate and necessary to disclose user’s details (name, address, phone number, tax reference number) as mentioned under Draft disclosure form A in Box 10 or client list (name of clients to whom the transaction was offered) as mentioned under Draft disclosure form B in Box 11.

**Question 16:**
Is there any other information that should be reported to the tax administration?

Comments

Please see comments on questions 12 and 13. The amount of information requested is sufficient to achieve the political goal of establishing and early warning system about any tax schemes. In contrast information about scheme users is inappropriate to be provided for the reasons mentioned in the comments to question 12 and 13.

Question 17:
Do any problems arise in practice in providing the information set out at Box 10 and 11? If so, what are those and how could they be dealt with?

Comments

Practical problems especially arise in considering conflicts with constitutional law and the relationship of mutual trust protected by law between the advisor and client. This will practically make it impossible e.g. for German advisors to provide any client specific information.

CHAPTER IV – INTERNATION TAX SCHEMES

Question 19:
Are the purpose and meaning of the terms used in the chapter clear, if not what further clarification is necessary?

The Discussion Draft states that “an arrangement that incorporates a cross-border outcome should be treated as a reportable scheme if it involves a domestic taxpayer. A domestic taxpayer should be treated as involved in a cross-border arrangement where the arrangement includes a transaction with a domestic taxpayer that has material economic consequences for that taxpayer or material tax consequences for one of the parties to the transaction.”

3 This standard does not offer a clear definition. Even if materiality were clearly defined, the domestic taxpayer would not be in a position to apply the second half of the test, since the information on the tax consequences to the other parties to the transaction may not be in the possession of the domestic taxpayer that has the obligation to report.

Question 21:
Do you think that the Recommendations will impose an undue compliance burden on taxpayers? If so, why?

Comments

Recommendation under para 236:

3 Discussion Draft, paragraph 243.
A person or entity in a multi-national group, which according to the MDR definition might be required to disclose any information, might not even be aware that it is part of any tax scheme. This holds especially true if there are (deemed) business reasons for including the respective person into the tax scheme. How should such a taxpayer be able to disclose all material information or identify any person, with possession or control of that information? This recommendation potentially drives single entities into non-compliance with these requirements.

**Recommendation under para 238:**

According to the OECD recommendation, Hallmarks for schemes to be disclosed should focus on identifying cross-border tax outcomes. This could for example include: "A conflict in the tax treatment of an instrument or entity that results in a deduction / no inclusion (D/NI) or double deduction (DD) outcome."

Such hallmark requires all parties involved to understand the tax implications in the countries where the other parties involved reside. This does not only require that each party of a cross-border tax scheme understands that it is part of a reportable tax scheme in the first place. It further requires to understand which other parties are involved, what their role and function in such a scheme is and finally needs to understand the tax implications in all the other countries.

That is a compliance burden, which is impossible to comply with for any entity in a multi-national group of companies, with the exception of the global or central tax function in the headquarters of a group of companies or the lead advisor coordinating the components of a tax scheme for a taxpayer.

Compliance recommendations as mentioned under para 236 and hallmarks as mentioned under para 238 of the Discussion Draft might be understandable from a tax authorities’ point of view, however impossible to comply with from a taxpayer point of view and therefore unrealistic to achieve in practice.

Similar concerns can be raised with regard to recommendations under para 243, 248, 250, 251 and 255. All of these requirements assume that all parties involved are aware that they are part of a tax scheme, who the other parties are and what tax implications such scheme has in every other jurisdiction to either recognize the reportable scheme or other parties involved, which might have any additional information.

Such requirements do not only impose an undue compliance requirement, it is also highly questionable whether they could actually be fulfilled.

Please do not hesitate to contact us if you have any questions.

Sincerely,

Berthold Welling
Dr. Karoline Kampermann
OECD Action 12: Mandatory Disclosure Rules

Introduction
This response has been prepared by the Tax Director Group of the Global Accounting Alliance (GAA). It was submitted to OECD on 30 April 2015.

The GAA welcomes the opportunity to comment on Discussion Draft BEPS Action 12: Mandatory Disclosure Rules published by OECD on 31 March 2015. The Institutes listed below, the member Institutes of GAA, may not necessarily have positions on the discussion draft which are absolutely the same as the comments in the current response but these comments are consistent with all the Institutes’ general positions and principles with regard to the disclosure of transactions. In addition, the Institutes have also reserved the right to comment separately on the discussion draft. CPA Canada has for instance submitted its own separate response and made reference to the current, GAA, submission where appropriate.

GAA will be represented at the Public Consultation meeting at OECD Paris Headquarters on 11 May and Ian Young, Chair of the Tax Director Group, has submitted an application to OECD to make a presentation on the views of GAA as set out in the current paper.

About the Global Accounting Alliance (GAA)

The Global Accounting Alliance (GAA) was formed in November 2005 and is an alliance of 10 leading professional accountancy bodies in significant capital markets. It was created to promote quality services, share information and collaborate on important international issues. The GAA works with national regulators, governments and stakeholders, through member-body collaboration, articulation of consensus views, and working in collaboration where possible with other international bodies, especially the International Federation of Accountants (IFAC).
The Alliance facilitates co-operation between 10 of the world’s leading professional accounting organisations:

- The American Institute of Certified Public Accountants (AICPA)
- Chartered Accountants Ireland (CAI)
- Chartered Professional Accountants Canada (CPA Canada)
- Hong Kong Institute of Certified Public Accountants (HKICPA)
- Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) *
- Institute of Chartered Accountants in England and Wales (ICAEW)
- Institute of Chartered Accountants of Scotland (ICAS)
- Institut der Wirtschaftsprüfer in Deutschland e.V. (IDW)
- The Japanese Institute of Certified Public Accountants (JICPA)
- New Zealand Institute of Chartered Accountants (NZICA) *
- South African Institute of Chartered Accountants (SAICA)

Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) was formed from the merger of Institute of Chartered Accountants Australia (ICAA) and New Zealand Institute of Chartered Accountants (NZICA). The new, merged, organisation is currently waiting to be admitted to membership of IFAC.

These organisations represent nearly 800,000 members in over 180 countries around the world.

GAA has Professional Institute members in five of the eight countries where there are existing mandatory disclosure rules in place namely, the United States, Canada, South Africa, United Kingdom and Ireland so GAA is particularly well placed to comment on the extension of such regimes to other countries and is able to draw some conclusions, on the basis of practical experience, of the benefits and pitfalls of such rules.

**GENERAL COMMENTS**

**GAA’s general position**

The GAA has a clear position on abusive transactions - they should be eradicated. They insult the large majority of honest taxpayers and their advisors who strive every day to obey increasingly complex tax laws. We distinguish between tax evasion, the breaking of tax
rules and laws which is always wrong, and tax avoidance, which is the legal arranging of the taxpayers affairs, within the ambit of the law, that results in a more beneficial tax outcome.

In the midst of the discussion regarding appropriate levels of disclosure, various terms such as “tax shelter,” “international tax schemes,” or “potentially aggressive or abusive tax planning strategies” may have a pejorative meaning as a result of the possibility that they are equated (explicitly or implicitly) with “abusive transactions.” For many, “sheltering” income means nothing more than entering transactions such as asset sales timed properly to incur capital losses and offset realized capital gains. Any fair analysis must take into consideration the fact that the overwhelming majority of the transactions entered into by taxpayers and the tax advice given by tax professionals with respect to such transactions is appropriate. Tax minimization is a basic taxpayer right. Many such “shelters” serve the important purpose of delivering economic incentives to taxpayers as specifically provided for in the tax code. These include tax-advantaged retirement savings and education plans, life insurance on key business partners and the development of manufacturing facilities and housing. Others enable business units to merge and grow to remain competitive. Still others postpone tax collection to avoid undue economic hardship on taxpayers. However, abusive tax shelters are another matter and we do not condone their use.

From a tax administration perspective, the goal should be to provide information at a level that leads to the elimination of abuse, but that does not overwhelm a tax authority’s ability to effectively use the information or disclosure.

A cautious approach to disclosure regimes may be appropriate

We have concerns, and therefore reservations, about OECD recommending disclosure regimes for all countries, as there will be very considerable costs involved for both tax administrations and business and we think there needs to be a rigorous debate about the benefit before such a recommendation is endorsed. We illustrate, in the section below, the experience of Ireland where a disclosure regime has led to very few disclosures because of the existing General Anti-Abuse Rule (GAAR). We believe that were a disclosure regime to be introduced, for instance in Australia and New Zealand, the experience is likely to be the same: there would be very few disclosures but there would be very significant costs for tax administrations and business. These remarks are in relation to domestic disclosure regimes. We have explained below why we are currently against the introduction of disclosure of international arrangements.
Are Disclosure rules necessary?

Ireland is a country where mandatory disclosure rules have been introduced very recently, in 2011, but where there has been a General Anti-Abuse Rule (GAAR) in place since the late 1980s. There have been very few disclosures in Ireland under the new disclosure rules and the view of our (Irish) member Institute is that that is because the GAAR has been successful in eliminating the more egregious and abusive schemes that might otherwise have been in existence and would have required disclosure under the new regime. This experience can be contrasted with that of the UK where its own disclosure rules (DOTAS) were introduced in 2004 and a GAAR was introduced many years later in 2013. There were 500 or 600 schemes disclosed in each of the first few years of the DOTAS regime but these have now declined to around about 100 a year.

We have discussed their current experience with some of the Big 4 professional services firms in the UK in relation to the UK disclosure rules and they have told us that it is relatively straightforward to deal with these rules for the following reasons:

- they have dedicated staff who have considerable experience dealing with the rules;
- the disclosure rules have been in existence for a relatively long time (more than 10 years),; and
- there is good quality guidance available from HMRC and HMRC is also willing, and has the capacity, to answer questions when advisers and their clients do not fully understand how the UK regime works or whether a particular scheme or arrangement requires disclosure under the regime.

But the experience of other countries with existing disclosure rules is quite different. In South Africa there are no dedicated SARS (South African Revenue Service) staff and nor are the conditions in bullet point three met: the result is that in the estimation of the GAA South Africa member Institute their disclosure regime is very onerous and does not seem to lead to any material benefit, just huge costs.

It is likely to be a similar story to South Africa if, and when, disclosure rules are introduced in other countries, particularly in the early days, when business and its advisers will be starting
from scratch and will have to understand how those new regimes work and then seek to apply them to particular facts and circumstances.

The three “outputs” identified in the discussion draft – we recommend that OECD concentrates on option one

Paragraph 6 of the discussion draft identifies three key outputs from Action 12:

- Recommendations for the modular design of mandatory disclosure rules;
- A focus on international tax schemes and consideration of a wide definition of tax benefit to capture relevant transactions; and
- Designing and putting in place enhanced models of information sharing for international tax schemes.

As is made clear in paragraph 11 the discussion draft deals only with outputs one and two above.

We believe that output two, designing disclosure rules to capture international tax schemes, will be extremely difficult to achieve and is likely to produce a considerable volume of data and disclosures without shedding a great deal of light and understanding as to what is happening on the international tax front.

We believe that OECD ought to concentrate initially on output one, domestic disclosure rules, and build its general understanding of “international tax schemes” by working on output 3 before determining whether, and how, it seeks to gather information on specific international tax schemes (output 2).

It would be helpful if OECD could explain, at the Public Consultation meeting on 11 May 2015, during its 8 June Webinar and more generally on its website what are the current arrangements introduced by OECD and other countries to build “models of information sharing for international tax schemes”.

There have been announcements in recent days of an enhanced role for Joint International Tax Shelter Information and Collaboration (JITSIC) which was set up in 2004 by United States, Canada, UK and Australia as the Joint International Tax Shelter Information Centre and has now come under the auspices of the OECD Forum on Tax Administration. The
entity is now called JITSIC Network and has more than 30 members. See https://www.ato.gov.au/printfriendly.aspx?url=/Business/Large-business/In-detail/Business-bulletins/Articles/JITSIC-Network-takes-off-in-Paris/

In the same way as the BEPS Action Plan is requiring more and better quality information about tax arrangements from business and its advisers we urge, and encourage, OECD and the BEPS countries to be more open and transparent about arrangements such as JITSIC Network and about the schemes that have been identified. We note that in addition to the JITSIC work OECD Working Party 11 maintains a directory of Aggressive Tax Planning which currently contains details of more than 400 schemes and arrangements but details of these schemes and arrangements are, currently, only available to tax administrations. See http://www.oecd.org/ctp/aggressive/co-operation-and-exchange-of-information-on-atp.htm In the UK the tax administration has a publication, Spotlight, where it discloses generic details of tax avoidance schemes which it believes are being widely marketed, many of which it has become aware of through the disclosure rules (DOTAS). See https://www.gov.uk/government/publications/tax-avoidance-schemes-currently-in-the-spotlight

**Capacity of tax authorities**

There are currently so few countries with disclosure rules, eight are named in the discussion draft, that we are concerned whether a sufficient number of other countries will have the capacity to put in place the appropriate processes to effectively manage and exploit the information gathered as the collection of this data will potentially put a considerable administrative and compliance burden on taxpayers and their advisers.

**Consistency of the rules in different countries**

The discussion draft allows flexibility in applying specific disclosure rules, which is welcome on the one hand, but it may also lead to additional administrative and compliance burdens. If OECD does, eventually, go ahead with output 2 for the disclosure of international schemes, then there would be confusion if different disclosure rules apply in different countries which are affected by the same international tax scheme.
Deadline for reporting

If disclosure rules are introduced for international tax schemes, longer lead times may be required because of the additional difficulty of collecting the relevant data in cross border situations. There could also be problems if such schemes are introduced on a phased basis in different countries.

Legal certainty

Civil law countries are particularly concerned that the disclosure rules need to be
- sufficiently clear; and
- sufficiently certain that a particular scheme or arrangement is required to be disclosed without the need to wait for subsequent decisions by the courts or interpretation by the tax authorities.

There is also concern that the possible use of hypothetical hallmarks will also lead to legal uncertainty as to whether particular schemes are required to be disclosed and could create an unreasonable burden on taxpayers and their advisers.

Confidentiality of data provided and its use

In some civil law jurisdictions it is necessary to make specific legal provision about the basic principles and purpose for which personal data is provided. The detail can be left to the tax authority, but the basic principles must be clear. We believe that OECD, in its recommendations, needs to be clear as to the purpose of data collection and how the data may be used and how long it can be retained before it must be deleted. We do not condone any practice involving the wholesale collection of taxpayer data merely for the sake of having the data.

Disclosure of facts or opinion

If the stated purpose of identifying and understanding international tax arrangements is to be met the question is raised whether this understanding is to be obtained by the tax authorities from the facts or the opinions of third parties. In our view any disclosure regime should merely entail the disclosure of facts as it is an obligation imposed by law on each tax authority to interpret and apply the law in relation to the facts presented. Notwithstanding the challenges and concerns of legal privilege, the opinion of third parties also leads to concerns.
of hearsay evidence and seeks to impose some purpose or intention understood by a third party to the relevant taxpayer.

It should also be recognised that where information is required to be disclosed which constitutes processed facts and not bare facts, such request should as a matter of principle be subject to limitation and reasonability statements by the OECD as it is overly burdensome on taxpayers. It is the view of our member institute (South Africa) that the introduction of an obligation to provide supplementary declarations, whereby data has to be processed and reconciled in a form and manner as stipulated by the local revenue authorities, has resulted in a tremendous administrative burden on taxpayers. In many instances this has resulted in taxpayers having to incur additional cost to change recordkeeping systems and acquire additional systems to extract and provide the relevant data and reconciliations.

**SPECIFIC COMMENTS ON THE HALLMARKS**

**Confidentiality and legal professional privilege**

We are concerned that targeting the confidentiality of the advice as a trigger for disclosure will cause considerable problems with professional privilege. In the UK, this problem arose at the time the legislation was being discussed in parliament in 2004 and the solution adopted was to place the obligation to disclose on the taxpayer, rather than the adviser, and the disclosure was then restricted to the facts rather than the advice. Since professional accountants do not have professional privilege in many countries we have considerable doubts as to the overall fairness of such a regime as between advisers with different professional qualifications. There is also a risk that differentiating reporting requirements among advisers by reference to their professional qualifications will lead to market distortion.

**Premium and/or success fees**

This hallmark may cause problems in certain GAA-represented countries. For example in Germany, the fees which a tax advisor is entitled to are regulated by law, i.e. “Steuerberatervergütungsverordnung” (StBVV) which translates as Tax Advisors Fee Act. Success related fees are generally not permitted under German professional law. Some minor exceptions exist under restrictive conditions. Further, the fees German advisors can obtain for their tax advice in general follow legal provisions which set a floor and a ceiling. It is basically possible to agree with a client on hourly rates that deviate from StBVV.
It is unclear how a premium fee hallmark could work in such an environment. There is considerable doubt if a legislator, who defines fees as appropriate by laying them down in legal provisions, could at the same time regard the fee as a premium fee and use them as a hallmark to distinguish reportable tax advice from non-reportable tax advice. A situation in which advisors agree upon a fee greater than StBVV, would not necessarily allow the conclusion to be reached that a premium for a tax planning scheme has been paid. Such a rule does not seem appropriate.

**Contractual protection**

Such clauses, as explained in paragraphs 101-102 of the discussion draft, are not compatible with German professional law. A person subject to such professional law would not be allowed to give such protection. If an auditor gave such protection this would be contrary to professional law. A hallmark that refers to a behaviour that is contrary to law would only apply in cases of offenses against law. Such a hallmark should be out of the question.

**Standardised tax products**

Some of our members are concerned that this would appear to catch ordinary tax planning which is applied in a “standardised” way to straightforward and common situations.

BEPS Action 12: Mandatory Disclosure Rules

I. Overview

The Discussion Draft focuses on the OECD’s intention to develop a best practice for addressing MDR.

The draft is an extensive discussion of alternatives aimed to obtain early information about tax avoidance schemes thereby allowing an accelerated response from the authority, identify the users and promoters of such schemes and act as a deterrent to reduce their promotion and implementation.

II. Comments

Need for clear guidelines on the “main benefit” test

The Discussion Draft takes a broad approach regarding the key features of an MDR and the framework to design such MDR taking into consideration experiences from certain countries and providing several recommendations to better implement this disclosure initiative on the OECD and G20 countries.

However, when analyzing the design features of an MDR pertaining to the types of transactions that must be reported, the Discussion Draft proposes filtering out certain transactions through a threshold established by either a “main benefit” test or a de-minimis
filter. The Discussion Draft also provides that the “main benefit” test should not combine with a de-minimis filter because the first test already targets transactions designed to generate a tax benefit.

We believe that, while it is important to establish a clear threshold for applying an MDR, it is also true that an inappropriate use of the “main benefit” test as the only threshold will likely result in uncertainty for taxpayers.

According to the Discussion Draft, the “main benefit” test is an objective threshold because it comprises a comparison on the value of the expected tax advantage with other benefits obtained from the transaction. From our perspective, this is not necessarily an accurate statement because, regardless of the objective comparison of values that could be made, the test could anyway capture situations where a taxpayer may have legitimate business reasons for a transaction to be structured in a tax efficient manner while not necessarily involving a tax avoidance scheme.

The foregoing challenges one of the key design principles included in the Discussion Draft in the sense that reporting should be clear and easy to understand and that costs should be balanced with the benefits achieved.

In this regard, the Report should establish clear guidelines on the appropriate application of the “main benefit” test thereby recognizing that a comparison of values is not a sufficient element to determine a transaction was tax driven and at the same time avoid falling into subjective tests that would only increase uncertainty for taxpayers.

Another solution that could be more objective and bring more certainty to taxpayers could be that, instead of addressing recommended thresholds and the need for countries to define a “reportable scheme”, the Report already includes a specific list of characteristics of a scheme for it to be deemed as a “reportable scheme” based on the experience of various countries. We believe that establishing clear reportable criteria will ease uncertainty and deter taxpayers and promotors in engaging from such schemes.

**Incremental costs for taxpayers & advisors associated with compliance of MDR**

While the Discussion Draft sets out the principles of balancing compliance costs with the benefits of mandatory disclosure, we note that the scope of the proposals is too broad, and that there are very general recommendations in terms of how to avoid increasing the compliance burden for taxpayers.

In this regard, the compliance burden that will likely result under the proposed MDR should be proportionate to the expected benefit. To achieve this goal effectively, we believe that the proposals under Action 12 should assist in targeting specific tax avoidance schemes rather than leaving open space for countries to decide within too many options for implementing an MDR.
The introduction of new reporting obligations will likely translate in extra cost, uncertainty and complexity for taxpayers. Therefore, we consider that by narrowing the scope of the proposals, the additional burden encountered by compliant taxpayers would be minimized.

**Duplication of compliance requirements - Penalties**

The Discussion Draft recommends that each jurisdiction should decide who is obliged to disclose under the MDR, i.e. to impose the primary obligation on the promoter or on both the promoter and the taxpayer. This is, the recommendation is that planners (promoters or advisors) should always be subject to disclosure obligations, likely resulting in dual reporting obligations thus increasing the administrative burden.

We believe that MDR should consider already existing reporting requirements to avoid duplication.

Other BEPS Actions already suggest additional documentation and reporting obligations for taxpayers, i.e. Action 13 on Transfer Pricing Documentation, and although the Discussion Draft recommends that the design of MDR should take into account the outcome of these initiatives, we believe that information that will be provided by taxpayers as part of other disclosure and information exchange initiatives being considered throughout other Actions of the Plan should not be demanded again under the MDR.

The Discussion Draft concludes that countries should be explicit in their domestic legislation about the consequences of failure to report a scheme or transaction under the MDR. It further recommends that in order to enforce compliance with MDR, countries should introduce financial penalties in the event of failure to comply with any of the obligations enacted, although such penalties must be coherent with each countries’ domestic law provisions.

Economic penalties to be imposed, in our view, should be related to failure of disclosing information, i.e. a specific sum, but not related to a perceived “tax savings” amount by the tax administrations. Alternatively, a possible non-monetary sanction such as an extension of the statute of limitations upon failure to disclose under an MDR could be imposed as an enforceable measure for taxpayers and/or promotors to properly disclose a scheme or transaction.

It is also our opinion that penalties should not be applied more than once in relation to a particular transaction.
International Tax schemes – Materiality Standard

The Discussion Draft indicates that cross-border schemes typically generate multiple tax benefits for different parties in different jurisdictions and the domestic tax benefits that arise under a cross-border scheme may seem unremarkable when viewed in isolation from the rest of the arrangement as a whole.

To target the above, the Discussion Draft recommends that special hallmarks be developed for cross-border schemes that focus on perceived cross-border abusive tax planning outcomes.

We believe that MDR targeted at cross-border planning will likely give rise to reporting the same transaction in multiple countries and in certain instances by taxpayers who are not a material party to the cross-border transaction. This would be often the case for MNEs where companies part of the group could be obliged to report the same transaction with different rules thus disclosing different information regarding the same set of facts.

The above situation would likely increase significantly the group’s administrative compliance burden, with a minimum benefit for the tax administrations.

We believe the purpose of early identification of new schemes is best served in domestic situations as the tax administrations can respond promptly as information is provided, through domestic legislative changes where necessary.

In accordance with the Discussion Draft, an arrangement that incorporates a cross-border outcome should be treated as a reportable scheme if it involves a domestic taxpayer.

Furthermore, a domestic taxpayer should be treated as involved in a cross-border arrangement where the arrangement includes a transaction with a domestic taxpayer that has material economic consequences for that taxpayer or material tax consequences for one of the parties to the transaction.

We believe that a clear definition with regards to materiality should be provided, and even if it were, in certain instances a taxpayer would not be in a position to comply with the reporting obligation as the information on the tax consequences may be unknown to the other parties to the transaction.

We also believe that many of the arrangements expected to be targeted under Mandatory Disclosure Reporting on International Tax Schemes, are also likely to be caught under BEPS Action 2 on Anti-hybrid rules and throughout other BEPS Actions such as Action 6 on Treaty Abuse or Action 7 on Permanent Establishment.
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.
VIA E-MAIL

Mr. Achim Pross  
Head, International Co-operation and Tax Administration Division  
Centre for Tax Policy and Administration  
Organisation for Economic Co-operation and Development  
2, rue André-Pascal  
75116 Paris  
France  
MandatoryDisclosure@oecd.org

Re: Comments on Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules

Dear Mr. Pross:

The International Alliance for Principled Taxation (IAPT or Alliance) is a group of major multinational corporations based throughout the world, and representing business sectors as diverse as consumer products, media, telecommunications, oilfield services, transportation, computer technology, energy, pharmaceuticals, beverages, software, IT systems, publishing, and electronics.\(^1\) The group’s purpose is to promote the development and application of international tax rules and policies based on principles designed to prevent double taxation and to provide predictable treatment to businesses operating internationally.

The Alliance appreciates the opportunity to provide input to the OECD with respect to its Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules released on March 31, 2015. Our comments are set forth in Annex 1 to this letter. As you know, the IAPT submitted comments on Action 12 of the

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\(^1\) The current membership of the IAPT is made up of the following companies: Adobe Systems, Inc.; Anheuser-Busch InBev NV/SA; A.P. Møller-Mærsk A/S; AstraZeneca plc; Baker Hughes, Inc.; Chevron Corporation; Cisco Systems, Inc.; The Coca-Cola Company; Exxon Mobil Corporation; Hewlett-Packard Company; Johnson Controls, Inc.; Juniper Networks Inc.; Microsoft Corporation; Procter & Gamble Co.; RELX Group plc; Repsol S.A.; TE Connectivity Ltd.; Thomson Reuters Corporation; Transocean Ltd.; Tupperware Brands Corporation; and Vodafone Group plc.
July 2013 BEPS Action Plan on October 16, 2013, and we include a copy of those comments as Annex 2 to this letter for reference.

We look forward to the opportunity to participate in the consultation to be held on May 11, 2015 with respect to this topic and would appreciate an opportunity to speak at the consultation. We also stand ready to respond to any questions or to provide further input as the work of the OECD on this item continues.

Sincerely yours on behalf of the Alliance,

Joshua Odintz
Baker & McKenzie LLP
Counsel to the Alliance

Annex 1: Comments on the March 31, 2015 Discussion Draft on BEPS Action 12
Annex 2: Comments on Action Item 12 of the July 19, 2013 BEPS Action Plan
ANNEX 1

INTERNATIONAL ALLIANCE FOR PRINCIPLED TAXATION

COMMENTS ON THE MARCH 31, 2015 DISCUSSION DRAFT

ACTION 12: MANDATORY DISCLOSURE RULES

APRIL 30, 2015
IAPT Comments on the March 31, 2015 Discussion Draft

Action 12: Mandatory Disclosure Rules

I. Introduction

1. The IAPT appreciates the opportunity to comment on the Discussion Draft for BEPS Action 12: Mandatory Disclosure Rules ("the Discussion Draft"). The IAPT supports clear, objective and appropriately scoped mandatory disclosure rules ("MDR").

2. In designing MDR, the IAPT recommends modifying the scope of those transactions that are reportable for both domestic and cross-border transactions. This will have the effect of reducing disclosure of transactions that are already subject to other disclosure or are very unlikely to give rise to significant concerns. In particular, the IAPT recommends reducing the scope of cross-border transactions that are subject to disclosure, as the defined scope would require significant compliance issues for businesses with questionable value for tax administrations.

3. One issue that is not discussed in detail is how disclosures will be shared by countries, nor is there any discussion regarding protections for such information. These comments contain recommendations regarding confidentiality issues regarding disclosures and how such disclosures should be shared between jurisdictions.

4. The IAPT agrees that penalties should be part of an MDR. Penalties have the incentive to induce disclosure of transactions, especially where penalties are reduced or relieved by such disclosure. However, there is no discussion regarding the form of such penalties and the principles that should underlie the design of such penalties. The IAPT strongly recommends that a final report on MDR should include principles regarding the design of penalties.

II. Principles for MDR Design

5. The Discussion Draft highlights four design principles for MDR: (1) MDR should be clear and easy to understand; (2) MDR should balance additional compliance costs to taxpayers with the benefits obtained by the tax administration; (3) MDR should be effective in achieving the intended policy objectives and accurately identify relevant schemes; and (4) information collected or provided under MDR should be used effectively.

6. The intended policy objectives include early identification of “avoidance schemes,” promoters, and the users.

7. The IAPT recommends that in balancing the compliance costs with the benefits by the tax administration, Working Party 11 should consider an additional principle, the reduction in overlapping disclosure regimes. This is discussed in detail below.
III. Scope of Reportable Transactions

8. Taking into account the principle of the reduction of overlapping disclosure regimes, the IAPT recommends that certain transactions should not be reportable in MDR. The first category of transactions are those that are already subject to disclosure pursuant to another regime, and the second are those transactions that are unlikely to give rise to “tax shelter” concerns.

9. The first category of transactions that should not give rise to another reporting obligation are transactions between related parties and rulings that are already subject to reporting obligations. Under Action 13, taxpayers will be required to prepare a master file and local file that identifies transactions relevant to a particular jurisdiction. Additionally, taxpayers will also be required to prepare country-by-country (“CbC”) documentation that will be shared with relevant jurisdictions to allow tax authorities to assess whether a taxpayer’s structure and transactions should be scrutinized. Given the number of transactions between related parties that will be subject to extensive documentation, related party transactions that are subject to master file and local file documentation should be scoped out from MDR. Otherwise, taxpayers will have potentially more costs in order to disclose any related party transaction and may be subject to penalties for the inadvertent failure to disclose a related party transaction that was already extensively disclosed in transfer pricing documentation.

10. The second type of “transaction” that will be subject to alternative disclosure is any transaction covered by a ruling obtained by a taxpayer and spontaneously shared with other tax authorities. Under Action 5, countries will disclose taxpayer-specific rulings to relevant jurisdictions that are affected by such rulings. Additionally, the European Union (“EU”) announced a Tax Transparency Package on March 18, 2015, that would require the automatic exchange of tax rulings. As part of the proposed package, EU countries would be required to report every three months to all other Member States on all advance cross-border tax rulings and advance transfer pricing arrangements that they have issued. Member States would be allowed to follow up with the issuing Member State and obtain the tax rulings. Since such rulings will be disclosed to other relevant jurisdictions, it is once again duplicative for a taxpayer to report a ruling that has already been disclosed by other means.

11. The second category of transactions that should be scoped out are those transactions that pose a low risk. Commercial transactions between third parties, such as the sale of goods, services, or a business, should be excluded (unless they otherwise are implicated by the loss hallmark). These transactions will be described in one or more tax returns (e.g., the jurisdictions where income and losses are reported) and should not be subject to additional disclosures.

12. Similarly, certain transactions that are imbued with significant, specifically authorized tax consequences should not be disclosed, including: (1) tax-free or tax-deferred transactions permissible under local law (e.g., mergers, acquisitions, amalgamations, and spin-offs); (2) transactions that provide clearly contemplated tax benefits or credits under local law; and (3) local law tax elections. These are transactions or matters that are typically structured in a way to take advantage of widely available tax

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benefits, and in some jurisdictions such transactions are exempt from a general anti-avoidance rule ("GAAR").

13. The Discussion Draft considers whether certain gatekeeping hallmarks should be applied to determine whether a transaction gives rise to a reportable transaction. The Discussion Draft considers the application of a main purpose test or a hypothetical test to determine whether a transaction is reportable. The IAPT strongly recommends that such tests not be included in MDR because such tests lead to unpredictable results. As discussed in the design principles section, MDR should be easy to understand and apply. Moreover, MDR should balance taxpayer compliance costs with tax administration. If the final report recommends such gatekeeping rules, then MDR will be difficult to apply and will increase compliance costs for taxpayers. Taxpayers will be incentivized or required to obtain review from outside advisors to determine whether a transaction satisfies a purpose or hypothetical test. Moreover, a tax administration may view the same or similar facts and circumstances in determining a taxpayer’s motivation and reach a different conclusion that a transaction should have been disclosed. This will require tax administrations to devote significant resources to audit and understand the taxpayer’s motivation for entering into a transaction. In the event that either test is included in MDR or is part of a jurisdiction’s disclosure regime, such filter should be coupled with a good faith/reasonable cause exception to penalties. The good faith/reasonable cause exception is described below in the discussion on penalty design.

14. We agree with the Discussion Draft that countries should establish threshold exceptions for reporting transactions, or else the compliance burden on taxpayers will greatly outweigh the benefits for the tax administrators. The IAPT recommends that each jurisdiction establish a monetary threshold for transactions in order to reduce the number of disclosures for small value transactions.

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3 In the United States, the economic substance doctrine was codified in 2010 (Internal Revenue Code section 7701(o)). The House of Representatives noted that the provision was not intended to alter the tax treatment of “certain basic business transactions that, under longstanding judicial and administrative practice are respected, merely because the choice between meaningful economic alternatives is largely or entirely based on comparative tax advantages.” H.R. Rep. No. 111-443 at 296 (2010) (the “House Report”). See also Technical Explanation of the Revenue Provisions of the “Reconciliation Act of 2010,” as amended, in combination with the “Patient Protection and Affordable Care Act,” JCX-18-10 at 154 (Mar. 21, 2010) (the “JCT Report”). The House Report provides examples of transactions to which the economic substance doctrine should not apply, which include but are not limited to: (1) the choice between capitalizing a business enterprise with debt or equity; (2) a U.S. person’s choice between utilizing a foreign corporation or a domestic corporation to make a foreign investment; (3) the choice to utilize a related-party entity in a transaction, provided that the arm’s length standard of section 482 and other applicable concepts are satisfied; and (4) the choice to enter a transaction or series of transactions that constitute a corporate organization or reorganization under subchapter C. House Report at 296.

4 The Discussion Draft does not discuss the design or implementation of a main purpose test or GAAR. If the purpose of the reference to a main purpose test is to create or implement a model GAAR, then the IAPT strongly urges that the OECD issue a discussion draft and hold a consultation on this issue.
IV. Cross-Border Transactions

15. It is not clear why the Discussion Draft singles out “cross-border outcomes” transactions for special treatment when the hallmarks that are proposed (e.g., loss transactions) would pick up a transaction in a jurisdiction where the transaction takes place or has a tax effect. If that jurisdiction enacts MDR, then it will receive information regarding the transaction that affects its fisc. If, as the Discussion Draft acknowledges can be the case, a cross-border transaction has no significant consequences for a jurisdiction’s fisc, there is no apparent reason for that jurisdiction to require reporting of that transaction under MDR, and the Discussion Draft provides no justification for such a requirement.

16. Consistent with or in addition to its general recommendations above for MDR, the IAPT recommends changes to the scope of cross-border transactions and the information reported to each jurisdiction in the following areas: (1) transactions already subject to disclosure; (2) transactions that pose a low risk; (3) threshold hallmarks; (4) the definition of a cross-border transaction or outcome; (5) transactions involving members of an affiliated group; (6) transactions involving unrelated parties; (7) the need for a reporting threshold; (8) the information required to be reported to another jurisdiction; (9) the timing for disclosure of a cross-border transaction; and (10) the need to avoid requiring disclosure to a jurisdiction that may assert criminal liability for entering into a transaction.

17. Cross-border transactions between related parties that are disclosed in the master file and/or local file transfer pricing documentation should not be subject to additional disclosure. Similarly, rulings that are subject to the spontaneous disclosure under Action 5 should not be subject to additional disclosure under Action 12. Moreover, transactions that pose a low risk (defined in the prior section) should not be subject to disclosure.

18. For the reasons discussed above, cross-border transactions should not be subjected to hallmarks that inquire into the intent of the transaction or hypothetical questions regarding whether a premium could have or should have been paid for the transaction.

19. The Discussion Draft recommends the creation of hallmarks for “cross-border outcomes” or transactions. While the Discussion Draft suggests some potential hallmarks for what might be considered a “cross-border outcome” triggering a disclosure requirement, it ultimately leaves the selection of hallmarks to each individual country and thereby fails to appropriately define cross-border outcomes or transactions, and the final document should appropriately identify those cross-border transactions that are of particular concern. If the OECD intends to define a cross-border outcome/transaction as any transaction that provides a “cross-border outcome,” then virtually every cross-border transaction will be subject to disclosure. A broad definition would drown taxpayers and tax administrations in irrelevant disclosures. Any potential benefit gained by a tax administrator would be greatly outweighed by taxpayer compliance costs. A broad definition also fails to meet the principles of effectively achieving the

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5 We note, for example, that the Discussion Draft refers to certain types of hybrid mismatch arrangements as a potential hallmark for triggering a disclosure requirement on a cross-border outcome, but without incorporating any of the parameters being developed under Action 2 for what situations might trigger the application of recommended anti-hybrid legislation. We see no sense in flooding tax administrations with disclosures about transactions that fall outside the coverage of thoughtfully crafted substantive legislation aimed at particular types of cross-border outcomes of potential policy concern.
intended policy objectives and accurately identifying relevant transactions. Once again, it is unclear what
the rationale or policy objective is in creating a broad definition that would require a taxpayer to disclose
every cross-border transaction. Tax administrations will be unable to effectively use the information
collected or provided because they will be flooded with extraneous and irrelevant disclosures. We note,
too, that imposing reporting obligations on a party other than one that is obtaining a material tax benefit
from a transaction, rather than relying upon MDR requirements in the latter party’s jurisdiction, will risk
misjudging that latter jurisdiction’s assessment of the extent of the tax policy concern involved in the
transaction and delaying (due to the need to transmit the reported information through exchange of
information channels) the receipt of the information by tax authorities in that latter jurisdiction, thereby
failing to achieve some of the principal objectives of MDR identified in the Discussion Draft. We
therefore suggest that reporting obligations on a party be limited to those cross-border outcomes that
involve material tax consequences for that party which have been specifically identified as raising tax
policy concerns for that party’s jurisdiction as reflected in substantive tax rules of that jurisdiction.

20. The Discussion Draft proposes to create a disclosure requirement for an entity that is a member of
an affiliated group and would require that member to provide information on an intra-group transaction.
This standard is overly broad and will create confusion regarding where cross-border transactions should
be reported. This requirement could also lead to multiple disclosures filed in multiple jurisdictions by
multiple members of the group. Additionally, a subsidiary in a country may not have any information
regarding the tax position its majority owner took in another jurisdiction, and it may not have the right to
access such information. For example, an entity is 51 percent owned by one group and 49 percent owned
by the public or a party unrelated to the 51 percent owner. Even though the entity is a member of the 51
percent owner’s group, it is unable to obtain information regarding the parent’s reporting position of a
cross-border transaction. A better approach is to focus on whether the entity obtained a tax benefit in the
jurisdiction where it has tax filing requirements, and that jurisdiction can determine whether the entity
should disclose the transaction.

21. The Discussion Draft expands the disclosure of cross-border transactions to those where a
transaction has “material tax consequences for one of the parties to the transaction”:

    An arrangement that incorporates a cross-border outcome should be treated as a reportable
scheme if it involves a domestic taxpayer. A domestic taxpayer should be treated as involved in a
cross-border arrangement where the arrangement includes a transaction with a domestic taxpayer
that has material economic consequences for that taxpayer or material tax consequences for one
of the parties to the transaction.

This standard imposes an incredible compliance burden on taxpayers. The Discussion Draft does not
define material economic consequence or material tax consequence. Moreover, in most third party (and
many related party) transactions, each party will not know how the other party will report the transaction,
let alone whether the transaction has “material tax consequences” for that other party. The level of
knowledge that is considered “sufficient information” to understand the operation and effect of a
transaction is undefined. How does a party to the transaction establish that it did not have the requisite
knowledge? It also may not be possible to identify persons with possession or control of information,
especially in a third party transaction. In a typical multiparty transaction, each party may have a reporting obligation, and because parties will not know how others may be reporting the transaction on a tax return, there is great potential for conflicting disclosures that will result in unnecessary and unwarranted audits. Moreover, due to the terms of the transaction, it may not be commercially possible to disclose the transaction to a tax authority, as the contract between the third parties may call for confidentiality (but not for the purposes of hiding the existence of the transaction from the relevant tax administrations).6 The IAPT recommends eliminating the requirement that a party other than a promoter or the taxpayer claiming a position on a return must disclose a cross-border outcome or transaction.

22. The IAPT disagrees with the Discussion Draft recommendation that there should not be a minimum threshold for reporting for transactions with cross-border outcomes. By eliminating a reasonable minimum threshold, this proposal would create a very significant compliance burden for taxpayers that would greatly outweigh any benefit gained by a tax administration. It is unclear how the reporting of a cross-border loss transaction of €1 further transparency and tax administration, while it clearly increases compliance costs and the potential for penalties for the failure to disclose such a de minimis transaction.

23. The Discussion Draft would require a taxpayer to disclose key provisions of foreign law to the local jurisdiction. This requirement is overly broad and it is unclear why the identification of foreign laws at issue is relevant to the local jurisdiction where the transaction is reported. The Discussion Draft would require a domestic taxpayer to determine which foreign laws may apply in a cross-border context, which could be virtually impossible to determine where the parties are unrelated. Rather, a better approach is to disclose the transaction in those countries where a tax benefit that is subject to a hallmark is reported. Alternatively, another option is to list the jurisdiction(s) affected by the transaction. In the event that the MDR requires disclosure of foreign law to the local jurisdiction, then penalties should not apply where a taxpayer fails to list all relevant provisions but nevertheless discloses the transaction with the local law at issue.

24. The Discussion Draft contemplates that a taxpayer will be required to file a disclosure shortly after implementing the transaction. The IAPT recommends that the final MDR recommendation provide that taxpayers should have at least 120 days after entering into a transaction to report it because of the vague and potentially overbroad definition of “cross-border outcomes,” and because taxpayer groups may be required to file such disclosures in numerous jurisdictions.

25. Annex II of the Discussion Draft addresses the compatibility between self-incrimination and MDR. We agree with the Discussion Draft’s concerns that the disclosure of information could give rise to criminal action in certain jurisdictions. The IAPT strongly recommends excluding from disclosure those transactions that could give rise to criminal liability or prosecution in a jurisdiction. Moreover, other jurisdictions should not share disclosures with those jurisdictions that may seek criminal liability for taxpayers that engage in certain transactions.

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6 If all third party cross-border transactions are scoped in, then every commercial transaction will require terms to address potential disclosures to tax administrations. This burden greatly exceeds the benefit that may be obtained by tax administrations.
V. Sharing of Disclosures and Confidentiality

26. Like the new proposed transfer pricing documentation, confidentiality is critical for MDR to work as taxpayer buy-in will be dependent on each of the respective tax authorities around the world being able to provide concrete assurances that their information is going to be safeguarded. For example, there is a risk that confidential information could be taken out of context and used inappropriately to further political agendas or to discredit certain companies, industries or business sectors.

27. Information provided pursuant to MDR could contain sensitive information that if disclosed, could be taken out of context and damage the reputation of a taxpayer before the transaction has been appropriately reviewed and the taxpayer has had a chance to exhaust its remedies. Depending on the transaction and breadth of what constitutes a reportable cross-border transaction, some disclosures pursuant to MDR may contain commercially sensitive information that could benefit competitors if publicly disclosed. Accordingly, the IAPT strongly recommends that transactions or schemes reported pursuant to MDR not be disclosed by tax authorities to the public, and that they receive the same confidentiality protections as the Country-by-Country report and transfer pricing documentation.

28. The Discussion Draft does not discuss the mechanism for how disclosures will be shared between jurisdictions, which should be addressed in the context of Action 12. Information exchange should not bypass the existing treaty network. Bilateral treaties, TIEAs and/or a multilateral Convention, such as the OECD/COE Multilateral Convention on Mutual Assistance in Tax Matters, provide appropriate avenues for exchanging disclosures pursuant to MDR. We assume that disclosures will be exchanged with confidentiality pursuant to the applicable instrument. If the OECD will consider a different route for the transfer of disclosures pursuant to MDR, then the IAPT recommends that the OECD should describe the process and provide stakeholders the opportunity to comment.

29. Because of the sensitivity of the information in a disclosure and the potential to cause embarrassment, a jurisdiction should be required to notify the taxpayer who made a disclosure before the disclosure or information contained therein is transmitted to another jurisdiction.

30. Tax authorities requesting/obtaining disclosure should commit themselves to strict processes in order to protect the confidentiality of taxpayer information in their possession. This includes material penalties in case of breach of confidentiality, secure systems (especially if taxpayers are required to electronically submit data or if tax authorities electronically share data), control audits, limiting the number of people involved, etc.
VI. Penalty Design

31. The Discussion Draft recommends that MDR should be supported with a penalty regime for the failure to disclose (and presumably to comply with the regime) reportable transactions. Most countries that are a party to the BEPS Project do not have MDR, and a final report should propose principles that should be taken into account in designing an effective penalty that supports MDR, and at the same time does not result in abusive behavior by a tax administration.\(^7\)

32. First, the penalty for failure to disclose a reportable transaction should be a civil penalty and should not give rise to a criminal penalty.

33. Second, the penalty should encourage voluntary compliance. If the penalty is set too low, then the likely response is under-disclosure, as a taxpayer may conclude that the cost of disclosure is greatly outweighed by the tax benefits of an undisclosed reportable transaction.

34. Similarly, the penalty should be fair and reasonable in relation to the misconduct, while at the same time deterring clearly defined misconduct. Similarly, the penalty should not be imposed to punish conduct that is proper, reasonable, appropriate or not clearly prohibited.

35. A penalty to disclose should be easy to compute, and the failure to disclose should not result in multiple penalties (“stacking”).

36. The penalty should be prospective and not retroactive. For example, some transactions have multiple years of tax benefits. A tax administration may become aware of such transaction after enacting MDR. If a taxpayer fails to disclose the transaction, a penalty should not apply to tax years that were not subject to MDR and should apply only to those years that were subject to disclosure.

37. A penalty should have a good faith and reasonable cause exception. Such exception should take into account all relevant facts and circumstances. A taxpayer should have the opportunity to raise a good faith and reasonable cause exception to penalties, and each jurisdiction should have a clearly defined process for determining and reviewing the applicability of penalties. Both the tax administration and the judicial branch should be given authority to consider the application of an exception. A penalty for failure to disclose should not apply where a taxpayer demonstrates substantial compliance. For example,

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a penalty should not apply where a taxpayer lists the key statutory provisions at issue, but fails to mention other, less relevant laws that may be affected by the transaction, but that otherwise do not affect the ability of the tax administration to scrutinize the transaction.

38. For those jurisdictions that impose criminal sanctions for taxpayers that enter certain transactions, the privilege against self-incrimination should control, such taxpayers should not be required to disclose those transactions that give rise to criminal liability. Moreover, civil penalties should not apply where a taxpayer does not disclose because of concerns of self-incrimination.
ANNEX 2

INTERNATIONAL ALLIANCE FOR PRINCIPLED TAXATION (IAPT)

COMMENTS ON ACTION ITEM 12 OF THE JULY 19, 2013 BEPS ACTION PLAN

OCTOBER 16, 2013
IAPT Comments on BEPS Action #12 (Disclosure of aggressive tax planning arrangements)

**Action 12 – Require taxpayers to disclose their aggressive tax planning arrangements**

*Develop recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the administrative costs for tax administrations and businesses and drawing on experiences of the increasing number of countries that have such rules. The work will use a modular design allowing for maximum consistency but allowing for country specific needs and risks. One focus will be international tax schemes, where the work will explore using a wide definition of “tax benefit” in order to capture such transactions. The work will be co-ordinated with the work on co-operative compliance. It will also involve designing and putting in place enhanced models of information sharing for international tax schemes between tax administrations.*

The OECD has devoted significant attention in recent years to tax planning regarded as aggressive. As the OECD noted in its report, *Tackling Aggressive Tax Planning Through Improved Transparency,*\(^8\) there are several mechanisms for countries to obtain information: mandatory early disclosure, additional reporting obligations, questionnaires, and co-operative compliance programs. The governments participating in the OECD/G20 BEPS Project have decided to pursue mandatory disclosure rules for “aggressive” or “abusive” transactions. The IAPT agrees that timely and targeted information reporting is important, as it provides the opportunity for tax authorities to focus their attention on specified transactions and encourages compliance. While we agree that such disclosure is important, the IAPT believes that there are numerous issues the OECD will need to consider before it is able to create a modular design that fits most or all of the OECD/G20 countries.

The remainder of the comments on Item #12 raise issues that the OECD should consider in designing a disclosure regime. We refer to the United States’ and Canada’s disclosure regimes to illustrate various design issues that the OECD should take into account.

**Which Transactions Are Subject to Mandatory Reporting?**

The most significant issue in establishing a mandatory disclosure regime is determining the types of transactions subject to such disclosure. A narrowly tailored, reasonable regime assists a tax authority in combatting transactions that it has identified as tax avoidance transactions and has a chilling effect on a taxpayer’s desire to enter into such transactions. A disclosure regime that is overly broad and applies to transactions that are not of interest to tax authorities is not effective, as tax authorities are swamped with irrelevant data and taxpayers are required to waste resources to disclose uncontroversial transactions. Also, the regime should be simple enough that taxpayers should be able to understand when and to whom a transaction should be reported.

Action item #12 calls for mandatory early disclosure of “aggressive” or “abusive” transactions. However, these terms are not defined. The IAPT believes it is essential that the OECD define “aggressive” and

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“abusive” transactions so that taxpayers may comply with any applicable disclosure rules and avoid penalties. Moreover, the IAPT believes that mandatory disclosures will overwhelm governments with disclosures unless the OECD narrowly tailors the definition of such terms to identify transactions that it believes are suspect.

If the OECD defines an “aggressive” or “abusive” transaction as a transaction that is primarily entered into for tax reasons, then it should consider how to except from reporting certain uncontroversial decisions that are inherently tax-favored, such as the decision whether to enter into: (1) tax-free or tax-deferred transactions permissible under local law (e.g., mergers, acquisitions, amalgamations, and spin-offs); and (2) transactions that provide clearly contemplated tax benefits or credits under local law.\(^9\) For example, in the United States businesses invest in low-income housing and may qualify for the low-income housing tax credit.\(^10\) These transactions generally do not have a profit potential without the tax credits. Nevertheless, such transactions should be excluded from mandatory disclosure.

Similarly, the OECD should generally exclude commercial transactions between third parties, such as the sale of goods, services, or a business. These transactions will be described in one or more tax returns (e.g., the jurisdictions where income and losses are reported) and should not be subject to additional disclosures.

Some jurisdictions use filters to identify transactions that should be disclosed. For example, the United States requires taxpayers to disclose reportable transactions, which are defined as: listed transactions (transactions identified by the Internal Revenue Service (IRS) as tax avoidance transactions); confidential transactions where the advisor receives a fee that exceeds a specified threshold (USD 250,000 for corporations and partnerships); transactions with contractual protection or indemnity; transactions with losses over USD 10 million in one year or USD 20 million over multiple years (for corporations and partnerships); and transactions of interest (transactions that the IRS has expressed interest in understanding but that may not be tax avoidance transactions).\(^11\) These filters generally do not apply to commercial transactions, other than the filter for losses.

Canada recently changed its reporting regime for the disclosure of transactions “undertaken alone or as part of a series of transactions, in order to avoid paying taxes.”\(^12\) Canada requires disclosure of transactions that have two or more of the following hallmarks: (1) the promoter’s or advisor’s fee is tied to the transaction’s tax benefit or the number of persons that have been provided access to the advice from the promoter regarding the tax consequences of the transaction; (2) the transaction is confidential (e.g., the taxpayer is contractually prohibited from discussing the transaction with third parties); and (3) the taxpayer or the promoter or advisor has or had contractual protection for the transaction (e.g., insurance, an indemnity).

\(^10\) Internal Revenue Code § 42.
\(^11\) Internal Revenue Code § 6707A; Treas. Reg. § 1.6011-4(c)(3).
\(^12\) Canada Explains Reporting Rules for Potential Tax-Avoidance Transactions, 2013 WTD 170-16 (30 August 2013).
The IAPT welcomes the opportunity to discuss appropriate filters if the OECD pursues that route. The filters should be narrowly tailored to avoid over-disclosure of non-aggressive or non-abusive transactions. In either scenario, the OECD will likely need to revisit the definition of “aggressive” or “abusive” transactions or the filters it creates to appropriately narrow the number of mandatory disclosures.

We have no objection in principle to the proposal that governments would commit amongst themselves to share information regarding “aggressive” or “abusive” transactions, so long as the OECD narrowly tailors the types of transactions subject to mandatory disclosure.

**Who is Required to Disclose the Transaction?**

Some jurisdictions require the taxpayer and the promoter, advisor or material advisor to disclose the transactions. The OECD should consider whether it is necessary to obtain multiple disclosures of the same transaction from multiple parties. Also, the OECD could consider establishing rules regarding which promoter or advisor is responsible for disclosing the transaction when multiple persons assist a taxpayer, to lessen both administrative and compliance burdens.

Further, a member of an affiliated group or a consolidated group (the “group”) may enter into a transaction that the OECD views as aggressive or abusive. Guidance will be required to determine which member or members of the group should be required to disclose the transaction. Requiring disclosure by a member of the group that was not a party to the transaction may be impracticable and result in inadvertent nondisclosure of transactions.

In the case of a partnership, the OECD should also specify whether the partnership or the partners are required to disclose the transaction. Also, if a partnership has a general partner and limited partners, the OECD should specify which partners are required to make the disclosure.

**Who Should Receive the Disclosure?**

Action item #12 does not specify whether a taxpayer or promoter/advisor will be required to disclose transactions to more than one jurisdiction. If the OECD contemplates mandatory disclosure to multiple tax authorities, then it should specify those circumstances in which a taxpayer or promoter/advisor is required to do so. The IAPT is concerned that mandatory disclosure to multiple jurisdictions could result in additional complexity and unwarranted penalties if a taxpayer fails to file in one jurisdiction.

**What is the Tax Benefit Reported?**

The IAPT strongly urges the OECD to clearly define the term “tax benefit” and whose tax benefit must be reported to a jurisdiction. It is unclear what type of disclosure of the tax benefit will be sufficient. The OECD should provide examples of transactions and disclosures that it views as adequate.

**What are the Consequences of Failure to Disclose?**

Some mandatory disclosure regimes have a penalty for failure to report a transaction. The penalty may be applied to either the promoter/advisor or the taxpayer. For example, the United States imposes a penalty
between USD 10,000 and 200,000 on corporations and partnerships for the failure to report a reportable transaction. Moreover, special penalty regimes may apply to an understatement of tax attributable to an undisclosed reportable transaction. In some jurisdictions, the statute of limitations to assess tax related to the undisclosed transaction may be extended.

If the OECD is considering a penalty regime for the failure to disclose a transaction, then the IAPT suggests that the OECD consider the following purposes and goals in designing an appropriate penalty. First, the penalty should encourage voluntary compliance. The penalty should be fair and reasonable in relation to the misconduct, while at the same time deterring clearly defined misconduct. Similarly, the penalty should not be imposed to punish conduct that is proper, reasonable, appropriate or not clearly prohibited. The penalty should be prospective and not retroactive.

The IAPT strongly recommends that the OECD create a good faith or reasonable cause exception to the penalty, and the penalty should not apply where a person demonstrates substantial compliance.

What is the Cost of Compliance with Mandatory Disclosure?

The IAPT is concerned that the cost of a global mandatory disclosure regime will greatly outweigh the governments’ benefits in obtaining a tidal wave of information. The OECD should consider the costs in time and money that taxpayers and other persons will spend in disclosing transactions to one or multiple jurisdictions. For example, the United States requires corporations to disclose reserved tax positions on Schedule UTP (Uncertain Tax Positions). The form is overly broad and requires significant resources to adequately complete the schedule. It is uncertain whether the schedule yields data that are useful to the IRS. The IAPT strongly urges the OECD to consider the costs of reporting to taxpayers and tax authorities by determining the number of hours it will take the average taxpayer to satisfy the new disclosure requirements.

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13 Internal Revenue Code § 6707A(b).
14 Internal Revenue Code § 6662A.

15 Canada extends the period of limitations by three years after the date of the filing of the disclosure. Canada Explains Reporting Rules for Potential Tax-Avoidance Transactions, 2013 WTD 170-16 (30 August 2013).
Confidentiality

The IAPT recognizes that OECD and G20 countries are committed to the exchange of information, and such exchange is important to ensure compliance with local law. However, the IAPT is concerned that some jurisdictions may not respect the confidentiality of information transmitted from one jurisdiction to another. A disclosure regime should take such concerns into account, e.g. by including a requirement that a jurisdiction notify the taxpayer who made a disclosure before the disclosure or information contained therein is transmitted to another jurisdiction.
Comments to the OECD Discussion Draft on BEPS Action 12 “Mandatory Disclosure Rules”

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, appreciates the opportunity to provide comments on the OECD Discussion Draft on Action 12 on Mandatory Disclosure Rules. In our view, the recommendations generally reflect current “best practices”. However, ICC would like to comment on a few of the suggested recommendations that it finds troublesome.

Coordination with Master File, Local File and Country-by-Country Reporting
ICC believes that information that is required to be provided as part of transfer pricing documentation should not generally be required to be provided separately through mandatory disclosure regimes.

Thresholds for Disclosure

Use of a main benefit test as a threshold for disclosure – The use of a main benefit test to determine whether disclosure is required, particularly if the test is “one of the main benefits” rather than the main benefit, may result in a test that violates the first design principle: “mandatory disclosure rules should be clear and easy to understand”. As that design principle points out the main purpose test will result in the following consequences: taxpayers will be uncertain whether disclosure is required, transactions that governments would want to be made aware of may be omitted, and taxpayers may be subject to penalties when they genuinely believed disclosure was not required.

Hypothetical application of generic hallmarks – ICC strongly objects to the use of hypothetical generic hallmarks. Taxpayers should be judged by their actions, not by what they might have done. This is especially true in the case of premium fees. The notion that the promoter could have charged a premium fee when they did not, involves too many levels of second guessing of the actual conduct of the parties.

Hallmarks for loss transaction – ICC urges caution against the inclusion of acceleration of losses as a standard for determining whether a loss transaction ought to be disclosed. How does one determine whether a loss has been accelerated? For example, would the disposition of an asset qualify as acceleration? This test also seems inconsistent with identifying the transfer of losses as a hallmark – either the loss is realised and recognised by the transferor (and perhaps accelerated?) or the loss carries over to the transferee. Loss trafficking seems a far greater concern. Economic losses that have been realised ought generally to be recognised and allowed (subject to any general limitations on the ability to use losses). The ability to claim these losses might be especially significant in an economic downturn.

International Tax Schemes
ICC is highly concerned about the suggestions on International Tax Schemes. The general thrust seems to be to create a reporting obligation to a country even though that country may not have a tax interest in the so-called “international tax scheme”. The Discussion Draft

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1 Discussion draft paragraph 20.
recommends that “domestic taxpayers should be under an obligation to disclose a cross-border arrangement to the reporting jurisdiction even if they are not a direct party to the cross-border outcome.” In ICC’s view, the more appropriate approach would be that the parties to the transaction should have the obligation to report. Any country is free to adopt mandatory disclosure rules and a country’s failure to do so, should not impose excessive obligations on taxpayers that are not direct parties to a reportable transaction.

The materiality standard is flawed in two respects. First, it is undefined. Second, it is not clear how, even if it were defined, the domestic taxpayer would be in a position to apply the second half of the test, since the information on the tax consequences to the other parties to the transaction may not be in the possession of the domestic taxpayer.

Further, although the Discussion Draft does not deal with reporting between countries, reporting this information to the country that is not affected by the cross-border arrangement will undermine the principle benefits of the mandatory reporting regime which are early identification of issues and the ability to respond quickly. Any information provided to a jurisdiction that is not a party to the transaction would likely have to go through a treaty exchange process, meaning the affected jurisdiction would not obtain the information until that process was complete and this might not be before the information becomes available through other channels such as the tax return including transfer pricing documentation. Thus, the proposed reporting with respect to so-called “international tax schemes” would create an unreasonable and uncertain reporting burden on international taxpayers with limited benefit to the affected jurisdiction.

Some Tax Authorities now publish the International Tax Schemes they consider to be aggressive. ICC recognises that this may not always be practical because of the need to keep the lists updated. For this reason it is unlikely that, in isolation, the publication of such lists could fully address the BEPS concerns but it is important to find the right balance between the burden on the taxpayer and that on the tax administrations and not to shift the balance too far onto the taxpayer.

In particular, paragraph 230 raises the issue of reporting with respect to cross-border tax planning schemes that are incorporated into acquisitions, refinancing or restructurings. The OECD’s guidance with respect to the master file and local file will require reporting on these transactions both globally and locally if the transaction affects the local country business. Additional reporting will likely be duplicative and will potentially significantly increase taxpayers’ costs. Significantly increased costs are especially likely in this area because of the modular design of the rules. Modular design will result in differences across jurisdictions as countries pick and choose those parts of the modules that serve their purposes and thus reporting will be unique to each country that adopts a mandatory disclosure regime. This runs counter to the design principles under Action 13, under which the OECD was attempting to achieve consistent reporting that would result in cost savings for multinationals.

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2 Discussion Draft, paragraph 241.
3 Discussion Draft, paragraph 243.
The International Chamber of Commerce (ICC) Commission on Taxation

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy. Founded in 1919, and with interests spanning every sector of private enterprise, ICC’s global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.
Mr. Achim Pross,
Head of International Co-operation and Tax Administration Division
Organisation for Economic Cooperation and Development

Accounting & Tax Committee
Japan Foreign Trade Council, Inc.

Comments on the Discussion Draft on
Action 12 (Mandatory Disclosure Rules) of the BEPS Action Plan

The following are the comments of the Accounting & Tax Committee of the Japan Foreign Trade Council, Inc. (JFTC) in response to the invitation to public comments by the OECD regarding the “BEPS Action 12: Discussion Draft on Mandatory Disclosure Rules” released on March 31, 2015.

The JFTC is a trade-industry association with Japanese trading companies and trading organizations as its core members. One of the main activities of JFTCs Accounting & Tax Committee is to submit specific policy proposals and requests concerning tax matters. Member companies of the JFTC Accounting & Tax Committee are listed at the end of this document.

General Comments

1. We understand that in the previous tax investigation, tax authorities have been facing a lack of comprehensive and relevant information on potentially aggressive or abusive tax planning strategies, leading to a difficulty when acting against the abusive tax avoidance, and we basically agree on the direction to introduce the mandatory information disclosure rules which would have highly deterrent effect and ensure fair international competition.

2. On the other hand, as the purpose of collecting the information, it is expressed to grasp the big picture of MNEs and deter the potential abusive tax avoidance before and after it occurs, but it will be difficult to judge as an abusive tax avoidance which should be disallowed with the vague definition regarding the “abusive” and “tax avoidance” etc. even if tax authorities could obtain the related information. Thus, a clarification of the definition should be prioritized.
3. Abusive tax planning can be deterred in a significant extent by concretely executing the other Action Plans and specifically, in terms of grasping the big picture of MNEs, submission of Master File and CbCR in Action Plan 13 would be sufficient enough. Therefore, considering the compliance cost of the taxpayers, introduction of mandatory disclosure should be conducted step by step and limitedly after making sure of the effect of those other Action Plans.

4. To be specific, until 2020 in which the effect of Action Plan 13 will be reviewed, it would be realistic to specialize in uniformly introducing Ruling regimes, Survey and Questionnaires and Co-Operative compliance programs which had already been introduced by many countries. Afterward, only if the further action is necessary as a result of verifying the deterrence effect of Action Plan 13 and other Action Plans against abusive planning, the mandatory disclosure that has not been introduced by many countries may be first discussed in a view of transparency.

5. It is important to confirm to tax authorities regarding the fact that the transactions, whose information is collected, do not necessarily mean the abusive planning. But it is also essential to propose the guidance of treating the collected information in the tax execution and check the abusive taxation.

6. Also, tax authorities should commit to lay down information management policies to prevent the divulging of information and to facilitate the environment for maintaining confidentiality.

Specific Comments

Chapter III. (Options for a model mandatory disclosure rule)

A. Who has to report

Paragraph 62

As mentioned above, we do not support the all-at-once introduction of mandatory disclosure regime at this moment, but if we are to choose, Option B that the principal of disclosure from the promoter would be desirable for the purpose of reducing compliance-related work burden for taxpayers.
The content of the disclosure by the promoters should be informed to the taxpayers in advance in order to avoid the repeated reporting.

Who to report and which transactions to be reported are still unclear, so it should be more clearly defined in order to ensure the taxpayers’ predictability and to reduce excessive administrative burden for both taxpayers and tax authorities.

The companies, who do not conduct the abusive tax avoidance, generally appoint the promoters only in cases where a complicated scheme is inevitable from business perspective, and the appropriate tax risk management is the main purpose, for example, consultants are appointed to review an unexpected risk of double taxation or a risk of being unintentionally regarded as tax avoidance in respect of a particular transaction. Therefore, it is very unlikely for such companies to formulate an aggressive scheme by themselves. In this regard, since companies do not usually consult once again with a promoter who has been appointed to review tax implications of their similar transactions in the past, there is a possibility for such companies to be obliged to disclose by themselves instead of promoters. However, as mentioned above, since its purpose is appropriate tax risk management, this should not be treated as a reportable transaction.

**Paragraph 76**

Discussion Draft suggests that the taxpayers should report the transactions in case the promoters are located in offshore or they insist their legal professional privilege, but it is not appropriate to shift all the obligations onto the taxpayers. Hence, it should be recommended that the content of the disclosure should be limited in view of the burden of the taxpayers.

**B. What has to be reported**

**Paragraph 83-86**

Since the transactions that have to be reported should be limited to those whose main purpose is to enjoy tax benefit, multi-step or threshold approach (Option B) would be originally desirable. However, it is difficult to determine what has to be reported, especially when the promoter discloses the information. In addition, it is unclear how the “main benefit test” which is suggested as the threshold in multi-step approach works. Therefore, when the compliance cost is considered, a single-step approach (option A) would be a
realistic choice.

**Paragraph 89**

- We suggest that the amount of taxable income deriving from transactions should be used as monetary amount for De-minimis filter, since the amount of tax advantage cannot simply be compared on an apples-to-apples basis due to differences in the tax position of each taxpayer.

**C. Hallmarks**

**Paragraph 115**

- In terms of improving the predictability, objective hallmarks (option B) would be desirable. In this regard, tax authorities of each country should understand that a duty of confidentiality imposed by Japanese companies to their promoters is not for the purpose of tax benefit, but rather for the confidentiality for their own business purpose. Therefore, it should be ensured that the transaction imposing a duty of confidentiality by taxpayers on promoters is not within the scope of mandatory disclosure.

- Under the subjective hallmarks (option A), since the taxpayers cannot easily determine whether or not the transaction has to be reportable, it is not desirable. Considering the timing of report, it is desirable that the disclosure of transactions is made only when the scheme is executed.

- Regarding setting specific hallmarks, it is recommended that each country shall define them by considering each tax policy. However, specific hallmarks shall be foreseeable for taxpayers, therefore domestic tax law should list the item of specific hallmarks restrictively.

**D. When information is reported**

**Paragraph 140**

- Where the promoter has the obligation to disclose, linking the timeframe for disclosure to the availability of the scheme may prove problematic considering the subjectivity that may be involved in the promoter's decision to claim whether a scheme is “made available for implementation” and ready to be promoted. Taking the mere fact that a scheme is being promoted or sold as the trigger event for disclosure may result in an excessive compliance burden, when in fact there is no guarantee that such a scheme will be implemented by
taxpayers. On the other hand, as far as the timeframe linked to implementation of scheme is concerned, it would need to be considered as to how the promoters can capture the implementation of the scheme by taxpayers. Therefore, there would be issues to be considered in both option A and B.

E. What other obligations should be placed on the promoters or users

**Paragraph 162**

- Option B under which only clients list is submitted would be desirable because providing the clients list is sufficient for identifying scheme user.

F. Consequences of compliance and non-compliance

**Paragraph 174-200**

- In case there are differences between the subjective judgment of taxpayers or promoters and authorities, opportunity to be heard prior to imposing penalties should be granted.

Chapter IV. (International tax schemes)

B. Recommendation on an alternative approach to the design of a disclosure regime for international tax schemes

**Paragraph 241-243**

- Since taxpayers and promoters do not verify the material tax consequence in both aspects of cross-border, the cases that are difficult to be captured by taxpayers and promoters are likely to occur. Therefore, there is a limitation when actually taking an action.

- The specific definition of “material economic consequence” and “material impact” and examples of “involve” should be clearly mentioned.

**Paragraph 255**

- In order to reduce excessive administrative burden for taxpayers, the disclosure requirements should be deemed satisfied once the taxpayers disclose all information they have in hand. Identification of the persons who are believed to hold the missing information or requesting information thereto should be handled between tax authorities.
**Question 21**

- OECD places mandatory disclosure rules as the useful scheme for tax authorities in the public discussion draft. However, to make the regime more effective, protection for taxpayers who are properly in compliance for the regime shall be taken into consideration for taxpayers who properly observe this disclosure rules. For instance, it would be desirable that the development of laws for waving penalty is recommended to each country, where under the laws, the taxpayer is exempt from any penalties even if the reported transaction is subject to correction in tax assessment, considering the fact that transaction has been reported properly by the taxpayer or the promoter without any intention to disguise or conceal in accordance with advance disclosure rules.
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General Comments

We understand the objectives of Action 12 that are to deter some multinational enterprises from undertaking aggressive tax planning (ATP), prevent base erosion, and ensure a level playing field. Strict control should be exercised over the promoters of base erosion and profit shifting (BEPS) schemes and abusive taxpayers who develop and use those schemes.

Nonetheless, it is not acceptable for ordinary taxpayers to suffer an undue increase in the administrative burden. Even if a mandatory disclosure regime were to be introduced, the majority of entities not engaging in ATP would not in principle be deemed parties obligated to report because they do not actively conduct such activities as buying and developing on their own the reportable schemes proposed in the Public Discussion Draft. Still, there is the concern that such a regime may lead to increases in compliance costs and disputes with tax administrations in the event of the regime lacking objectivity (as exemplified by the main benefit test and subjective hallmarks discussed below), having no materiality threshold, or requiring extensive information disclosure on the pretext of preventing ATP. Therefore, a balanced discussion is absolutely necessary under the acknowledgement of the need for protection of the fundamental rights of taxpayers, such as ensuring predictability and confidentiality. In addition, disclosure rules with sanctions might cause overcompliance. Attention should therefore be paid to the fact that the mind-set of taxpayers varies from country to country.

As Japan has no mandatory disclosure rules in place, we have not been able to sufficiently scrutinize the current regimes of other countries and the contents of the Public Discussion Draft within the short time frame given to us. Whereas under such circumstances we find it difficult to determine whether those rules should be introduced or not, we at least believe that, when considering a mandatory disclosure regime, taking into account the following four points is vital:

The first is the interaction with other BEPS Actions. As Action 13 leads to the provision
of information through a master file and local files and the recommendations pursuant to other Actions (especially Actions 2, 4, 6, 7, and 8–10) are expected to significantly deter the use of BEPS techniques, compliance with international tax rules is likely to increase. While taking the perspective of international harmonization is important, it is equally important to examine how much progress has been made under other BEPS Actions and to review, based on the findings, how much risk each tax administration is still exposed to. It is debatable whether every country has situations that require the uniform application of Action 12 recommendations as early as possible.

The second point to consider is the specifics of a mandatory disclosure regime, were it to be introduced. As described under “design principles” in page 14 of the Public Discussion Draft, due consideration should be given to designing rules that are clear and easy to understand, and balance additional compliance costs to taxpayers with the benefits obtained by the tax administration, among other things.

Thirdly, clarification should be provided regarding the interaction with other disclosure rules such as advance ruling regimes and cooperative compliance programs. For the countries where those rules have already been introduced, it is essential to adjust what has to be reported under a mandatory disclosure regime in line with the existing rules in order to ensure that the introduction of the regime will not result in dual reporting obligations. Especially, the countries in which an advance ruling regime is not legally binding should also take into account legislating an advance ruling regime in parallel with introducing a mandatory disclosure regime. Another important matter to note is that, whereas the work on Action 12 is supposed to be coordinated with the work on cooperative compliance, the Public Discussion Draft is not clear enough as to how taxpayers subject to mandatory disclosure rules are positioned within the cooperative compliance framework. Further careful examination is required on this matter as well.

The fourth point is an application to international tax schemes. As part of BEPS countermeasures, the main challenge faced by Action 12 is thought to be how to apply the recommendations to international tax schemes. However, the criteria for application leave room for broader interpretation by each nation, raising serious concerns about a possible undue increase in the volume of information to be disclosed by taxpayers. In addition, tax authorities would use disclosed information unilaterally to ensure their tax revenue and therefore, an additional risk of double taxation would be caused in the situation that bilateral mutual agreement procedures under tax treaties are not virtually working in many countries. Another matter we deem crucial is information exchange among tax administrations, about which the Public Discussion Draft only states that further work will be done along with the work on Actions 5 and 13 (paragraphs 13 and 254). We cannot help but have the impression that the guidance for this matter is not sufficient in the Public Discussion Draft.

The Public Discussion Draft offers recommendations on mandatory disclosure rules and on a mandatory disclosure regime for international tax schemes. Based on the general comments stated above, we present below our comments on specific issues.
Comments on Specific Issues

III. Options for a Model Mandatory Disclosure Rule

A. Who Has to Report

• The Public Discussion Draft provides two options: Option A is that both the promoter and the taxpayer have the obligation to disclose separately; and Option B is that either the promoter or the taxpayer has the obligation to disclose. We consider it preferable to combine Option B with the placement of the primary disclosure obligation on the promoter.

• Imposing the reporting obligation on both the promoter and the taxpayer would unduly increase the administrative burdens of not only the taxpayer but also the tax administration in the form of larger enforcement and compliance costs. To avoid that, the primary disclosure obligation should be placed on the promoter who has a thorough knowledge of the entire scheme.

• Imposing the reporting obligation on the promoter is expected to lead the promoter to inform the taxpayer that the proposed scheme will be disclosed as a reportable transaction to the tax administration. That way, the use of tax avoidance schemes will be effectively deterred. Additionally, where the proposed scheme by the promoter would be not adopted actually, or adopted with some modification on the taxpayer side, a difference between the content reported to tax authorities by the promoter and the actual implementation by the taxpayer would be caused. Therefore, it is one idea that the promoter should confirm the content reported to tax authorities with the taxpayer before they disclose the reportable transaction.

B. What Has to Be Reported

• The Public Discussion Draft proposes two options, Option A being a single-step approach and Option B being a multistep or threshold approach (Box 3). It then outlines, in connection with the threshold approach, a main benefit test that is employed by many countries and uses the criterion of whether “the tax advantage is, or might be expected to be the main benefit or one of the main benefits of entering into the arrangement” (paragraph 81). The BEPS Project’s objective of curbing abusive tax avoidance transactions implies that the reportable transactions should be limited to ones whose main benefit is to obtain tax advantages. From that standpoint, Option B (multistep or threshold approach) seems preferable on paper.

• In practice, however, the efficient operation of mandatory disclosure rules calls for the rules to be clear and easy to understand as described under “design principles” in page 14 of the Public Discussion Draft. From that perspective, the main benefit test is not a desirable choice in that the criterion of whether the main benefit is to obtain tax advantages is ambiguous. Rather, the preferable method is to combine
Option A (single-step approach) with filters (e.g. monetary filter) in order to produce effects similar to those of Option B (multistep or threshold approach). Additionally, given that risks vary depending on the hallmarks mentioned below, the filters (e.g. monetary filter), if employed in combination with Option A, should be diversified accordingly.

C. Hallmarks

- For designing generic hallmarks, two options are proposed: Option A being subjective hallmarks and Option B being objective hallmarks (Box 6). The adoption of Option A (subjective hallmarks) will call for the value of schemes to be reasonably estimated. There is the concern, however, that this process of examining scheme specifics may not be free from subjective judgments by tax administrations, as reflected in the use of phrases like “new and innovative transactions” and “reasonably be expected.” Such subjective judgments may cause disputes between reporting entities and tax administrations, undermining predictability. In view of the design principles dictating that mandatory disclosure rules be clear and easy to understand, the adoption of Option B (objective hallmarks) is preferable as it will more effectively ensure fairness.

- Although the confidentiality obligation owed by the client to the promoter is mentioned as a generic hallmark, it is common that, even under a standard tax-consulting agreement that is not aimed at obtaining tax advantages as its main benefit, each party owes confidentiality obligations to the other. Therefore, attention needs to be paid so as to prevent a transaction from being deemed reportable solely because of the existence of a confidentiality clause in the agreement.

- We consider that the use of specific hallmarks in ways supplementing objective hallmarks will be instrumental in clarifying the hallmarks.

D. When Information Is Reported

- The Public Discussion Draft proposes two options, Option A being a time frame linked to availability of a scheme and Option B being a time frame linked to implementation (Box 8). From the perspective of obtaining early information, which is one of the main objectives of mandatory disclosure rules, it is preferable that the primary disclosure obligation is placed on the promoter, who is then required to disclose information at the timing of Option A (time frame linked to availability of a scheme). However, a more clarified guidance should be provided since the definition of “availability of scheme” solely mentioned that ”at this point all the information on how the scheme works must be available” in paragraph 141.

E. What Other Obligations Should Be Placed on the Promoters or Users

- Identifying scheme users through the scheme reference numbers and client lists
provided by the promoter is proposed as Option A in Box 9; and in cases where a country places the primary disclosure obligation on the promoter, the adoption of Option A is recommended in paragraph 172. Whereas the paragraph continues to recommend that, where domestic law allows, client lists be automatically provided to the tax administration, we believe it necessary to ensure that such automatic provision is made in a manner that considers the confidentiality obligation owed by the promoter to the client.

F. Consequences of compliance and non-compliance

- Although Paragraph 200 states that "In order to enforce compliance with mandatory disclosure rules, countries should introduce financial penalties that apply if there is failure to comply with any of the obligations introduced.", certain incentives for taxpayers who comply properly with mandatory disclosure rules should be taken into consideration to enhance compliance more effectively.

IV. International Tax Schemes

- Regarding an international tax scheme that a domestic taxpayer is obligated to report, the Public Discussion Draft recommends that it be defined as “a transaction with a domestic taxpayer that has material economic consequences for that taxpayer or material tax consequences for one of the parties to that transaction” in paragraph 243. We, however, have the following concerns about this recommendation:

  (1) The guidance given is insufficient regarding what constitutes “material economic consequences” and “material tax consequences”. Clarification and examples should be provided as to the transactions that have material economic consequences and material tax consequences. The timing at which those consequences are deemed to arise needs to be specifically defined as well.

  For instance, in the Figure 3 example, the principal amount of an interest free loan provided by A Co. to B Co. is deemed to have material economic consequences for A Co. (paragraph 259). Yet, the question remains as to what the term “material economic consequences” specifically means in this context. Does it mean that B Co.’s recognition of a deemed interest payment for the loan and reduction in its tax burden will indirectly cause A Co.’s economic benefits to increase? Or, does the term refer to the transfer of funds itself?

  (2) A problem also lies in the phrase “material tax consequences for one of the parties to that transaction.” As cross-border transactions and supply chains become increasingly complex in today’s globalized economy, there are cases in which the taxpayer and the promoter are unable to grasp all the relevant cross-border transactions and supply chains. Furthermore, in the event of specific hallmarks being defined not specifically but broadly, the scope of information to be disclosed would widen indefinitely, raising concerns about abusive disclosure requests being made on the pretext of capturing ATP. For these reasons, we believe it essential to set certain limitations on the scope of
the parties to a transaction, for example, only parties immediately involved (based on governing tax law in the relevant jurisdiction) with a transaction should have an obligation to report.

- Another concern is that, in the absence of a domestic promoter, the domestic taxpayer may be required to disclose information on the international tax scheme perceived to be high risk (in which the taxpayer is involved, in which material economic or tax consequences arise, and in which those consequences arise within the same controlled group or the taxpayer was a party to the arrangement), based on paragraph 251. This would increase the burden on taxpayers.

- Paragraph 253 states that, if a domestic taxpayer does not possess the information required by the tax administration with regard to the reportable international tax scheme, the domestic taxpayer “should identify the persons who are believed to be hold the missing information and certify that requests for that information have been made to those persons.” In the detailed design of a mandatory disclosure regime, due attention needs to be paid so that the tasks of identifying persons and certifying requests will not create an additional burden on taxpayers.

Sincerely,

Subcommittee on Taxation
KEIDANREN
Comments on the OECD Public Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules

Professionals at KPMG welcome the opportunity to comment on the OECD’s Public Discussion Draft on BEPS Action 12 Mandatory Disclosure Rules (“Discussion Draft”). KPMG commends the OECD for getting the business community involved on this important and challenging issue.

General comments:

We support the BEPS initiative and appreciate that any modern tax system should ensure the ethical behaviour of both advisors and taxpayers and should be able to respond to transactions that achieve unacceptable outcomes.

There is an expectation that the wider BEPS action plan on matters such as hybrids, treaty abuse, and transfer pricing, including with respect to intangibles and country-by-country reporting, will resolve many of the perceived problems of the current international tax environment. On that basis there may be arguments that no disclosure regime is necessary. However, we accept that governments may still have concerns that unacceptable international tax behaviour may continue and that such behaviour is identified and resolved in a timely fashion.

Whilst we accept these concerns we consider that the Discussion Draft does not provide sufficient information or suggestive changes which need to be discussed and analysed in further detail prior to concluding that a mandatory disclosure regime is the right answer. In particular, we hold the view that the Discussion Draft fails to explain:

(a) What mischief these proposals are trying to identify without which it is difficult to judge the merits and practical implications of a mandatory disclosure regime.

(b) How sharing of information (whether via mandatory disclosure or some other system) should be responded to by governments/tax authorities;

(c) How compliance can be monitored and enforced on an international scale;
(d) How a mandatory disclosure regime can be kept up to date or ‘future-proofed’ for future tax developments; and

(e) Why mandatory disclosure is the best way to tackle the problem or if there are other approaches which might be better suited.

(a) The mischief these proposals are trying to identify

First, the Discussion Draft does not clearly articulate the mischief that the proposed international mandatory disclosure regime is designed to deal with. The Discussion Draft does not state whether the intention is only to identify transactions that are inconsistent with the final Action Plan recommendations or whether mandatory disclosure is intended to extend beyond BEPS items (and whether this is to be left to individual jurisdictions to determine).

Assuming the intention is only to capture transactions inconsistent with the Action Plan recommendations this would imply that there should be some form of ‘filter’ to ensure that BEPS compliant transactions or structures are not disclosed.

The Discussion Draft recommends no filters or thresholds such as a principal purpose or benefits test of tax avoidance or a ‘tax savings’ threshold. Without this there is a risk of over-disclosure leading to increased compliance for taxpayers and the potential for increased tax authority audits on what may be routine transactions.

Arguably the recommendation that any hallmark should focus on ‘outcomes’ rather than the methodologies of achieving those outcomes goes some way to filtering ‘non-BEPS compliant’ transactions. However, it is difficult to comment on specifics when the objective has not been clearly identified. If the target is non-BEPS compliant structures there may be benefits in waiting until the outcome of other Action Plans are known before proposing the form of a hallmark for international transactions.

(b) How information should be responded to by governments/tax authorities

Second, the Discussion Draft does not explain how governments are expected to respond to a disclosure (both from a domestic and an international perspective). Without this clear guidance we believe it is difficult for individual countries to understand the merits or otherwise of an international disclosure regime.

A particular country’s level of concern at a transaction that achieves a domestic advantage will be higher than a transaction that achieves an international advantage. Further, some countries offer attractive tax regimes to generate inward investment and would not perceive their regime as something which needs to be amended. These tensions may mean that any disclosure regime may be ineffective or, worse, may lead to negative outcomes such as unilateral action leading to double taxation. However, without
understanding how the information is expected to be used it is difficult to assess the effectiveness of the proposals.

This may be best articulated using an example.

A multinational group finances all of its trading subsidiaries via a tax efficient structure in Country A. Country A has given a ruling on the structure implying that Country A does not perceive there to be any abuse or threat to its tax base. The overall tax analysis of the financing arrangement is that trading subsidiaries in multiple locations obtain a deduction for interest which is equivalent to the deduction they would obtain if the funding were on arm’s length terms (transfer pricing operates to make this so) but the lender (in Country A) pays minimal or no tax.

In most domestic disclosure regimes this would not be disclosable unless targeted by a specific international hallmark because there is no domestic tax advantage over and above a third party arrangement.

What response should arise from a disclosure of this transaction in the relevant jurisdictions? One answer would be that the jurisdictions of the trading subsidiaries should disallow the deduction but they may be unwilling to do so as there is no domestic abuse and such action might make their country comparatively uncompetitive unless they know all other countries will apply the same treatment. Also, to do so would represent unilateral action which is widely accepted to be detrimental to the international tax system.

Should Country A be expected to change their rules? Country A has given a ruling so Country A is either unconcerned by the arrangement or they may see the arrangement as maintaining or improving their tax competitiveness. It is not clear how or why Country A would respond.

It is interesting to note in this example that there would presumably be multiple disclosures, one from each trading jurisdiction as well as Country A. It also assumes that each trading jurisdiction possesses the information necessary to understand that there is an international tax advantage. If the group’s modus operandi is that all loans are obtained from a global financing entity there would be no reason for a trading subsidiary to be aware of how the loan is structured ‘behind the scenes’ and therefore what, if any, cross-border advantages arise and therefore whether any disclosure obligation has been triggered.

Further, we note that this example highlights the overlap with other actions and the lack of a coherent approach. Given the existence of a ruling, the transaction will be disclosed to other countries under the automatic exchange of rulings proposed under Action 5.

(c) How compliance can be monitored and enforced on an international scale

Third, the Discussion Draft does not explain how compliance can or will operate in an international regime. Chapter IV is silent on the matter of penalties, however, encouraging compliance without some
form of negative consequence arising will be difficult. Clearly penalties are used to ensure compliance in domestic disclosure regimes but in these cases governments will be invested in ensuring compliance because there will be a perceived domestic abuse. Whether they will be as invested in policing a regime that identifies tax advantages arising in other jurisdictions remains to be seen, particularly where local businesses may obtain a benefit at the expense of a country other than their own.

The Discussion Draft is also silent on what measures could be introduced to ensure countries respond to disclosures. This requires a multilateral framework with local administration (as do other of the BEPS Action Points). However, without some form of consensus on how disclosures should be dealt with by the relevant tax authorities there is a clear risk of no action being taken which potentially means that any disclosure regime is of no value, alternatively it may result in an increased compliance burden and cost for no reason, or to unilateral action being taken by countries which could lead to, for example, double taxation.

We note that the penalties need to be proportionate. As the discussion draft notes, not all disclosed transactions will be of concern. Penalties which operate unfairly will encourage over-reporting which will create unnecessary compliance and tax administration costs.

(d) Keeping a mandatory disclosure regime up to date or ‘future-proofed’

Fourth, any mandatory disclosure regime should have the ability to identify future developments in ‘tax technology’ that are not acceptable. This is inherently difficult. In the UK some of the more prescriptive parts of the disclosure regime (those focused at known techniques or transactions) have become outdated because they have not been regularly reviewed. The key things to consider in keeping a regime up to date would be having a tax policy process which clearly defines the tax base and what is and is not acceptable. This would involve a continuous process of review to take into account business, technology, culture and other changes to test the framework. Revenue Authorities would need to understand the commercial environment and to assess the risk and benefits for the current tax base objectives. On a more domestic level it will require an audit and risk assessment process which gathers information early.

(e) Is mandatory disclosure the best way to tackle the problem?

Finally, the Discussion Draft does not explain why a mandatory disclosure regime is the best answer for identifying transactions that are unacceptable. The Discussion Draft compares six jurisdictions with a domestic disclosure regime and discusses how this could be extended to international transactions but as most jurisdictions do not have any disclosure regime it is not clear what the OECD recommendations are. Should all countries introduce a domestic regime and then extend it to international transactions? Or is the recommendation that only countries with an existing regime should extend it to international transactions? Or that countries with no disclosure regime should introduce a regime targeting purely international transactions?
Any mandatory disclosure regime will increase the tax uncertainty for a taxpayer (and this is acknowledged in the Discussion Draft) with the possibility of increased audit or multi-jurisdictional review of a transaction, which is why setting the right “scope” of targeted transactions is important. In addition, there could be reputational risk for a taxpayer and the relevant advisor with having a transaction disclosed as a “tax scheme” when such transaction, even if it produces tax benefits, is an ordinary course transaction.

**A Broad Ruling Regime**

Many jurisdictions adopt a ‘ruling’ system as an alternative to mandatory disclosure but this is dismissed as an alternative in the Discussion Draft. The justification for this is that ruling regimes do not all rule on the relevant country’s avoidance rules. We consider that this is a failing of the rulings regime rather than a reason to recommend a disclosure regime. Countries which rule on their avoidance rules provide certainty to taxpayers. Given that each Revenue Authority is required to consider and apply their avoidance rule on audit or other risk activity, there seems to be no reason why any Revenue Authority is prevented from ruling on their avoidance rule.

To illustrate the benefit of a broad rulings regime we outline the Australian regime and its effects.

Australia has a Private Binding Ruling (PBR) regime which allows taxpayers to apply for a ruling based on specific facts and circumstances disclosed by the taxpayer. As part of the clearance process the Australian Tax Office can also be asked to provide its view on whether Australia’s GAAR would potentially apply to the transaction as disclosed.

A ruling can be viewed as an alternative to mandatory disclosure because, as part of the ruling process, the taxpayer or promoter provides all relevant information to the tax authorities. Any departure from the facts and circumstances as disclosed can mean the ruling is invalid. The information provided would enable the relevant tax authority to share the information with other jurisdictions as appropriate.

A ruling can also afford taxpayers added certainty and greater efficiency in complying with the tax laws. If no clearance is provided a taxpayer may still proceed with a transaction but clearly there will be a heightened risk of audit and/or law change. However, the taxpayer proceeds in the full knowledge of this risk instead of bearing the uncertainty produced by a mandatory disclosure regime. If a domestic disclosure regime can be extended to address international tax matters then there is no reason to suppose that a rulings regime cannot be similarly extended.

**Interaction with GAARs**

Similarly many countries have introduced a General Anti-Avoidance Rule (GAAR). We acknowledge that, in common with current disclosure regimes and ruling systems, any GAAR is likely to be focused on domestic tax advantages. This further supports our comments regarding the need to properly scope a mandatory disclosure regime. There is no concept of international tax avoidance in any country’s GAAR. By definition avoiding another country’s tax is not within a country’s GAAR (and in fact, the international
tax benefits may be a reason why a country’s GAAR does not apply to avoid the domestic benefits if any). We consider that the focus of this action, given its BEPS context, is identifying transactions which are not within the tax base and which a country might consider ought to be rather than transactions which avoid tax in the tax technical sense. We consider that giving the regime this focus will help clarify its scope and therefore its design.

Most countries provide a pre-clearance process for the GAAR. If a transaction falls foul of a particular GAAR then it will be ineffective and in effect the tax code ‘self-polices’. Arguably this removes the need for such a transaction to be subject to mandatory disclosure. At the same time any GAAR clearance procedure would provide information to tax authorities which could potentially be shared via information exchange agreements.

If the final recommendation is that all countries should implement a mandatory disclosure regime then the interaction of this with any existing ruling systems and GAARs would need to be carefully considered. For those jurisdictions that already operate a rulings system which rules on the GAAR, a more flexible solution may be to exclude arrangements which are ruled upon. These transactions will by definition be disclosed to the Revenue Authority.

A principles based approach

Another alternative (and new) approach might be for the OECD to draft a set of ‘principles’ that countries could agree to apply. These would not be tied to specific metrics or transactions (which are already known about). Applying a set of principles would remove the need for a prescriptive approach and would allow each country to formulate domestic rules (whether via disclosure or a ruling system) that would enable a transaction to be examined. Processes could then be put in place for information about relevant transactions that breach the principles to be reported by the tax authorities via tax information exchange agreements.

Other areas of concern

There are a number of other areas of concern where we believe further consideration is needed:

The cost of implementing and maintaining a disclosure regime should not be underestimated. The burden on taxpayers, promoters and tax authorities on making and dealing with disclosures must be balanced with the benefits of early information about potential abuses. The Discussion Draft spends some time analysing existing mandatory regimes that are generally focused on domestic tax advantages. The underlying assumption that domestic regimes can easily be adapted to cater for international transactions may not be realistic. However, until the discussion about mandatory disclosure is set within the context of the broader strategic questions raised above the cost/benefit analysis is difficult to judge.

There are areas in the Discussion Draft which do not reflect the way in which international corporate transactions are undertaken. For example, in Chapter III on models for a disclosure regime the
Discussion Draft recommends that generic hallmarks should include a confidentiality and premium/contingent fee hallmarks. However, Chapter IV is silent on whether these generic hallmarks should apply to international transactions. In our experience, however, although these would be effective in capturing certain domestic arrangements, especially those that are pre-packaged and mass-marketed solutions, they are unlikely to be triggered in most corporate international transactions.

In a similar vein the Discussion Draft considers a standardised tax product hallmark. Again our experience is that this might be useful in identifying pre-packaged and mass-marketed schemes in domestic markets but we do not see use of these schemes in the international corporate environment.

The Discussion Draft recommends that the trigger point for disclosure should be around ‘availability’. Again, this is a concept that fits well with a transaction that is pre-packaged and mass-marketed but the concept is harder to define in a cross-border corporate environment where a transaction generally develops over a longer timescale and through a number of fact specific iterations. The transactions are therefore very bespoke and tailored. The challenge will be identifying the point at which something becomes ‘available’ in such scenarios. In addition, any disclosure should target the ‘core technology’ rather than the wider arrangements, not least to ensure that multiple disclosures of substantially the same technology are not generated.

The Discussion Draft does not deal to any substantial extent with the practical issues arising from a mandatory disclosure regime. For example,

- Within one jurisdiction there should be a filter to ensure that substantially the same transactions (or use of core technology) are disclosed only once. Multiple uses of substantially the same technology can then be notified via a reference number system and client lists.

- Is the intention that the same transaction could be disclosed in different jurisdictions (ie in all countries that implement a disclosure regime)? Or is the intention that once it is disclosed to one jurisdiction, this can exempt it from disclosure in the other jurisdictions (provided they are satisfied the disclosure is adequate)? How would this operate in practice? What happens if another country’s disclosure is considered inadequate?

- Is there a particular priority over which jurisdiction is expected to counteract any disclosed transaction or is this a domestic matter? In the notional interest example in the discussion Draft, assuming the transaction was also disclosed in Country B should Country B act to deny the deduction or Country A to tax the receipt? What is to prevent unilateral action by both leading to double taxation? (We also note that potentially the hybrid mis-match rules could apply. Is it intended that the disclosure would provide each country with evidence as to the level of the potential problem thereby encouraging implementation of that rule? If the rule has already been implemented and applies, the example should provide no concerns and should not need to be reported.)
• Is there an order to any disclosure? For example, should a disclosure occur first in, say, Country A which Country A could then share with Country B detailing the counteraction (if any) that Country A is considering?

• The Discussion Draft refers to the concept of a material advisor. Many regimes exclude certain types of advice from an obligation to disclose. This is particularly the case where a tax professional is commenting on another advisor’s structure or transaction. In this case their role is one of providing a second opinion but they are not involved in the active design or promotion of the transaction. It seems sensible to exclude such activity from triggering an obligation to disclose.

Finally, this action needs to consider and integrate its response with the recommendations of other actions. A transaction or arrangement which has been dealt with by another action should not need to be disclosed in a jurisdiction if that action’s recommendations have been implemented. This will minimise duplication and cost.

Responses to specific questions in the Discussion Draft

In relation to the questions posed in the Discussion Draft, we have specific comments on the following:

4. Are there any other features common to promoted schemes that you believe could be included in generic hallmarks?

   We consider that the primary ‘generic’ features would include, but not necessarily be limited to, confidentiality, premium or contingent fees and contractual arrangements. However, in our recent experience such features are generally only present in mass-marketed pre-packaged planning (normally this planning is sold by smaller ‘boutique’ promoters to individual taxpayers). We do not see these features in the types of cross-border transactions that the BEPS project is intending to target. Further, there are many commercial reasons that confidentiality may be required. Any confidentiality hallmark must be narrowly targeted at situations where the desire for confidentiality arises over the ‘tax technology’ to avoid triggering unnecessary disclosures.

   In our view, a generic hallmark for international transactions requires a different approach and in this respect we agree that the ‘outcomes’ hallmark suggested in Chapter IV is a good starting point although we believe thresholds and filters should also apply.

5. What is the best way of capturing those transactions where the promoter’s benefit is priced into the return on the transaction itself (rather than through a separate premium fee)?

   The UK used to have an ‘off-market terms’ hallmark which targeted structured finance products. The hallmark was removed from the regime in 2011. We understand the UK authorities received very few, if any, disclosures under this hallmark.
For the UK hallmark to be triggered certain tests needed to be met: (a) there had to be a UK tax advantage; (b) the arrangements had to include a financial product; (c) the promoter had to become a party to the financial product; and (d) the price of the product had to differ from that that would normally be available on the open market.

These types of transactions are considered to be very rare in the types of international transactions the BEPS project is designed to address. Even if there are some cross-border products of this type it is difficult to see how any disclosure obligation could arise on a user in such circumstances. If a taxpayer acquires a product from, say, a third party bank there is no reason to believe that information about how the product is structured or treated in other jurisdictions would be within the possession and control of the taxpayer. Disclosure of such transactions (if they do exist within the area targeted by BEPS) would need to be the responsibility of the promoter.

6. Are there any other specific hallmarks which should be considered but are not covered in the Discussion Draft?

The Discussion Draft details several specific hallmarks from different jurisdictions but each of these will be identified by the relevant jurisdiction as targeting specific areas of concern within their domestic tax landscape (this assumes that governments are generally concerned with taxpayers gaining domestic tax advantages rather than foreign ones). To put in place effective specific hallmarks for a mandatory disclosure regime for international transactions will require an assessment of specific international risks and may better suit an international mandatory disclosure regime that sits alongside but separate to any domestic regime. In this respect please see our later comments.

7. Have you encountered any practical and administrative difficulties in applying generic and specific hallmarks in practice? If so, why have these arisen and how could they be overcome?

Specific hallmarks are easier to apply as they generally tend to be very prescriptive. This means that a transaction is generally clearly disclosable or not disclosable. However, this can then mean that benign transactions are disclosed purely because they meet the tests even though there is no objectionable tax result.

It follows that specific hallmarks should make clear the tax result that they are trying to target and ensure that the hallmark wording is narrow enough that it does not result in unwanted disclosures. Governments should respond quickly to any unwanted or benign disclosures to give taxpayers comfort that their transaction is not a concern. However, the practical difficulties of drafting a narrowly targeted specific hallmark should not be underestimated. Specific hallmarks, if drafted too prescriptively, can become prone to aggressive promoters or taxpayers structuring transactions around the hallmark thereby avoiding disclosure.
Hallmarks focused on specific transactions or listed transactions are generally designed to gain information on ‘known’ transactions and can inform on the frequency of such transactions and the tax loss involved. However, they can become out of date very quickly and need to be regularly reviewed.

Generic hallmarks look to identify the ‘unknown transaction’ and therefore are designed to catch the new or innovative. In this respect they can be very powerful. However, generic hallmarks are harder to apply in practice. They involve the exercise of judgment which can be subjective. Often they require identification and assessment of a hypothetical which can be complex and, again, may involve a degree of subjectivity. This means generic hallmarks can produce challenges in monitoring compliance. For example, if a taxpayer or promoter does not disclose because they did not think it was something they wished (or a hypothetical person would wish to) keep confidential how does an authority demonstrate non-compliance and therefore justify the imposition of penalties?

8. Does a hypothetical test effectively address one-off or tailored transactions? Are there any other ways in which such transactions could be captured by a mandatory disclosure regime?

There is a difference between ‘one-off’ and ‘tailored’ transactions. A ‘one-off’ transaction implies something that will not be repeated and it is difficult to see why such a transaction would justify a policy response if it genuinely is an isolated occurrence. If no policy response is justified it is difficult to see why such a transaction should be disclosed.

A tailored transaction implies a transaction that is heavily adapted to meet a particular taxpayer’s commercial fact pattern. Within the transaction there may be a piece of core technology that may be capable of being used more widely, albeit in a heavily tailored scenario. However, it is not clear that applying a hypothetical test would lead to a bespoke transaction becoming disclosable.

Specific hallmarks focused on particular areas of concern may go some way towards capturing one-off and tailored transactions if this is the desired policy although these will only target a narrow area.

If, as the Discussion Draft recommends, any international hallmark is drafted on the basis of ‘outcomes’ rather than methodologies to reach that outcome it is difficult to see how this would not capture ‘one-off’, bespoke or tailored transactions.

9. Do any practical problems arise from an earlier reporting date and short timescale? If so, what are those and how could such issues be dealt with?

An early reporting date needs to use some concept of ‘availability’ as a trigger for disclosure. This concept of ‘availability’ works well with mass-marketed arrangements which are based on a fairly standard set of documents and tax analysis but is harder to define in a complex international transaction. In our experience an international corporate transaction requires significant due diligence both commercially and from a tax perspective and can therefore take months before the final form of the transaction and its tax analysis is known with any certainty. They are generally heavily bespoke and within that context it will be difficult to judge when something becomes ‘available’.
The earlier the reporting date the higher the risk that the form of the transaction (or the tax analysis) is not fully known. This could lead to supplementary or additional disclosures (and issues about when those supplementary or additional disclosure are triggered). There must be a balance between waiting until the transaction/tax analysis is fully formed and requiring earlier disclosure which risks supplemental or amended disclosures. And these must be balanced with the authorities need for early information. In the UK this is done by requiring disclosure when a promoter makes a ‘marketing contact’ with a client when a transaction is ‘substantially designed.’

However, the concepts of ‘availability’ or ‘implementation’ as trigger points for disclosure may be hard to monitor in an international transaction where many parties may have incomplete information.

The short time-scale for disclosure is more problematic the earlier the reporting date especially if the disclosure requires international input which the domestic taxpayer or promoter may not be fully competent to provide. Once the transaction is known and the analysis confirmed then a short timescale for disclosure becomes more practical.

10. What further information or detail is needed in respect of the concept of availability or is this clear?

As detailed above, availability is much easier to identify in pre-packaged planning but more difficult in heavily tailored and bespoke planning. Many cross-border transactions are heavily bespoke and therefore the concept of availability will be much harder to define. Countries will need to be prepared to issue detailed guidance on when that particular jurisdiction regards a particular transaction to be ‘available’.

11. What might prevent the automatic provision of client lists to the tax administration and how could this be dealt with?

There may be limits on what a promoter can provide to the authority in terms of confidential client information (even a client name may be confidential). This may be further complicated if a client list involves information about a client in another jurisdiction to that in which the list is being submitted. This may require specific law changes.

12. Do you think that the proposed disclosure form (in Boxes 10 and 11) will be appropriate to provide tax administrations with the information necessary to understand the reportable transaction?

In principle these are sufficient although reporting names of clients to whom the transaction was offered seems inappropriate for the following reasons:

- Client lists should operate on the basis of information about taxpayers that have implemented transactions rather than taxpayers that have been ‘approached’ by a promoter.
- This disclosure requirement places an unnecessary compliance burden on the promoter or adviser and, since it is not focused on implementations, will fail to deliver any useful information to the authority about tax loss.
It presumes a ‘mass-marketed’ and ‘pre-packaged’ approach to international tax transactions. In practice international corporate transactions are heavily bespoke and tailored and come to fruition through an iterative process.

It is not clear how ‘future approaches’ to clients (ie approaches after the disclosure) would be dealt with.

In our view it is better not to require submission of a ‘target’ list at the time of the disclosure but focus information on actual implementations after the disclosure has occurred.

13. Are there any other information powers that would be necessary in the context of obtaining information from a promoter or advisor?

Provisions will be needed to cater for particular problems, for example, legal professional privilege, rules of self-incrimination and contractual confidentiality.

14. Do you think that the Recommendations will be effective to capture international schemes, and, if not can you suggest alternative approaches?

In our view the capturing of international schemes requires a combination of generic and specific hallmarks. We agree with the Discussion Draft that, in an international context, a hallmark that focusses on the outcomes (such as double deductions or deduction with no inclusion) rather than the way in which the outcome is achieved can be seen to be both generic and specific.

It would not only result in the disclosure of ‘known’ transactions that achieve such results (which would in turn inform authorities about the quantum and frequency of such transactions) but it would effectively provide a tool to collect information on ‘unknown’ new transactions that achieve the outcome through new innovative techniques.

There may then be a requirement to include some additional specific hallmarks to target particular areas. For example, an ‘outcome’ hallmark targeting double deductions may adequately catch hybrid arrangements but it might not catch treaty abuse transactions and therefore it might be necessary to have a supplementary specific hallmark that is designed to target particular areas of concern identified by some of the BEPS Action Points.

On the basis that any international disclosure regime should be targeting transactions that are not within the ongoing BEPS action plan proposals (ie are not ‘BEPS compliant’ in the future) we consider that there is a case for a filter or threshold in any disclosure regime that exempts ‘BEPS compliant’ transactions from unnecessary disclosure.

Further we think a threshold around a main purpose or benefit of gaining a tax advantage should be included and that, where a taxpayer has received a tax ruling or clearance on the transaction, that transaction should be exempt from disclosure.
We also consider that it may practically be difficult to extend existing domestic regimes to international transactions by merely adding a hallmark or similar. There should be flexibility that those countries with existing mandatory disclosure regimes can introduce a new regime that sits alongside but is separate to the existing regime. Please also see our earlier comments about counties that have a ruling system or a GAAR.

15. Are the purpose and meaning of the terms used in the chapter clear, if not what further clarification is necessary?

Terms such as ‘material’ need further clarification. For example, is this based on a normal audit concept of materiality or some other concept? Is it group-wide or entity specific? The Discussion Draft implies this may be an absolute monetary amount which seems arbitrary.

We also think the concept of ‘availability’ may need some further work.

16. Do you think that the Recommendations will impose an undue compliance burden on taxpayers and promoters? If so, why?

There will be costs associated with implementing and, more importantly, maintaining a mandatory disclosure regime which is why it is vitally important that the regime is appropriately focused and leads to the disclosure of relevant and valuable information to tax authorities. The cost of implementing a regime should not be underestimated.

As currently drafted we think there is capacity for the recommendations to result in multiple disclosures in multiple jurisdictions. We also believe that the implications of a mandatory disclosure regime that sits alongside and interacts with existing disclosure systems, ruling systems and GAARs have not been considered.

Further, any recommendations in this area must have regard to the recommendations of other actions. Otherwise, there is likely to be unnecessary duplication as well as unnecessary disclosure.

We trust the above is useful and would be happy to respond to further Discussion Drafts in this area.

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About KPMG

KPMG is a global network of professional firms providing Audit, Tax and Advisory services. We operate in 155 countries and have more than 162,000 people working in member firms around the world. The independent member firms of the KPMG network are affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. Each KPMG firm is a legally distinct and separate entity and describes itself as such.
Dear Mr Pross

BEPS Action 12: Mandatory Disclosure Rules

Matheson welcomes the opportunity to comment on the public discussion draft issued under Action 12 (the “Discussion Draft”) of the base erosion and profit shifting (“BEPS”) project.

Matheson is an Irish law firm and our primary focus is on serving the Irish legal and tax needs of international companies and financial institutions doing business in Ireland. Our clients include over half of the Fortune 100 companies. We also advise seven of the top ten global technology companies and over half of the world’s 50 largest banks. We are headquartered in Dublin and also have offices in London, New York and Palo Alto. More than 600 people work across our four offices, including 75 partners and tax principals and over 350 legal and tax professionals. We are familiar with the structure and operation of the Irish mandatory disclosure regime which was introduced in Ireland in 2010.

Comments made in this letter are made solely on our own behalf.

1 General comments

Generally, we welcome the proposals made under the Discussion Draft requiring disclosure of “tax avoidance schemes”. One general point that we consider is important to bear in mind is that giving due consideration to the tax effects of a commercial transaction should not bring that transaction within the remit of tax avoidance. For example, if a taxpayer is considering buying an Irish business, the taxpayer will have to decide to acquire either the assets of the business or the shares of the business-owning company. Amongst other factors, taxpayer will likely have regard to the stamp duty cost arising on the acquisition of the business (1% on the acquisition of shares or 2% on the acquisition of
assets). If the taxpayer opts to acquire the shares rather than the assets, that, of course, should not render the transaction as one in the nature of avoidance.

That aside, we have focussed only on the proposals in respect of so-called “international tax schemes” and have limited our comments to question 21 – Do you think that the Recommendations will impose an undue compliance burden on taxpayers and promoters? If so, why? We consider that the proposals will impose an undue compliance burden on taxpayers and promoters and have set out below the reasons why.

2 The proposals are not sufficiently targeted

The proposal not to include any avoidance threshold requirement means that the recommendations under Action 12 will not be sufficiently targeted and will require taxpayers to disclose transactions that were entered into for commercial reasons. This is unreasonable and will impose an undue compliance burden on taxpayers. Similar to the approach under chapter III of the Discussion Draft, it should be open to countries to incorporate an avoidance threshold in their rules targeting transactions with a cross-border tax outcome.

Requiring transactions that have particular tax outcomes or other hallmarks to be disclosed if one of the main purposes of the transaction is to avoid tax reflects a more balanced approach. It limits the number of transactions taxpayers are required to disclose and ensures that revenue authorities are not swamped with disclosures relating to transactions entered into primarily for commercial reasons. Just because a transaction includes a “cross-border tax outcome” should not automatically result in it being deemed to be an avoidance transaction or equivalent to an avoidance transaction for compliance purposes. Commercial transactions are frequently entered into that give rise to a cross-border tax outcome where that outcome is not the main purpose or one of the main purposes of the transaction. This should be reflected in the recommendations issued under Action 12 and an anti-avoidance threshold requirement, or, at least, the option for countries to incorporate an anti-avoidance threshold ought to be included.

3 The obligations to disclose are imposed on too broad a range of taxpayers

It is proposed in the Discussion Draft that a taxpayer would be required to disclose a transaction that gives rise to a cross-border tax outcome where the taxpayer was party to the transaction. Paragraph 235 of the Discussion Draft provides that taxpayers should only be required to disclose information that is within their knowledge, possession or control. It is not clear whether the parameters described in paragraph 235 also apply to the recommendations made in paragraph 248 (described in the document as part of an “alternative approach”). This should be clarified.

If the parameters described in paragraph 235 do not apply, it seems that transacting parties will be required to know the tax treatment of the other contracting parties to a transaction. Where transactions are entered into between unrelated parties acting at arm’s length, more often than not, those parties will have no knowledge of the tax treatment of the other transacting parties. It is unreasonable to expect disclosure where taxpayers have no knowledge of whether the transaction gives rise to a cross-border tax outcome.

Further, it is unreasonable to expect taxpayers to obtain information regarding an unrelated counterparty’s tax treatment of a transaction (beyond what is learnt during the course of an
ordinary commercial due diligence) for the purposes of a disclosure regime. Requiring a taxpayer to obtain that information from an unrelated party will, at the very least, reduce the speed at which transactions can be closed and in some cases may even hinder the transaction. A regime that requires a taxpayer to obtain such information may also be in breach of the counterparty’s rights to privacy and confidentiality of their tax affairs. In other cases it will be impossible for the taxpayer to obtain the information. For example, if a taxpayer wishes to raise finance and issues listed and cleared loan notes to the market, that taxpayer will have no visibility over who holds those notes, let alone what the tax treatment of the interest income is in that taxpayer’s home jurisdiction. The proposal that taxpayers would be required to disclose transactions with unrelated parties that give rise to a cross-border tax outcome is unreasonable and should at the very least be limited to circumstances where taxpayers have knowledge of the cross-border tax outcome as described in paragraph 235.

The Discussion Draft also recommends that taxpayers should be required to disclose a transaction that gives rise to a cross-border tax outcome where that outcome arises within the same controlled group. It is unclear whether it is implicit in this recommendation that the taxpayer also must be a party to the transaction and that the parameters described in paragraph 233 will also apply. If that is the case, it should be explicitly clarified in the final recommendations. However, if that is not the case and taxpayers could be required to disclose transactions that they are not party to, the recommendation is too broad. It is unreasonable to expect taxpayers that are not party to a transaction to make any disclosures or to have any compliance obligations in respect of it. Those obligations should rest solely with the relevant transacting parties.

4 Is disclosure targeting cross-border tax outcomes necessary?

If the final recommendations made under Action 12 provide that all countries should introduce a mandatory disclosure regime, it is not clear that special provisions targeting cross-border tax outcomes would be required. If there is a sufficient take-up of mandatory disclosure regimes by those participating in the BEPS project, it should be expected that cross-border avoidance transactions would be reportable under those regimes.

The Discussion Draft points to the idea that cross-border tax planning schemes are often incorporated into commercial transactions and therefore can be difficult to target. It seems that this premise may be the basis for the alternative approach to targeting transactions with cross-border tax outcomes. However, that premise is difficult to accept. In our view, if there is a commercial transaction, tax avoidance should not be a concern. Base erosion in a jurisdiction can be targeted under a standard mandatory disclosure regime where that base erosion is combined with an avoidance purpose. If there is no base erosion, the transaction should not be disclosable. Equally, if the transaction is a commercial transaction, it should not be disclosable.

Targeting transactions that give rise to cross-border tax outcomes is duplicative. It will frequently require disclosure of commercial transactions in the absence of any tax avoidance motive. The recommendations in chapter IV of the Discussion Draft apply too broadly and in many cases are unworkable. For those reasons, we consider that the recommendations under chapter IV should be abandoned.
Thank you for the opportunity to comment on the Discussion Draft. Should you wish to discuss any of the points raised, please do not hesitate to contact us.

Yours faithfully

Sent by email, bears no signature

MATHESON
Comments on BEPS action 12: Mandatory disclosure rules

Dear Achim,

MEDEF is pleased to provide comments on the Discussion Draft “Mandatory disclosure rules” issued on the 31st March (hereafter “the draft”).

French companies consider OECD’s work in general and BEPS Action Plan in particular as crucial if it is to provide a fair, competitive and coherent global fiscal landscape. The forthcoming changes are numerous and will have a gigantic impact on the running of their business. Companies are in the best position to identify difficulties related to implementation, to give feedback on the practical feasibility and to geographically and temporally assess the OECD proposals.

They believe, however, that the operating mode, process and time-frame are inadequate to ensure a full and comprehensive analysis of the draft submitted for consultation. They regret the strengthening of this trend which will be detrimental to all: companies and Governments.
The draft does not concentrate exclusively on abusive tax schemes but rather seems to look for more generic information. The scope is too wide and goes beyond tax fraud and the objective of BEPS.

The draft (p.6) states that the main objectives of mandatory disclosure rules can be summarised as follows: (i) obtaining early information about tax avoidance schemes; (ii) identifying schemes, and the users and promoters of schemes; and (iii) acting as a deterrent to reduce the promotion and use of avoidance schemes. It also mentions “potentially aggressive or abusive tax planning strategies”.

This presentation is confusing:
- If the scheme is abusive: we do not see how a taxpayer would set up or buy a tax avoidance scheme knowing that it has to be disclosed. Because of its abusive character it will not be used and will not even exist in the first place.
- If the scheme is not abusive: there is no reason to disclose it as it falls outside BEPS’s scope.
- If the idea is to create a new mandatory constraint to assess whether the scheme is abusive or not: not only does the wide and vague definition of abuse create an unacceptable level of uncertainty for taxpayers, but also there is no positive return for them since tax administrations are not required to validate the schemes thus declared. In this regard, we strongly regret that no counterpart, involving transparency from tax administrations, is offered to the taxpayer.

Besides, and even more important, we believe that tax administrations already have at their disposal the appropriate tools to tackle aggressive or abusive tax planning strategies: GAARs already discourage taxpayers from entering into such arrangements and many additional ways exist to obtain early information: rulings, additional reporting obligations, surveys, cooperative compliance programs. We therefore question the necessity of a new constraint for business.

As the draft is currently drafted, we have some serious concerns:

1. *The draft goes beyond what was originally envisaged*
   Disclosure for information purposes is an understandable objective if it is to improve current regulations to an ever-changing economic environment. This should ensure legislative adequacy to new and complex business models and a level playing field between them.
   However, there is a strong feeling that disclosure intends to exceed a purely informative function: indeed, revenue implications are also mentioned as a possible use of disclosed information (§24). Hence, we understand that it could also lead to tax audits. Disclosure is then departing from its true role of information to move towards a penalty system. This would definitely undermine relationship between tax payers and administration which is even more necessary in this context.
2. Disclosure is not appropriate in civil law countries

Mandatory disclosure is designed to provide for relevant information on potentially aggressive or abusive tax planning strategies. In this respect, it can be considered as a risk assessment tool which might help reducing promotion and use of the identified schemes. Risk assessment is a usual practice in common law countries in which off-site audits based on transmitted documents are carried out and it makes sense where on-going dialogue process with tax administration exists: tax auditors have an advisory role. Disclosure is a then way to work in concert and to evaluate the potential risks before they arise.

On the contrary, and logically, it does not exist in most civil law countries, such as France, where on-site audits are conducted and data directly collected in the company. Tight connexion between accounting and taxation in the French system already allows the administration to get a good knowledge of the operations and transactions carried out in the company. Disclosure would then be assimilated to a request for a tax audit.

We would also like to draw your attention to extra compliance burden imposed on such companies that are actually not submitted to this kind of documentation requirements. Besides, according to BEPS, business would be subject to two risk assessments: CbCR and disclosure. Both are new for many groups and we therefore question the balance between additional compliance costs to taxpayers with the benefits for tax administrations. Finally, we would welcome more information on the articulation of these two assessment tools.

3. This draft appears as a transposition of the Anglo-Saxon rules which do not correspond to the general principles of French law

Consequently, possible regulatory or constitutional issues may arise:

a. Lack of clarity of the rules: clarity is the corner stone in comprehension for taxpayers and appropriate implementation for tax administrations. We are somehow perplex with the absence of clear definition for the abusive tax schemes. A “tax benefit” which could either be the main or one of the main purposes (§81) or a “material impact” are definitely not sufficient enough to meet this clarity requirement. As for France, the French Constitutional Court has rejected a proposal of disclosure of tax schemes included in the finance bill for 2014\(^1\) for lack of accessibility and comprehensibility of the law: in other words, the project was considered to be unclear and ambiguous creating an excessive legal uncertainty for taxpayers and a risk of arbitrary application of the law by tax the administration.

\(^{1}\text{Décision 2014-707 DC du 29 décembre 2014 : Considérant que le législateur tient de l'article 34 de la Constitution, ainsi que du principe de légalité des délits et des peines qui résulte de l'article 8 de la Déclaration de 1789, l'obligation de définir les crimes et délits en termes suffisamment clairs et précis.}
b. **Extensive definition of abuse:** the French Supreme Court decided in 2011\(^2\) concerning the participation exemption regime providing exemption of dividends following a capital increase: the operation has been considered as non-abusive since it was not realised for the sole purpose of avoiding or reducing tax liabilities.

It also has to be noted that the simple fact of reducing tax liabilities (e.g. tax benefit) is not to be considered as abusive according to the French Supreme Court\(^3\). To characterise an abuse of law, the notion of artificial arrangement or scheme is essential: “what seems an abuse of law [...] is not the only fact for optimising the choice of the location of a company to take advantage of comparative tax benefits within the EU but to create an artificial ad hoc structure, without any substance or own existence or self-justification, for the sole purpose of placing it in a given tax position ».

In those two cases, the Court sanctions a definition of abuse of law which is too wide especially as the purpose of benefiting from a tax benefit is not the only one.

c. **Conflict with professional secrecy:** as for France, promoters are most of the time-if not always- lawyers or members of regulated professions. In this regard, they would oppose their professional secrecy when being asked to disclose a list of clients. It is probably also the case in other civil law countries as in Portugal where promoters do not have any obligation to provide the clients list. (p.77).

Legal privilege whereby all communications are protected from being disclosed could create discrepancies as it apply differently and can benefit to different persons from one country to another. Disclosure might also affect in some extend the right of defence.

d. **Impossible fulfilment of some obligations:** the draft (§ 241) imposes on taxpayers the obligation to disclose information “even if they are not a direct party to the cross-border outcome”. When a document is not at the disposal of a taxpayer, this latter cannot be obliged to provide it to the tax Administration and before all not be sanctioned for the failure to do so. The French Constitutional court has issued a decision concerning a proposal in the Finance bill for 2014 where taxpayers were compelled to provide the French authorities with any decisions/rulings/guidelines issued by foreign tax Administrations to related entities. The decision has limited the scope of the proposal to information that is at the disposal of the taxpayer\(^4\).

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\(^2\) Conseil d’État, 15/04/2011, 322610

\(^3\) CE arrêt du 18 mai 2005, n°267087, SA SAGAL : « Or, dans la présente espèce, ce qui nous semble constituer un abus de droit [...] ce n’est pas le seul fait d’optimiser le choix de la localisation d’une société pour profiter des avantages fiscaux comparatifs au sein de l’Union européenne, mais de constituer une structure ad hoc, artificielle, sans aucune substance propre ni existence ou justification autonome, dans le seul but de se placer dans une situation fiscale donnée [...] ».

\(^4\) Décision n° 2013−685 DC du 29 décembre 2013 :Considérant, en second lieu, que les dispositions de l’article 98 n’ont ni pour objet ni pour effet d’imposer aux entreprises intéressées de tenir à la disposition de l’administration des documents émanant d’administrations étrangères que ces entreprises n’auraient pas en leur possession.
It should be noted that being part of a group does not necessarily mean having more information on a scheme used by another entity of the group, and there is no valid reason to put more obligations on entities being part of a group.

Finally, it should also be stressed that imposing disclosure on an employee is also contradictory to the obligations arising from an employment contract, such as loyalty and confidentiality.

4. The disclosure regime, as actually proposed in the draft, encourages denunciation (p.9) or denouncement – a kind of a naming and shaming- which is morally not acceptable. We are concerned that reporting may foster a climate of persons informing on one another. We do not support this.

We hope our contribution will give you a clearer insight into our expectations. We remain at your disposal if you have any questions and will also be pleased to participate in any working groups regarding this issue.

Yours sincerely,

Vanessa de Saint-Blanquat

PS: we have not specifically asked to take the floor during the public consultation but will be happy to make a presentation on general principles of French law if needed.
Specific comments

Considering the short timeframe awarded to comment and the fact that disclosure rules, as currently drafted in the draft, are not consistent with our principles, we will concentrate on three points:

- **Options:** The draft presents a number of existing disclosure initiatives and the possible options. If disclosure were to be implemented, we are in favour of a list of transactions to disclose under the condition that it is effectively limited to the listed schemes and does not include the “tax benefit” test. We would accept disclosures on certain operations, provided that the reporting system avoids the penalties in case of a tax audit.

- **Monetary penalties:** Instead of a penalty proportionate to the tax savings (which is not abusive *per se* according to French court cases), we suggest that disclosure should allow the taxpayer not to be subject to tax penalties but only to interest for late payment. We consider that penalties already exist for unjustified or abusive tax savings we do not see why those penalties should be increased by the failure to disclose. Disclosure should be to the advantage of the taxpayer to incentivize him to disclose.

- **Loss transaction:** the incertitude on the deductibility of loss could create accounting issues since loss making entity often book deferred taxes for all or part of their loss carry forward. Rules already exist in many countries to limit the manipulation of losses or challenge the reality of losses. No additional rules should be put in place.
30 April 2015

Dear Achim,

**BEPS Discussion Draft: Mandatory disclosure rules**

PricewaterhouseCoopers LLP (PwC) welcomes the opportunity to comment on the OECD's *Public Discussion Draft on Action 12: Mandatory disclosure rules*.

We commend the Working Group for its efforts in identifying a modular approach to a mandatory disclosure regime (MDR), along with challenges associated with it. We think the OECD should make it clearer whether or not it recommends countries implement MDRs. In particular, we are uncertain at this time whether the OECD agrees that a thorough analysis is needed to ascertain any gap that remains to be filled if countries adopt all the other BEPS action items. To the extent that such an analysis can only be made after implementation of the BEPS package, it makes more sense to delay the policy recommendations of Action 12.

However, we also have concerns in a number of specific areas, notably with respect to the reporting of certain international tax arrangements, and believe further consideration is needed. In particular, we believe that reporting of such international tax arrangements should be restricted to mass marketed schemes.

The response in the pages that follow reflects the views of the PwC network of firms, and we offer our observations on several key aspects of the Discussion Draft, many of which relate to the options for including international tax arrangements.

1. **Policy aims**

The draft states that principles of clarity and ease of understanding, effectiveness and targeting, balancing additional compliance costs to taxpayers with the benefits obtained by the tax authority, as well as effective use of the information collected, are shared by existing disclosure regimes. Our experience suggests that this has not always been the case. Countries looking to introduce an MDR under the modular approach recommended might usefully consider their policy aims and review the experience of the existing regime most closely aligned with those aims.
The recommendations acknowledge that available data on the effectiveness of regimes is not comprehensive. But it concludes that there is sufficient evidence that they have met some of their key objectives. Our experience in the countries that have these regimes has been that the compliance burden on promoters (as broadly defined), companies and the taxing authority has been particularly noticeable, and great care is needed to ensure that none of those is burdened with disproportionate or inappropriate responsibilities. It has taken a number of iterations of the rules in order to make them effective and appropriate.

We recognise the need to identify mass marketed pre-packaged schemes or those which rely on limited or no disclosure and which aim to provide absolute tax benefits or cash flow advantages from delays in paying the tax due. Our experience in several countries with an MDR has been that the promotion and use of ‘off-the-shelf’ type products has been curtailed as a result of the introduction of the MDR. The MDR seems to work best on these types of scheme. This was particularly noted in Ireland and the UK, although there has been a suggestion, not in our view supported by the facts, that some of the promotion of schemes has been driven ‘under the radar’. However, other countries have had positive experiences of using a range of other tools which deter promotion of schemes or ensure their detection. In some cases, this has resulted in the rejection of the need for an MDR, a decision which should be respected. In Australia, it has been sufficient to introduce a promoter penalty regime to prosecute advisors that market tax avoidance arrangements; the product rulings system under which mass marketed schemes are commercially unattractive without signoff by the revenue authority; and the tax return international dealings schedule. In China, a renewed focus on its General Anti-Avoidance Rule (GAAR) has coincided with an MDR article being dropped from the Chinese Tax Collection and Administration Law that is currently being amended, despite a more relaxed approach to the historically extensive questionnaires regularly used to seek information on hot topics.

The interaction of an MDR and a GAAR may give rise to practical problems. On the face of it, the MDR would need a dominant purpose/main benefit threshold which would have to be similar to that in the GAAR, leading to taxpayers presumably either not entering into such arrangements or not disclosing them. South Africa has recently dropped the main benefit threshold from its MDR on the basis that where the offending elements of the GAAR are present the scheme will be reportable without regard to a main benefit test. This is particularly relevant in the context of the South Africa GAAR where the onus is on the taxpayer to show that the main purpose of a scheme is not tax avoidance – in effect, the MDR requires taxpayers to report cases where their sole defence against the GAAR is on the basis of main purpose.

Where other tools require the reporting of a list of transactions, the recommendations might go further so that an MDR would additionally support quantification of those transactions and related details of any tax effects or benefits obtained. However, countries are free to strengthen the requirements of those existing reporting regimes without including an MDR.

While there are numerous practical problems, the policy reasons for reporting certain international tax arrangements are also less obvious. Changes in international tax standards and other promised increases in cooperation between jurisdictions and alternative methods for addressing avoidance activity also suggest a serious review of the costs and potential benefits is needed before the recommendation of any new disclosure regime for international tax arrangements. Considering the overlap with other reporting measures, this could also be the small addition needed to tip the scales to the point where the compliance burden becomes too onerous for taxpayers and advisers (see also below). Further, countries with worldwide tax systems, like the US, retain residual taxing rights in respect of their taxpayers including multinational enterprises (MNEs) – these countries would not typically need to identify foreign tax planning that creates a cross-border mismatch.
2. **Clarity and ease of understanding**

Further work may need to be done to establish best practice in providing clarity and making the rules easy to understand. For those designing schemes, the reporting criteria should be sufficiently certain, unambiguous and based on objective criteria that there is a deterrent effect but they should also be wide enough to cover new and innovative schemes. For those implementing or merely advising on transactions, judgmental rules about whether there is avoidance which the tax administration wants to know about are more likely to avoid the disclosure of innocent planning.

Inherent vagueness, where disclosure is based on more subjective criteria, can lead to either over-reporting or under-reporting in our experience. Conservative taxpayers tend to over disclose, resulting in a greater burden on tax authorities, as happened with the US Reportable Transaction Regime in relation to loss transactions. It can also though allow positions to be adopted to the effect that arrangements are not reportable – prior to recent changes, South Africa’s MDR had not worked particularly well in this regard and relatively few arrangements had been reported (the bulk of reported arrangements related to preference share financing arrangements that were specifically listed as reportable and which presented little risk to the fisc). Having to ascertain whether there are material economic consequences or material tax consequences as a result of an arrangement, in the manner proposed, appears to be largely subjective and the effect is uncertain.

Any generic and specific hallmarks need to be very clearly described in MDRs to avoid these uncertainties which have arisen in practice. This also impacts the need for either a threshold test or a monetary filter, but even with the best targeting one or other is likely to be vital to keeping the compliance burden in check, as noted further below.

The Discussion Draft recognises that a taxpayer may play only a minor part in an arrangement – for example, a small subsidiary that doesn’t typically receive much information from its parent. However, there is an assumption that it will be sufficiently aware of the material tax consequences for any one of the parties to the transaction. In many instances it would have an obligation to find out more, but to a level which is rather unclear and that also affects the potential burden imposed.

3. **Compliance burden**

The challenge for an MDR is to target egregious schemes without creating an enormous compliance burden for the vast majority of companies whose commercial affairs happen to need advice, or in the case of MNEs, cross-border advice; and of course if there is excessive disclosure of benign transactions, the taxing authorities may also get swamped with unnecessary compliance costs.

The definition of a promoter who is required to make a disclosure should focus on design and sale of a reportable arrangement. Where it includes others only incidentally involved in the arrangement the level of knowledge and culpability may sometimes be relatively low, such as in South Africa where a promoter includes a person responsible for financing a reportable arrangement. Where the onus is put on intermediaries rather than the taxpayer (at least by default), those intermediaries have to put in place procedures and systems to ensure compliance at the time arrangements are made available. This could be when first discussed with the client, and staff who are involved have to be trained to ensure that is captured in relation to what is generally bespoke advice. In Mexico, the onus has been placed in relation to consulting situations more on taxpayers who can better control matters by reference to actual implementation of any arrangements carried out, whether based on the advice of one or more advisers or otherwise.
Where the burden is imposed partially on both the taxpayer and the adviser, the approach can itself lead to confusion as we found in South Africa. There needs to be absolute clarity as to when the reporting obligation falls on the taxpayer and when it falls on the adviser, without duplication.

An MDR can impose a significant burden on the tax administration to review and analyse all disclosures. This burden can be particularly onerous where the MDR is poorly targeted with scarce resources being directed to reviewing arrangements that are of little or no risk to the fisc.

The overall burden on taxpayers and advisers in relation to reporting transactions or satisfying compliance with a GAAR is already substantial in some countries. In Mexico, the MDR is duplicative in the most relevant areas, as taxpayers are already required to report transactions with non-residents, with related parties and certain other transactions. The US has both a codified economic substance rule and business purpose requirement which create significant uncertainty, and therefore consideration, on the part of taxpayers due to the subjectivity of the standards and the lack of guidance on how they may be implicated in normally accepted tax transactions. Korea has a substance-over-form rule that allows the tax authority to recharacterise transactions and requires taxpayers to report information on international transactions with related parties. Australia includes in its tax return an international dealings schedule. The Chinese tax authorities have regularly launched initiatives involving questionnaires or tax inspections on specific topics, such as intra-group cross-border payments and dividend repatriation. In Ireland, Australia and South Africa the MDR is fairly complementary to the GAAR as regards indicators such as the lack of commercial substance, but there is a degree of redundancy as a result of the overlap.

Virtually all our people in territories with existing MDRs recognised the significance, in keeping the compliance burden in check, of sufficiently high monetary limits on reportable transactions, particularly in relation to international tax arrangements. Most commented on the burden for both the taxpayer/adviser and for the tax administration. In Mexico the taxpayer ombudsman (taxpayer protection body) was involved in establishing reasonable limits. South Africa’s monetary threshold has just been increased, but the popular view is that it remains too low and the threshold should be set at a level that will capture only those arrangements that present a material threat to the tax base.

The absence of a dominant purpose/main benefit threshold would be of concern in some territories. In Australia, for example, there is a clearly established GAAR rule (in the law since 1981, with a history of prior rules going back 100 years) that distinguishes between what is tax avoidance and what is not through the dominant purpose test. Absence of a main benefit test in relation to international tax arrangements might be more supportable in countries where there is a clear listing of arrangements that are reportable within the BEPS space, such as hybrid debts and foreign cell captives.

Significant work may sometimes be needed to confirm whether a disclosure has to be made following the introduction or extension of a specific regime as put forward in this Discussion Draft. In many cases, the outcome will be that no disclosure is needed.

4. Timing

Early identification of new schemes is not as relevant in cross-border situations as it is in relation to domestic situations when the law can more easily and quickly be changed. Instances of legislative change being made at an early stage in relation to disclosures seem far more prevalent in the UK than elsewhere. It may be arguable that the 5 day deadline in the UK facilitates such early change but also that the timing issue may not be as critically regarded by tax authorities in many cases as might otherwise seem likely.
In relation to international tax arrangements, much more time may be necessary in order to establish reportable information. As previously noted, neither taxpayers nor advisers will not always be in a position to have first-hand access to more than a small piece of the big picture. Any request for additional information takes time. There is an additional question as to whether any validation of a response would be necessary, if not strictly by the law then by an entity’s own control framework. The reporting of the details of a person from whom additional information could be sought by tax administrations, as mentioned in the Discussion Draft, may be all that is feasible.

In particular, it should be questioned whether early reporting under an MDR is necessary in the context of treaty related matters and whether these should be reportable only at the time of the filing of a return.

5. Multiple taxpayers and advisers in different countries

There seems to be an expectation that promoters will be aware of the full consequences of tax planning within multinational groups. It is very unlikely to be the case in the common and mainstream situation of international tax advice where several advisers have been involved in bespoke tax planning for a group on its commercial affairs. Frequently there will be a mixture of firms of accountants, lawyers and other intermediaries involved, each responsible for only part of the transaction. Even where separate firms within the same network are involved, the ease of cross-border communication and the specificity of the information supplied cannot be assumed.

In limiting the burden on taxpayers/advisers and tax administrations, it would be preferable to require one disclosure in one territory for an arrangement, rather than multiple reporting to multiple tax authorities. However, it may not be feasible to constitute such rules. Consider, for example, a tax advisor in Country A engaged by the headquarters in Country A to work on tax planning for a subsidiary in Country B to achieve a tax benefit in Country B. In this case, who should report and to which tax authority should it report? It is unclear whether rules could be formulated in such a way that there would be certainty about reporting and enforcement.

The terminology of legal professional privilege suggests a strong underlying UK influence. It is similar to the attorney-client privilege in US common law but may not be present in all jurisdictions. It is important to ensure a level playing field between promoters who can claim such privilege and those that cannot do so in relation to particular arrangements.

6. Behaviour and focus on outcomes

Generic hallmarks tend to be framed by reference to the behaviour of promoters. These have in some cases been described in a subjective manner that has made it difficult for advisers to show that even bespoke commercially driven advice is not within scope. An absence of a dominant purpose/main benefit test would make this doubly difficult. Hypothetical tests (such as premium fee) are in general considered to be too subjective and place an undue burden on taxpayers and promoters.

The Discussion Document states that reporting will be required of “key provisions of foreign law relevant to the elements of the disclosed transaction”. However, in making this disclosure, advisers (or taxpayers) will be wholly reliant on information given from advisers in those overseas territories – they will not, even in the largest organisations, have the expertise to verify whether that analysis is complete or accurate.

Advisers and other intermediaries falling within the definition of promoters would be expected to provide information within their knowledge, possession or control. The Discussion Draft suggests that
regimes might often identify an intermediary as the primary reporter or having an equal obligation with the taxpayer. This would seem to raise particular difficulties in relation to international tax arrangements where the description of a reportable arrangement is outcome focused – intermediaries may in practice often have difficulty ascertaining a description of the outcome from the taxpayer (or another adviser).

The description of hallmarks for cross-border arrangements which would be reportable transactions, and the examples used in the Discussion Draft, suggest that many of the outcomes would be addressed by other BEPS actions. Is it reasonable to assume in Figure 4 on page 63 of the Discussion Draft that the mismatch is not dealt with under post-BEPS rules?

7. Consequences

The Discussion Document recognises that disclosure does not necessarily imply aggressive avoidance, but in practice there are negative consequences of transactions being reported. In the UK, for example, reputational, taxation and commercial consequences include Advance Payment Notices, issues for companies seeking Government contracts and the High Risk Promoter regime. Those consequences ought to be carefully examined – it is clearly vital that the regime should only apply to its intended targets, and that taxpayers do not face negative consequences as a result of badly targeted hallmarks.

Yours sincerely

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cc Stef van Weeghel, Global Tax Policy Leader

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Some Comments on BEPS Action 12: Mandatory Disclosure Rules
From Jim Stewart,
Associate professor in Finance,
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Summary
The purpose of Mandatory Disclosure Rules and other rules to ensure co-operative compliance is to ensure timely access to information to revenue authorities. This note argues that ‘co-operative compliance regimes’ have not succeeded in their aims as evidenced by the disclosures of no or low corporate tax payments by large corporations and more recently by the ‘Lux Leaks’ revelations. The note further argues that due to the imbalance in resources and expertise between tax authorities and the tax advice industry, requiring additional mandatory information will not succeed in reducing adverse agency issues. Rather what is required is greater regulation, both at a national and international level.

1. Disclosure Regimes

The discussion draft is focussed on the need for “timely access to relevant information in order to identify and respond to tax risks posed by tax planning schemes” (OECD 2015, par 1). The report states that a number of countries “have introduced disclosure initiatives to “give them real time information about taxpayer behaviour” (OECD, 2015, par. 2). These initiatives include “co-operative compliance programmes” as well as “mandatory disclosure regimes” (OECD, 2015, par. 2).

Co-operative compliance programmes have been introduced by a number of tax authorities in dealings with large complex entities. Tax authorities may have a particular division referred to as the ‘Large Cases Division’ (LCD) dealing with these entities. An OECD Report on co-operative compliance published in 2013, states that In the UK “all taxpayers must comply with statutory requirements to disclose details of avoidance schemes that they are selling to others or planning to use in-house” (OECD, 2013, p. 32). This Report on Co-operative Compliance also states that the experience of the UK and the Netherlands on co-operative compliance “has resulted in rapid information sharing, quick resolution of issues and the prevention of unnecessary and prolonged disputes” (OECD, 2013, p.32).

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1 Introduction of ‘co-operative compliance’ has involved change within LCD and ‘initial investment’ (OECD, 2013, p. 74) The OECD Report also notes that uniquely in the case of Ireland, it was also necessary to invest in “social skills” for revenue officials in the Large Case Division (OECD, 2013, p. 69).
BEPS Action 12 states:- “Co-operative compliance relationships allow for a joint approach to tax risk management and compliance and result in more effective risk assessment and better use of resources by the tax administration (OECD, 2015, par. 9).

The discussion draft on Action 12 states that:-

“Both mandatory disclosure and co-operative compliance are intended to improve transparency, risk assessment and ultimately taxpayer compliance. They do this in different ways and may be aimed at different taxpayer populations, for instance co-operative compliance programmes often focus on the largest corporate taxpayers”.

Mandatory disclosure and co-operative compliance are thus seen as being mutually supportive (OECD, 2015, par. 35).

The OECD draft on Mandatory Disclosure Rules refers to the UK disclosure regime (Disclosure of Tax Avoidance Schemes – DOTAS) in several places (for example par. 40, Annex III). The report states (par. 45) that “the information provided by the UK DOTAS regime about the take up of a scheme has been useful in putting together an operational response”. The Draft discussion paper recommends the types of information that may be collected by the scheme user and scheme provider (Box 10, p. 52 and Box 11, p. 53).

2. Enhanced Co-operative Regime and Criticism.

In the UK the revenue authorities (HMRC) introduced “an enhanced co-operative regime” in 2006 dealing with the 800 largest businesses in the UK but with a staff of only 1200, and stated that it is “committed to taking the business perspective into consideration in implementing policy decisions and designing systems and processes, through more consistent consultation” (OECD, 2013a, p. 18).

There has been considerable criticism of the operation of Large Cases Division of the tax regime for large business in the U.K. The U.K. Public Accounts Committee (2013, p. 13) concluded:-

“We have long been concerned that, despite HMRC having customer relationship managers for large businesses to understand these organisations, and its overriding duty to collect all tax due, it has not done enough to tackle corporate tax avoidance. In the case of Google, we could not understand how a few journalists, whistleblowers and MPs have uncovered what the Department had not”.

A report by the U.K. Public Accounts Committee in 2011 expressed “serious concerns that large companies are treated more favourably by [HMRC] than other taxpayers” and that
large companies in particular “appear to receive preferential treatment compared to small businesses and individuals” (Public Accounts Committee, 2011, p. 4).

More recently The Public Accounts Committee (2015, p. 5) concluded that: “The tax arrangements PwC promoted in Luxembourg bear all the characteristics of a mass-marketed tax avoidance scheme”. They further state that:

“We consider that the evidence that PwC provided to us in January 2013 was misleading, in particular its assertions that “we are not in the business of selling schemes” and “we do not mass-market tax products, we do not produce tax products, we do not promote tax products” and that “in our view these are marketed tax avoidance schemes and we are also sceptical that HMRC was kept fully informed of PwC’s activities. We continue to believe there is no clarity about the boundary between acceptable tax planning and aggressive tax avoidance”.

3. Australia and Co-operative Compliance

The OECD Report (2013) on a “co-operative compliance” strategy in Australia states:

“The Australian Tax Office (ATO) compliance strategy is based on a compliance model that takes into account the factors that influence taxpayers’ behaviour. The ATO aims to encourage taxpayers to adopt the attitude “that they are willing to do the right thing” resulting in a low level of compliance cost (OECD, 2013, p. 23)”.

A rather different viewpoint has been made in a submission to the Australian Senate Committee enquiring into corporate tax avoidance in Australia. One submission by a former tax official (Martin Lock, 2015) states:

“Disputes over tax planning arrangements that the ATO [Australian Tax Office] argued were ‘avoidance’ or that concerned grey laws were common in the early 2000s but in about 2011 the number began declining. The decline coincided with a loss of tax technical specialists from the ATO’s ‘Internationals’ area, a series of restructures in the Large Business Compliance and Advisings areas, the abandonment of general audits and the introduction of a generic approach to tax return-based tax risk assessment. It is likely the decline will continue following the heavy staff cuts to those areas in 2014 and as result of a general failure of the ATO to undertake proper succession planning before its staff departed”.

“Contrary to ATO claims, a decline in the number of disputes with large companies and multinationals is unlikely to mean the tax law has been made any clearer through ATO publications or that more taxpayers are now ‘doing the right thing’. Rather, it is
more likely to mean that the ATO is not identifying or challenging as many contentious claims as before”.

“Since about 2010 the ATO has placed heavy reliance on tax return-based risk modelling to identify potential non-compliance of large businesses and multinationals. Anecdotally, the model has largely failed, the main reason being that it relies for its analysis on tax disclosures not non-disclosures, and mostly ignores qualitative intelligence concerning the entity’s business affairs”.

Centralised dealings with complex entities through a large cases division poses risks of lack of independence by tax authorities as recognised by the OECD (2013, chapter 5). In contrast the discussion draft on Mandatory Disclosure Rules (OECD, 2015) has no discussion of governance issues.

4. The ‘Lux leaks’ Test.

One way of assessing the impact of the proposed new rules on mandatory disclosure is to consider whether PwC would have been obliged to disclose details of subsidiaries in Luxembourg of UK based firms to the UK tax authorities. The evidence given to the Public Accounts Committee is that HMRC was not informed under the DOTAS regime. The reason for this appears to be that a UK company was not directly involved and “the DOTAS regime refers to whether there were hallmarks around secrecy and whether there is a premium fee or whether something is being kept confidential from HMRC”.  

A key aspect of the operation of Luxembourg finance subsidiaries is the fact that as far as the UK (and other countries) are concerned “not much substance is required if all you have is a finance company”. Hence part of the solution to firms operating through subsidiaries in no/low tax jurisdictions is to require substance in those jurisdictions.

The draft on Mandatory Disclosure Rules states (par. 252) that “the information that should be disclosed in respect of International tax schemes will generally be the same as the information required for domestic schemes”. The ‘Lux Leaks scandal would suggest that more information needs to be provided, because of the unanticipated effects of transactions between subsidiaries in countries A and B on tax payments in countries C and other countries.

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3 See Q235, in Public Accounts Committee, Oral Evidence: Tax avoidance: the role of large accountancy firms- follow up, HC 860
5. Key Information now resides in Big Four.

For a variety of reasons corporate tax expertise and in particular international tax expertise resides in the ‘big four’. This information may also be to some extent shared amongst the tax advice industry through networking and business arrangements. The imbalance in expertise is not just a result of reliance on ‘generic’ approaches to tax collection, but also because of the movement of skilled staff into private sector employment with much greater remuneration. The difference in skill levels is further exacerbated by the need to rely on the expertise of ‘Big Four’ firms for advice on changes to tax legislation. One commentator (Martin Lock, 2015, p. 2) considers that in Australia:-

“Those with the fullest understanding of the corporate and international tax laws are the global tax advisory firms - the recognised leaders in corporate and multinational tax planning and minimisation. They are also the most active in collaboratively assisting Treasury to shape and design new and amending tax laws, laws that most affect their client base. Not lost on them is the fact that the tax Commissioner and his officers are precluded under penalty of imprisonment from breaching tax privacy”.

In Ireland the Large Cases Division reduced its staff by 50 to 208 in 2009 under a scheme with enhanced payments for early retirement as part of a response to the fiscal and economic crisis. In November 2014 there were 206 staff working in the Large Cases Division. This compares with at least 500 professional staff in the tax section of just one of the big four (PwC) in Ireland.

One implication for collection and analysis of data whether collected on a “co-operative compliance” basis or on a mandatory basis, is that tax authorities do not have the ability or resources to adequately collect and process required information.

Asymmetries in information plus self interest, mean that agency issues are likely to be prevalent in dealings with tax intermediaries. The greater the disparity in information the greater the risks. Because of these risks the UK Public Accounts Committee stated that “we believe strongly that the Government must act by introducing a code of conduct for all tax advisers” (Public Accounts Committee, 2015, p. 6). But in addition there is a need for much great regulation of those providing taxation advice similar to the regulation of those providing accounting services (Stewart, 2006).

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4 Simon Carswell, “Tax Unit dealing with affairs of richest to lose 20% of staff to early retirement”, Irish Times, Dec. 4 2009.
5 Colm Kelpie, Revenue Beefs Up Global Tax Compliance Division, Irish Independent, 15/11/2014
6 Source:- http://www.pwc.ie/careers/working-with-us/what-we-do.jhtml
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Achim Pross  
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Via Email: MandatoryDisclosure@oecd.org  

RE: Public Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules

Dear Mr. Pross:

On 19 July 2013, the OECD published an Action Plan on Base Erosion and Profit Shifting (hereinafter the Action Plan or the Plan) setting forth 15 actions the OECD will undertake to address a series of issues that contribute to the perception that individual countries’ tax bases are being eroded or profits shifted improperly. Pursuant to Action 12 of the Plan, on 31 March 2015 the OECD published a document entitled BEPS Action 12: Mandatory Disclosure Rules (hereinafter the Discussion Draft or Draft). The OECD solicited comments from interested parties on the Draft no later than 30 April 2015.

On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the OECD’s request for comments. In addition, TEI requests the opportunity to speak in support of these comments at the Public Consultation regarding Action 12, to be held in Paris on 11 May 2015.

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organisation has 56 chapters in Europe, North and South America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy, as well as the fair and efficient administration of the tax laws,
at all levels of government. Our nearly 7,000 individual members represent over 3,000 of the largest companies in the world.¹

TEI Comments

TEI commends the OECD for its thorough overview of the components of a potential mandatory disclosure regime and its comprehensive discussion of various options that countries may adopt to implement disclosure rules into their domestic law. TEI appreciates tax authorities’ need to obtain a better view into the aggressive tax planning engaged in by some businesses and we do not oppose a mandatory disclosure regime in principle. Indeed, an objective, clear, uniform, and easy-to-apply mandatory disclosure rule could help level the playing field between multi-national enterprise (MNE) competitors that might have differing appetites for tax risk. While the flexible approach in the Discussion Draft gives countries the ability to tailor a disclosure regime to their particular domestic tax policy concerns, varied approaches to mandatory disclosure across jurisdictions present several concerns for MNEs.

In particular, the Draft does not recommend a single approach to mandatory disclosure, but instead offers a list of options that countries may select when designing their disclosure rules. This is a departure (as is much of the BEPS project) from the OECD’s traditional role of building consensus, setting the “gold” standard and devising model rules. For example, even when the Draft sets forth “recommendations,” they are often stated in the alternative or as a minimum requirement, rather than a definitive approach to disclosure.²

The option approach of the Discussion Draft will lead to differing disclosure regimes across jurisdictions. A transaction may therefore be reportable in some jurisdictions, not be reportable in other jurisdictions, and reporting may be unclear in a third set of jurisdictions. A taxpayer would need to analyse a transaction multiple times from the perspective of the disclosure rules in each jurisdiction that might be impacted by the transaction. A local disclosure regime that includes subjective elements or uses a “hypothetical” approach to identify the features of schemes that might interest tax authorities would further complicate the analysis. For these reasons, TEI recommends that the OECD set forth a model approach that

¹ TEI is a corporation organised in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. federal income tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).

² See, e.g., the recommendations for “hallmarks,” which provide that countries may adopt a single step or multi-step/threshold approach, choose between a hypothetical approach or purely factual objective tests, and state that “[t]he design and selection of specific hallmarks should be left to each country taking into account their own tax policy and enforcement priorities.” Discussion Draft, p.39-40.
includes specific, clear, and limited recommendations for each issue\(^3\) that a mandatory disclosure regime must address. With respect to the hallmarks of a suspect transaction under a disclosure rule, TEI recommends that the hallmarks be objective and not hypothetical to provide greater certainty to the process and ease of application.

A uniform disclosure regime along with a common reporting standard that applies across jurisdictions would limit the burden placed on taxpayers while providing tax authorities with the information necessary to combat transactions the authorities view as problematic. A recommended uniform (in terms of what needs to be disclosed, when, and who needs to disclose it) and limited (in terms of what transactions are targeted) mandatory disclosure rule would also avoid the problem of local tax authorities adopting whatever disclosure rules they prefer, claiming that their approach was “sanctioned” by the OECD’s option approach and is therefore representative of a global consensus on disclosure.

A broader concern is that the Discussion Draft recommends imposing yet another information reporting system on MNEs. Under Action 13 of the BEPS project, the OECD has already recommended that MNEs prepare master and local files for transfer pricing documentation purposes and submit these files to tax authorities around the world. In addition, the OECD has recommended that jurisdictions require MNEs to file the Action 13 country-by-country reporting template for tax years beginning on or after 1 January 2016, which will also be shared internationally. Further, the public discussion draft under Action 11 Improving the Analysis of BEPS raises the possibility that tax authorities may ask MNEs to provide additional, “firm-level” information to assist authorities in analysing the extent of base erosion and profit shifting. Outside of the BEPS Project there is the U.S.-led FATCA reporting system and its accompanying Intergovernmental Agreements, which impact financial and non-financial companies, as well as the Common Reporting Standard for automatic exchange of financial account information, targeted primarily at financial institutions. Thus, MNEs are already required to report, or soon will be, voluminous information to tax authorities that will be shared across jurisdictions.

Moreover, tax authorities currently have difficulty analysing and effectively utilising the information and data already at their disposal, such as tax returns of specific taxpayers and other information acquired through domestic reporting requirements. An additional mandatory disclosure regime requiring taxpayers to produce additional information may merely result in the information disappearing within the tax bureaucracy without being utilised by the revenue authority – a cost to taxpayers with no benefit to tax authorities.

\(^3\) *See* Discussion Draft, Section III.A through G (who has to report, what has to be reported, hallmarks, when information is reported, *etc.*).
The proliferation of tax reporting regimes has inundated MNEs with tax compliance obligations. Indeed, in certain cases it seems that an MNE cannot conduct routine business operations without filling out and filing a tax reporting or disclosure form (e.g., under FATCA by opening a bank account or taking on a new customer). This will only increase should multiple jurisdictions adopt non-uniform, mandatory disclosure rules, especially if they include easily triggered reporting obligations, such as a broad definition of “marketing” as a hallmark. Indeed, TEI members now see contract terms in negotiations whereby, for example, suppliers attempt to pass on their tax administration and compliance costs to their customers as a separate provision of the supply contract. These provisions arise not in the context of financial transactions or institutions, where reporting for tax and other purposes is a regular part of the business, but in operating contracts between non-financial institutions. Tax compliance and administration is a concrete burden on MNEs and therefore on cross-border commerce.

Thus, before urging that Member States and other jurisdictions participating in the BEPS project adopt yet another reporting regime for MNEs, TEI recommends that the OECD be sure that (i) the benefits tax authorities expect to reap outweigh the cost and administrative burden to taxpayers (and tax authorities) in the face of multiple other disclosure and information reporting regimes, and (ii) the information required to be reported is not already available to tax authorities in the taxpayer-specific information currently requested. Moreover, the overall international information sharing and disclosure environment further illustrates the need for the OECD to set forth a recommended uniform approach in the final guidance under Action 12.

TEI also recommends that the OECD suggest measures to ensure the confidentiality of sensitive taxpayer information that may be contained in any disclosure under the recommended mandatory disclosure regime. Unauthorised disclosure of confidential information is a persistent MNE concern with many BEPS action items and is present under Action 12 as well. Moreover, a number of tax authorities are introducing measures to toughen the consequences for tax evaders and those who assist them, which include publicly naming evaders and enablers of evasion (e.g., the United Kingdom) or disclosing taxpayers’ tax information (e.g., Australia). The mandatory disclosure information of taxpayers’ complex tax planning should not be prematurely released to the public before the taxpayers (and others) have a chance to exercise their right to fair and due process as some of the transactions may not be considered tax avoidance or evasion once thoroughly reviewed.

With respect to other specific points regarding the mechanics of a mandatory disclosure regime, and in the interest of fostering a uniform approach to disclosure rules across jurisdictions, TEI recommends the following:

1. **When information is reported:** Some domestic mandatory disclosure rules require reporting within a relatively short timeframe (e.g., within five days of a certain event). In an international environment, a longer lead time would be
needed because it is extremely difficult to obtain information in a short period of time even if the information is contained within a corporate group. Moreover, timing disclosure for when a transaction is “made available for implementation” or a promoter “makes a firm approach/marketing contact” is too early, especially if taxpayers are required to provide the disclosure. Large MNEs are often approached by promoters or advisors with tax planning opportunities, most of which are not implemented after a taxpayer’s due diligence. Therefore, requiring disclosure when marketing contacts occur would create administrative and compliance burdens for taxpayers even though taxpayers do not enter into most of the transactions that are marketed to them. Thus, TEI recommends that taxpayer disclosure only be required when the taxpayer files its return for the relevant tax year that contains a tax benefit of reportable transaction.

2. **Who should report:** TEI recommends that taxpayers only be required to disclose a transaction if (i) the promoter is offshore; (ii) there is no promoter or the MNE uses multiple advisors to implement a transaction; or (iii) the promoter asserts a legal privilege, including where the provision of the client list may breach confidentiality or violate domestic law.

3. **Primary purpose or de minimis filter:** The Discussion Draft does not recommend the inclusion of a test to require a disclosure only where a primary purpose of the transaction is tax avoidance or where the tax benefit is material. Such filters would reduce the administrative and compliance burden on taxpayers as well as the tax authorities and should be recommended by the OECD.

4. **Maintenance of a list of tax planning schemes:** Many of the examples provided in the Discussion Draft are longstanding aggressive tax planning schemes that are well known by tax authorities. TEI recommends that the OECD collaborate with tax authorities to prepare an annual list and brief description of the known aggressive tax planning schemes. Tax administrators can then use the list to determine whether they need additional information from their counterparts in other countries to determine whether they view the transaction as inappropriate, whether they need to change the law to close a loophole, or whether they need additional information from promoters or taxpayers. To reduce the administrative and compliance burden on both taxpayers as well as tax authorities, reporting should be limited to new or innovative aggressive tax planning that has not previously been disclosed, is not on the OECD annual list of known or existing aggressive tax planning schemes, or where the tax

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4 This work may already be done under the auspices of the Joint International Tax Shelter Information Centre.
administrators specifically request additional information. Where information on a scheme had been provided in a previous year (e.g., for a transaction that spans multiple tax years), taxpayers should be allowed to reference or attach the previously disclosed information.

5. **Protection against self-incrimination:** TEI agrees that in most cases a mandatory disclosure regime will not impinge upon the privilege against self-incrimination for the reasons set forth in the Discussion Draft. However, for countries that impose criminal liabilities on taxpayers for undertaking certain tax avoidance transactions (e.g., some countries impose criminal liability if the amount of tax at issue is above a certain threshold), TEI recommends that (i) such transactions be excluded from the scope of the disclosure regime, and (ii) a properly asserted privilege against self-incrimination be specifically listed as an acceptable reason for not disclosing the transaction.

6. **Penalty protection:** TEI recommends that a proper and timely disclosure of a transaction under a mandatory disclosure regime protect taxpayers from the assertion of penalties by the tax authorities. This would provide an additional incentive for taxpayers to proactively and transparently disclose their aggressive tax transactions and restore some balance to the disclosure process on the side of taxpayers.

**Conclusion**

TEI appreciates the opportunity to comment on the OECD Discussion Draft regarding mandatory disclosure regimes. As noted above, TEI requests the opportunity to speak in support of its comments at the scheduled public consultation in Paris on 11 May 2015.

These comments were prepared under the aegis of TEI’s European Direct Tax Committee, whose Chair is Nick Hasenoehrl. If you have any questions about the submission, please contact Mr. Hasenoehrl at +41 786 88 3772, nickhasen@sbcglobal.net, or Benjamin R. Shreck of TEI’s legal staff, at +1 202 464 8353, bshreck@tei.org.

Sincerely yours,
TAX EXECUTIVES INSTITUTE, INC.

Mark C. Silbiger
International President
To whom it may concern,

RE: Taxand responds to the OECD discussion draft on Action 12: Mandatory Disclosure Rules

Further to the publication of the OECD’s invitation for public comments on the discussion draft on BEPS Action 12: Mandatory Disclosure Rules, Taxand is honoured to provide written comments based on the practical experience we have as tax advisors.

Our response provides comments and practical suggestions for improvements to the draft.

We would like to salute the efforts of the OECD Committee on Fiscal Affairs for its continual and vast work on laying down the cornerstones for the ambitious and comprehensive Action Plan aimed at addressing base erosion and profit shifting in an open format that allows all stakeholders to provide their views.

Taxand can confirm that we have no objections with posting the comments on the OECD website and that comments represent Taxand and are based on our experience working with multinationals worldwide.

We appreciate this opportunity to provide comments to the OECD Committee on Fiscal Affairs and would be pleased to discuss this further and to participate in any further discussion on these matters.

More information about Taxand is provided below. Taxand is wholly committed to supporting the OECD Committee on Fiscal Affairs and we look forward to contributing to further debate.

If you wish to discuss any of the points raised in this letter, please do not hesitate to get in touch with us directly via the contact details below.

Yours faithfully,

Taxand

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ABOUT TAXAND

Taxand provides high quality, integrated tax advice worldwide. Our tax professionals, more than 400 tax partners and over 2,000 tax advisors in nearly 50 countries - grasp both the fine points of tax and the broader strategic implications, helping you mitigate risk, manage your tax burden and drive the performance of your business.

We're passionate about tax. We collaborate and share knowledge, capitalising on our expertise to provide you with high quality, tailored advice that helps relieve the pressures associated with making complex tax decisions.

We're also independent—ensuring that you adhere both to best practice and to tax law and that we remain free from time-consuming audit-based conflict checks. This enables us to deliver practical advice, responsively.

Taxand has achieved worldwide market recognition. Taxand ranked in the top tier in Chambers Global Guide 2014 global network rankings and in the International Tax Review's (ITR) World Tax 2015, 41 Taxand locations were commended and a further 26 locations listed in ITR's World Transfer Pricing Guide 2015. 31 countries were voted top in the ITR Transaction Tax Survey 2014 and 29 in ITR Tax Planning Survey 2013. Taxand has received 65 national awards and 14 regional awards in the ITR European, Americas and Asia Tax Awards since 2009. These include Latin America Tax Disputes Firm of the Year, European TP Firm of the Year, European Indirect Tax Firm of the Year, Asia Transfer Pricing Firm of the Year, and Asia Tax Policy Firm of the Year. Full details of awards can be viewed at www.taxand.com/about-us.

www.taxand.com
1. Introduction

Taxand would like to thank the OECD for the opportunity to respectfully provide the following comments to “BEPS Action 12: Mandatory Disclosure Rules”. Our comments below intend to be practical and experience-based, as well as constructive, in our responsibility as global tax advisors to contributing to a more comprehensive debate on the important issues raised.

Taxand appreciates the challenges that tax authorities face in gathering information on aggressive or abusive tax planning strategies. We agree that there are benefits, to governments and tax authorities, of early detection of such strategies. Taxand also recognises the views of the OECD in the Action 12 discussion draft that “mandatory disclosure rules should balance additional compliance costs to taxpayers with the benefits obtained by the tax administration”. However, with respect, we believe there is insufficient available information for the OECD to justify a move towards international implementation of mandatory disclosure rules (“MDR”). Much has been written regarding the foundation of the BEPS project as a whole regarding the quality of the available data to support or quantify the existence of BEPS. However, the lack of credible statistical data is most concerning for Action 12 and we believe the OECD’s recommendations in support of MDRs are premature.

The complexity of tax laws and the constant increase in taxpayer reporting obligations within these tax systems is a serious issue which does not appear to have been given due consideration in the Action 12 discussion draft. We believe that MDRs also have other impacts on disclosure and taxpayer compliance not adequately covered in the discussion draft, such as protections on disclosing confidential information and the negative perception that such MDR rules carry for taxpayers and advisors when seeking bona fide advice as to the tax consequences of any particular transaction or operation.

Consequently, we wish to be clear and unequivocal in expressing our collective opinion, based on our knowledge and experience as a collective of global tax advisors, that even a carefully constructed MDR regime is likely to result in far greater burdens and negative ramifications to taxpayers and tax advisors than the anticipated benefits to tax administrations. Concerns about this inform the majority of our comments below.

2. Lack of statistical evidence regarding net costs and benefits of MDR

In the absence of further statistical evidence supporting the net costs and benefits of MDRs, the OECD should be more reticent, or certainly more cautious, in recommending them. Before imposing costly and complex rules on taxpayers and tax advisors, the balance of the costs and benefits to such regimes should be better documented and evaluated, including its link in curtailing base erosion and profit shifting. We strongly believe this to be the case with respect to any suggestion that countries might consider adopting a single hallmark system, particularly a single hallmark system that does not include a threshold precondition or filters as, from our experience, such a system would be extraordinarily broad in its sweep and would impact many innocent taxpayers.
The OECD’s evidence in favour of MDRs appears to be based exclusively on the observation that the United Kingdom’s MDR regime may have prevented GBP 12 billion in aggressive tax planning in the early years of implementation, from 2004 to 2010. We wish to emphasise that these findings do not appear to have been corroborated in some of the other countries identified in the discussion draft as having MDR regimes already in place. The absence of statistical data or evidence of success in some of these jurisdictions is noteworthy. For example, in Canada, there has been very little written about the benefits of its MDR which was introduced in 2011. In Portugal, the data made publicly available since 2008 by the tax authorities is very limited and also does not provide any possibility to make an appraisal of the benefits of the regime. This suggests that the early indications regarding the benefits of that MDR regime may be linked with country specific circumstances and particular domestic transactions and not directly connected with BEPS-related behaviours.

3. Current tools for tax administrations to identify aggressive tax strategies are sufficient

It would seem that most tax regimes today are fairly sophisticated in that they have an abundance of general and specific tax avoidance rules that effectively shut down most aggressive tax planning strategies.

In addition, in certain jurisdictions there is no sufficient guidance on principles and practices of the tax administration regarding the dividing line between unacceptable tax avoidance and legitimate tax planning and MDRs represent in those cases a side-step, as they try to approach aggressive tax planning from the taxpayer disclosure and not from a principle based approach.

The Action 6 proposal to introduce a GAAR (Principal Purposes Test) in tax treaties illustrates that if recommendations of BEPS Action plan initiatives are adopted by governments, it would seem that even more anti-avoidance rules, will be implemented to respond to so-called tax risks posed by tax planning schemes. The global sharing between tax administrations of information on aggressive tax strategies would also seem to be increasingly on the rise. The actual existence of the ATP directory with more than 400 schemes also indicates that there are other tools or methods available to identify tax planning trends and formulate detection and response strategies.

So when you combine this with tax authorities’ extensive information seeking and audit powers, this should be more than sufficient to allow tax authorities to identify and tackle aggressive tax avoidance schemes in a timely manner without imposing complex and costly MDRs on taxpayers and their advisors.
4. **An overly broad MDR regime burdens taxpayers and tax administrations**

The majority of disclosures will be legal, as was the case in the UK. This has the effect of redirecting revenue collection resources to the assessment of tax planning arrangements that might otherwise have rightfully avoided scrutiny.

5. **MDRs are likely to be ineffective due to promoter adaptation**

The proposed hallmark approach presents a difficult dilemma. If the hallmarks are clearly expressed and easily understood, as the OECD suggests they should be, they provide little administrative benefit. Effectively, the hallmarks become a roadmap for those seeking to avoid triggering the disclosure obligation. For example, in the UK the large corporate market, and their tax advisors, have moved away from generic schemes to a much more tailored approach to tax planning which typically does not require disclosures.

An MDR regime may bolster its administrative benefits by creating hallmarks with less clear application. For example, in Ireland a tax advisor must report any transaction (or element of a transaction) which he or she “might reasonably be expected to” wish to keep confidential. While disclosure is more difficult to avoid under such rules, they are also more difficult to apply and, as a result, greatly increase the taxpayer’s cost of compliance.

Another example is Portugal, where an overly broad generic hallmark defines reportable tax planning as “any scheme or arrangement entered into solely or mainly to give rise to a tax advantage (ie reduction, elimination, deferral of tax or application of a tax benefit)” is combined with an administrative order considering such tax advantage to arise always when the tax advantage is undetermined or above EUR 100,000.

Jurisdictions should also be wary of overly general hallmarks such as contingency fee arrangements. In adapting to their client’s needs, many tax advisors have adopted creative fee arrangements including contingency fees. These arrangements allow tax advisors to represent clients who would otherwise be unable to afford tax advice. As a result, there is likely to be little, if any, correlation between particular fee arrangements and aggressive tax planning. Furthermore, adopting overbroad hallmarks such as the contingency fee hallmark risks deterring tax advisors from offering flexible payment plans. This could make tax advice unaffordable for many taxpayers.

Thus, it is extremely difficult to craft MDR hallmarks capable of properly balancing the benefits to the tax administration with the costs to the taxpayer: Hallmarks will tend to be ineffective, costly or, most likely, both.

6. **Recommendations will likely not be effective to capture international tax schemes**
The suggested MDRs provide no sufficient guidance on the type of international arrangements that are targeted and this will ultimately lead to significant uncertainty and misunderstanding towards the identification of relevant and non-relevant schemes. To apply MDR rules on a cross-border level, it would be preferable to have a listed transaction approach (instead of hallmarks).

The experience of MDRs also indicates that to a large extent the achievements were more significant when there was connected with the disclosure mechanism an indicative position by the tax authorities on a particular transaction (or similar transactions) under review. This issue and the merits of a listed transaction approach are not significantly addressed throughout the discussion draft.

**7. Early detection risks disproportionate infringements on taxpayer privacy**

Limited attention was granted on the interaction of a broad based MDR (with hallmark criteria and significant penalties) and the protections granted by international conventions on disclosing confidential information. Linked to this there is also the significant negative perception that MDR rules carry for taxpayers and their advisors, which may even outweigh the purported benefits in terms of real-time tax risks posed by tax planning schemes.

**8. Imposing reporting obligations on tax advisors creates conflicts of interest**

Clients must be able to trust their tax advisors to provide them informed, objective and independent advice. Reporting obligations impugn that independence and objectivity, potentially depriving many taxpayers of professional tax advice. Concomitantly, such disclosure obligations may dissuade taxpayers from fully informing their tax advisors out of concern for triggering a disclosure obligation.

The limits of legal privilege and interaction with MDR are also not fully developed in the discussion draft. In certain regimes, lawyers are not considered promoters if they act or become involved in the scheme or arrangement by issuing an opinion or advice under the attorney/client privilege as a legal counselling or in connection with judicial proceedings. The question whether this applies only to legal advice or extends to all other communication between tax advisors and clients, the extension to working documents and client lists is also relevant.

In addition, the mechanism to revert the duty to disclose to the taxpayer when the promoter falls under this legal privilege condition also may raise several ethical and practical issues. This include the reference in the context of cross-border schemes that when the information disclosed is insufficient, “the person making the disclosure should identify the persons who are believed to be hold the missing information and certify that requests for that information have been made to those persons”.

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For these reasons, we would suggest that any recommendations for MDRs include a recommendation that the rules clearly specify that they are subject to the applicable solicitor-client privilege regime in the particular country or jurisdiction, as is the case under the rules in Canada.

9. A due diligence defence for non-disclosure places a reverse onus on the tax advisor: the tax advisor is guilty until proven innocent

The OECD recommends that jurisdictions “take into account factors such as” negligent non-compliance with disclosure obligations. Taxand agrees but wishes to emphasise the importance of placing the onus on the tax administration to prove deliberate or negligent non-disclosure.

Tax advisors should not be unjustly burdened with the requirement to prove their due diligence in deciding not to disclose client information. Placing the onus on the tax advisor effectively imposes a presumption of guilt.

10. Advance Payment rules violate the Action Paper’s emphasis on distinguishing between the requirement to disclose and the validity of the transaction

Recent UK legislation requires taxpayers to pay disputed tax to Her Majesty’s Revenue and Customs in advance of a final disposition on the matter. These kinds of rules suggest that reportable transactions are presumptively illegitimate and inappropriately stigmatise legitimate tax planning. They would also seem to go directly against the spirit and object of an MDR regime that is intended to be simply a reporting regime rather than a declaration that the tax structure is not legally effective in any way.

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We appreciate this opportunity to provide comments to the OECD Committee of Fiscal Affairs and would be pleased to discuss this further, and to participate in any further discussion on these matters.

More information on how to contact Taxand is provided above. Taxand is wholly committed to supporting the OECD Committee of Fiscal Affairs and we look forward to contributing to further debate.

Yours faithfully,

Taxand
This response is the sole view of Taxand advisors and does not represent the opinions of Taxand clients or contacts. As provided in Treasury Department Circular 230, this response is not intended or written by any Taxand firms to be used, and cannot be used, by a client or any other person or entity for the purpose of avoiding tax penalties that may be imposed on any taxpayer. The information contained herein is of a general nature, is up to date as of 30 April 2015 and is subject to change. Readers are reminded that they should not consider this response to be a recommendation to undertake any tax position, nor consider the information contained therein to be complete. Before any item or treatment is reported, or excluded from reporting on tax returns, financial statements or any other document, for any reason, readers should thoroughly evaluate their specific facts and circumstances, and obtain the advice and assistance of qualified tax advisors. Even though all reasonable care has been taken in the preparation of this response, Taxand and all of its firms do not accept any liability for any errors that it may contain or lack of update before being submitted, whether caused by negligence or otherwise, or for any losses, however caused, or sustained by any person. Taxand is a global organisation of tax advisory firms. Each firm in each country is a separate and independent legal entity responsible for delivering client services.
Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration
2 Rue André Pascal
75775 Paris Cedex 16
France

Via e-mail to MandatoryDisclosure@oecd.org

Ladies and Gentlemen:

TD appreciates the opportunity to submit comments on the Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules issued by the OECD on March 31, 2015 (the “Discussion Draft”).

Our key points with respect to BEPS Action 12, described in more detail below, are as follows:

- Mandatory disclosure rules should be tailored to a country’s particular circumstances and should be a coherent part of the country’s overall tax system.

- Consultation with stakeholders is essential as a country develops its mandatory disclosure regime in order to ensure that the rules are appropriate and effective.

- The work on Action 12 should be coordinated with the work on the rest of the BEPS Action Plan. Moreover, in the context of the measures being recommended under the other BEPS Actions, the Discussion Draft’s proposed approach to mandatory disclosure of “international tax schemes” is overly broad and overly vague and should be narrowed considerably.
• It should be made clear that the fact that an arrangement is subject to mandatory disclosure rules is not itself an indication that the arrangement is improper.

• Duplicative disclosure obligations should be avoided through coordination rules.

• Inclusion of clear and specific hallmarks is critical to the design of an effective mandatory disclosure regime.

Overall concerns about the BEPS Project

Before turning to the specific issues with respect to this Discussion Draft, we want to express grave concern about the implications of the collected pending BEPS proposals for cross-border trade and investment and the global economy. Changes of the type being contemplated under the rubric of the BEPS project, and the uncertainty that would be created by abandoning clear standards and principles in favor of vague and subjective concepts, would have a profound adverse effect in terms of stifling global business. We of course recognize the need for governments to raise revenue to support essential government functions. However, they must do so efficiently and without having a chilling effect on essential commerce.

We urge the OECD to ensure that the work on all the BEPS Actions includes full consideration of the microeconomic and macroeconomic implications of any changes. The OECD has the world-class resources needed to contribute to the global debate by educating participants about the economic, policy, and revenue dimensions of the issues to be addressed and the solutions to be developed. This should go beyond the corporate income tax system and include the whole range of tax approaches available to governments.

The OECD and the countries involved in the BEPS project must not lose sight of the fact that the role of business in the global economy is not to provide revenue for governments. In imposing tax on business to provide government revenue, governments have both a compelling interest and an obligation to minimize the impact on business. The fact that only some businesses are subject to entity level taxes and others are not heightens the government’s obligation to minimize the impact on those businesses that are subject to tax. In seeking revenue from businesses, governments must weigh both the impact of their proposals on particular businesses and the impact across businesses against other approaches to the generation of revenue.
Overall comments with respect to BEPS Action 12

*Mandatory disclosure rules should be tailored to a country’s particular circumstances*

In describing the mandate with respect to Action 12, the BEPS Action Plan emphasizes the need to balance the interest in having consistent approaches across countries with country specific needs. In considering that balance in the context of the design of mandatory disclosure rules, we believe that the OECD’s focus on a “modular design” approach is appropriate. Different countries have very different traditions and styles with respect to the design of their tax laws. Some countries favor the promulgation of very detailed rules; other countries favor communication of core principles with illustrative examples. Some countries have extensive procedures for rulings and advance determinations to provide taxpayer-specific guidance; other countries place greater focus on the issuance of comprehensive regulations and other generally applicable guidance that taxpayers then apply to their particular situations.

Any mandatory disclosure regime must mesh with the rest of a country’s tax system. A country’s approach to mandatory disclosure rules necessarily should be consistent with its approach to its substantive tax rules so that the system as a whole is coherent. Therefore, the OECD recommendations with respect to the design of a mandatory disclosure regime should be in the form of options and information regarding best practices, rather than any kind of mandate of a specific approach. This will allow countries to benefit from the experiences, both positive and negative, that other countries have had with particular approaches to such rules. It also will facilitate some degree of consistency across countries that will help to streamline the compliance burden of taxpayers and others impacted by disclosure rules. However, it will ensure that each country will be able to tailor its mandatory disclosure rules to its own specific circumstances so that such regime fits appropriately into its overall tax system.

*Consultation with stakeholders is essential in ensuring appropriate and effective mandatory disclosure rules*

The Discussion Draft notes the importance of stakeholder comments in advancing the work on mandatory disclosure rules. We believe that consultation with stakeholders is critically important both in the development of the OECD’s recommendations on Action 12 and in countries’ evaluation and implementation of those recommendations as tailored to their particular tax systems. Moreover, we believe that consultation with the financial services sector is especially important, as financial services businesses typically will be impacted by a disclosure regime both in their capacity as taxpayers and also as advisors or promoters in their role as financial intermediaries. In this regard, several of the mandatory disclosure regimes that
are in place today were developed, and have continued to evolve, with the benefit of significant consultation with stakeholders regarding the whole range of design choices and myriad practical issues. We urge the OECD to include consultation with stakeholders as a best practice for countries that seek to design and implement a new mandatory disclosure regime.

**The work on Action 12 should be coordinated with the work on the rest of the BEPS Action Plan**

The work of the OECD and individual countries on Action 12 must be closely coordinated with the work on the other BEPS Actions so that model mandatory disclosure rules are designed in the context of the outcomes of the BEPS project as a whole.

As an initial matter, the requirements of the mandatory disclosure rules should be coordinated with the other transparency elements of the BEPS project. Mandatory disclosure rules should not require disclosure of information that will be provided to tax authorities through country-by-country reporting or the master file/local file transfer pricing documentation framework under BEPS Action 13. Information provided under those regimes should be considered to satisfy any overlapping mandatory disclosure rule requirement.

More fundamentally, the scope and reach of mandatory disclosure rules should reflect the outcomes of the substantive aspects of the BEPS project. Mandatory disclosure rules should serve as a backstop only and should be designed for that role. Given the robust measures being recommended under other BEPS Actions with respect to the substantive tax rules regarding cross-border transactions and arrangements, we believe that the Discussion Draft’s recommendations with respect to “international tax schemes” are overly broad and should be scaled back significantly.

The suggestions in the Discussion Draft regarding mandatory disclosure rules with respect to cross-border transactions and arrangements are so broad and vague as to potentially sweep in much of the cross-border activity of a global business. This would not serve the objectives of mandatory disclosure rules as identified in the discussion draft, which are to provide early information to tax authorities to inform risk assessment, to identify the promoters and users of arrangements that raise concerns, and to act as a deterrent with respect to the use of such arrangements. In order to further these objectives, the international tax arrangements for which disclosure is to be required should be clearly defined. Moreover, given the measures being proposed under the other BEPS Actions, we believe that the right approach is to narrowly define the international tax arrangements that would be subject to mandatory disclosure rules, with the potential for targeted expansion of such definition if and as needed to respond to particular concerns that may arise.
Technical comments with respect to BEPS Action 12

In addition to our overall comments with respect to the design and implementation of mandatory disclosure rules, we have several comments with respect to technical design choices:

- The OECD should stress that countries must be clear that disclosure of a transaction or arrangement under a mandatory disclosure regime will not be considered to be an indication that such transaction or arrangement involves tax avoidance or abuse or otherwise is improper. The fact that a transaction or arrangement is required to be disclosed does not obviate the need for a thorough substantive analysis before any determination can be made regarding its tax treatment.

- Where disclosure obligations are imposed on multiple stakeholders, such as promotors and advisors in addition to taxpayers themselves, such obligations should be coordinated so that duplicate disclosure is not required. If one stakeholder discloses a particular transaction or arrangement, that disclosure should satisfy the obligations of the other stakeholders with respect to such transaction or arrangement.

- It must be recognized that the use of a “main benefit test” that looks to whether a main benefit of the particular transaction or arrangement was obtaining a tax advantage is not particularly effective as a pre-condition or threshold requirement for application of disclosure requirements. Given the inherent subjectivity of such a test, it cannot be expected to appreciably narrow or target the reach of any mandatory disclosure regime. Therefore, it is critically important that mandatory disclosure regimes include well-functioning specific hallmarks that help to focus the required disclosures.

- Hallmarks based on confidentiality requirements should be used with caution given the role that such a requirement can play in ordinary business transactions and arrangements. It is not uncommon for the parties to a business arrangement to treat it confidentially for competitive or other commercial reasons. Therefore, confidentiality conditions alone do not signal a transaction or arrangement of concern.

- Hallmarks based on hypothetical tests are inherently impractical. They create undue uncertainty and are not consistent with the identified objectives of mandatory
disclosure regimes. We believe that hallmarks based on hypothetical tests should not be included as part of a best practices recommendation.

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We appreciate the opportunity to provide these comments on key issues with respect to the Action 12 Discussion Draft. We would be happy to respond to questions or to provide any further information that would be useful as the OECD continues its work in this area.

Sincerely,

[Signature]

Peter van Dijk
Senior Vice President, Tax
TD Bank
To,
Achim Pross
Head, International Co-operation and Tax Administration Division
Organisation for Economic Co-operation and Development
Paris, France

Dated: April 24, 2015

Sent via E-mail: MandatoryDisclosure@oecd.org

Re: Public Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules

Dear Mr Pross,

On March 31, 2015, the Organisation for Economic Co-operation and Development (OECD) invited stakeholders’ comments on the discussion draft on base erosion and profit shifting (BEPS) Action 12, which seeks to put into place a mandatory disclosure regime.

We note that, through BEPS Action 12, the OECD is seeking to require taxpayers to disclose their aggressive tax planning arrangements. A part of this work will involve designing and putting in place enhanced models of information sharing for international tax schemes between tax administrations.

As part of the transparent and inclusive consultation process mandated by the BEPS Action Plan, the OECD has invited interested parties to send comments on this discussion draft. We are pleased to submit our comments as below.

About Trinity Law Partners

Trinity Law Partners (TLP) is an Indian legal and tax consultancy firm representing primarily companies from start-ups to transnational corporations operating in various sectors.

Comments

TLP welcomes the intentions of the OECD to provide an efficient legal framework for tax administrations to secure information from multinational corporations with a view to addressing aggressive tax avoidance strategies. We agree that mandatory disclosure regimes will assist tax administrations in reducing tax risks through improved risk assessment and compliance program. However, we recommend that there must be an apparent nexus between any mandatory disclosure measures and the intended policy objectives that they seek to achieve.

First, the discussion draft highlights two different approaches for tax administrations to identify the person who is obliged to disclose under the regime: to impose the primary obligation to disclose on the promoter or the taxpayer or to impose an obligation on both the promoter and the taxpayer.

Option A, which proposes a dual reporting obligation, will create unnecessary compliance burden (also on the part of the tax administration) given that the information provided by the “material advisor” and the taxpayer will more often than not be similar in form and content. While Option B is undoubtedly preferable, the discussion draft is not clear as to what will happen in situations where the information on the scheme provided by the promoter to the taxpayer is later on not taken into consideration by the taxpayer in whole or in part. Presumably in such situations, tax administrations putting an exclusive, mandatory disclosure burden on the promoter (unless one of the stated exceptions applies) or on the
company, may not get the “true” and “correct” account of the arrangement, defeating the whole purpose of this Action Item.

Secondly, the discussion draft identifies “confidentiality” as one of the generic hallmarks which may be used by countries while adopting mandatory disclosure measures, stating that: “A confidentiality condition indicates that a promoter or a corporate wishes to keep schemes or arrangements confidential either from other promoters or from the tax authorities.” However, the mere presence of a “confidentiality” requirement should not and does not imply that the tax arrangement in question is aggressive. It is a common business practice to have these requirements agreed beforehand given the importance of keeping key business information from entering into the public domain.

Thirdly, in its current state, the discussion draft does not provide adequate taxpayer guidance in respect of the consequences of compliance and appears to be inclined towards protecting the interests of the tax administrations while conveniently overlooking the fact that the proposals may lead to uncertainties in the tax system. While noting concerns about “legitimate expectations,” we believe that the implementing law must be clear about the period within which the tax authority must communicate its stance to the taxpayer along with any further documentation requests. Such an assurance will only lead to more voluntary compliance and will be in tandem with the goals and objectives of this Action Item.

Finally, we urge the OECD to take into account the needs, requirements, and limitations of developing nations in finalizing its work on BEPS Action 12. As you will appreciate, most of the countries at present do not have a mandatory disclosure regime in place, and it will be difficult for these countries to adapt to a sudden change without having had due time and consideration to the merits and drawbacks of such a regime as existing in other countries such as the US, the UK, and Ireland, among others.

Conclusion

Once again, we extend our sincere appreciation to the OECD for inviting us to comment on the discussion draft regarding formulating mandatory disclosure rules under BEPS Action 12. In the hope that the OECD will take into account the above comments in carrying out further policy work under this Action Item, we remain:

Yours sincerely,

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April 29, 2015

VIA EMAIL
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Re: USCIB Comment Letter on the OECD Discussion Draft on BEPS Action 12: Mandatory Disclosure Rules

Dear Mr. Saint-Amans,

USCIB appreciates the opportunity to provide comments on the OECD Discussion Draft on Action 12 on Mandatory Disclosure Rules. Because of the extremely short comment period and the need to comment on other drafts, USCIB has focused on a few high-level issues. The lack of comments on other sections of the discussion draft should not be considered an endorsement of the proposals contained therein.

Coordination with Master File, Local File and Country-by-Country Reporting

USCIB believes that information that is required to be provided as part of transfer pricing documentation should not generally be required to be provided separately through mandatory disclosure regimes. This issue is especially relevant with respect to reporting obligations that would be created under Section IV of the Discussion Draft with respect to so-called “international tax schemes” and imposed on entities that are not parties to arrangements (see also below).
Thresholds for Disclosure

Use of a main benefit test as a threshold for disclosure – The use of a main benefit test to determine whether disclosure is required, particularly if the test is “one of the main benefits” rather than the main benefit, may result in a test that violates the first design principle: “mandatory disclosure rules should be clear and easy to understand.” As that design principle points out the main purpose test will result in the following consequences: taxpayers will be uncertain whether disclosure is required, transactions that governments would want to be made aware of may be omitted, information that governments receive may be poor quality or irrelevant, and taxpayers may be subject to penalties when they genuinely believed disclosure was not required.

Hypothetical application of generic hallmarks – USCIB strongly objects to the use of hypothetical generic hallmarks. Taxpayers should be judged by their actions, not by what they might have done. This is especially true in the case of premium fees. The notion that the promoter could have charged a premium fee when they did not, involves too many levels of second guessing of the actual conduct of the parties.

Hallmarks for loss transaction – USCIB urges caution against the inclusion of acceleration of losses as a standard for determining whether a loss transaction ought to be disclosed. How does one determine whether a loss has been accelerated? For example, would the disposition of an asset qualify as acceleration? This test also seems inconsistent with identifying the transfer of losses as a hallmark – either the loss is realized and recognized by the transferor (and perhaps accelerated?) or the loss carries over to the transferee. Loss trafficking seems a far greater concern. Economic losses that have been realized ought generally to be recognized and allowed (subject to any general limitations on the ability to use losses). The ability to claim these losses might be especially significant in an economic downturn. Although the discussion draft states the disclosure has no impact on whether the loss would be allowed or not, the overall notion is that “schemes” are subject to disclosure and the reported behavior is in fact suspect.

Timeframe linked to implementation – With respect to the timing of reporting by users it is important that reporting be linked to some reporting cycle, such as the filing of the annual tax return or quarterly reporting cycles. Otherwise it is too difficult to manage the reporting obligation. If the promoter has the primary obligation to report and that is tied to when the “scheme” is made available to users, then the jurisdiction will have the information relating to the “scheme” that will allow it to react in a timely manner.

1 Discussion draft paragraph 20.
Consequences of non-compliance – non-monetary penalties – Penalties always ought to be proportionate to the failure, with caps to prevent excessive financial burdens. The second recommendation on penalties provides that “countries are free to introduce penalty provisions (including non-monetary penalties) that are coherent with their general domestic law provisions.” USCIB is concerned that this is a very open-ended blessing of non-monetary penalties. While non-monetary penalties relating to tax obligations, such as extending the statute of limitations, may be appropriate, an open-ended invitation to impose non-monetary penalties is not. This recommendation should either be limited to non-monetary penalties relating to tax obligations or amended to provide standards for determining whether the penalty is appropriate in light of the failure.

International Tax Schemes

Policy Objections

Obligation of a domestic taxpayer to report -- USCIB is very concerned about the suggestions made in the section on International Tax Schemes. In particular, the general thrust seems to be to create a reporting obligation to a country even though that country may not have a tax interest in the so-called “international tax scheme”. The Discussion Draft recommends that “domestic taxpayers should be under an obligation to disclose a cross-border arrangement to the reporting jurisdiction even if they are not a direct party to the cross-border outcome.”

In USCIB’s view, this approach raises issues a number of issues that have not been addressed. First, a country may consider and reject mandatory disclosure. If that is the case, why should a taxpayer located in another jurisdiction be required to provide information indirectly to that country? If a reporting requirement is imposed in such a case by country A, but not country B, with respect to country C, then there may be commercial incentives for a country C taxpayer to deal with country B counterparties to avoid the reporting. Second, what is the legal authority of a country to require reporting of a transaction if the domestic taxpayer is not a direct party to the cross-border outcome? The more appropriate approach would be that the parties to the transaction should have the obligation to report.

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2 Discussion draft paragraph 200.
3 Discussion Draft, paragraph 241.
4 We understand Australia has considered and rejected mandatory disclosure.
5 Presumably through treaty exchange between the local jurisdiction of the taxpayer and the country that rejected mandatory disclosure in the first instance.
The outcome of Action 12 ought to be that countries consider whether they wish to adopt mandatory reporting and the scope of that reporting. Any country that does not adopt mandatory disclosure rules should not expect to receive information from another jurisdiction on transactions affecting its tax base. That is, excessive obligations should not be imposed on taxpayers that are not direct parties to a reportable transaction to make up for the lack of an appropriately imposed reporting obligation.

The absence of obligation to report so-called “international tax schemes” does not mean that countries would not have other sources of information available to them. First, the OECD maintains a database that is available to countries that would enable them to identify a very large number of so-called “schemes”. Second, to the extent that countries have a legal basis for doing so, they are free to spontaneously exchange information that they believe will be of interest to another country. Third, the master file and local file may provide this information in a standardized way.

Technical objections

Imposing a reporting obligation on domestic taxpayers that are not direct parties to the cross-border outcome will also violate a number of the design principles that are supposedly important to designing sound mandatory disclosure regimes. First, the materiality standard is not clear and easy to understand. Second, there seems to be no balancing of compliance costs with the benefits obtained by the tax administration. The discussion draft acknowledges that domestic taxpayers may have incomplete knowledge of the transaction, but reporting is nevertheless required. There does not seem to any “out” from reporting if the actual parties to the transaction are subject to reporting requirements. There could, therefore, be reporting of the same transaction multiple times by domestic taxpayers located in different jurisdictions who are not themselves a direct party to the cross-border outcome. This could especially be the case in the context of acquisitions, refinancings or restructurings, which may involve dozens of companies. If all of the parties to a restructuring are required to report the same transaction, the reporting could involve many companies reporting inconsistent information at different times on the same structure. This could substantially increase costs with little benefit to tax administrations.

Materiality standard – Paragraph 243 provides as follows:

An arrangement that incorporates a cross-border outcome should be treated as a reportable scheme if it involves a domestic taxpayer. A domestic taxpayer should be treated as involved in a cross-border arrangement where the arrangement includes a
transaction with a domestic taxpayer that has material economic consequences for that taxpayer or material tax consequences for one of the parties to the transaction.

(Bolding added.)

This standard is flawed in two respects. First, critical terms are not defined. Second, it is not clear how, even if it were defined, the domestic taxpayer would be in a position to apply the second half of the test, since the information on the tax consequences to the other parties to the transaction may not be in the possession of the domestic taxpayer.

Example 16 “applies” the materiality standard in determining whether reporting is required. It is assumed that a loan from A Co to B Co will have material economic consequences for A Co. There are no facts justifying this assumption. It is certainly possible, and may even be likely, that a single loan to a related party does not have material economic consequences to the lender. For example, if A Co has substantial assets and the loan represents a small portion of those assets and B Co is a good credit risk, it would seem that the loan may not have material economic consequences for A Co. A Co’s entire investment in B Co could be immaterial from A Co’s point of view depending on the relative sizes of A Co and B Co and A Co’s risk diversification profile. Are these considerations intended to be taken into account in determining materiality?

Example 27 involves a loan between B Co. and C Co. that by itself does not raise any issues. It is only because there is a hybrid financial instrument between A Co. and B Co. that the transaction becomes reportable. Although the example recognizes that C Co.’s reporting obligation may be limited because it may not hold complete information about the “scheme”, it is possible that C Co. has no information and that it would therefore be entirely unaware of an obligation to report any information to the tax authorities or to request additional information and certify that such a request has been made. This might especially be the case if B Co. is a group financing entity that sweeps excess cash in and loans it out to other members of the group as needed. It might be impossible to track the flow of funds as described in this example. In any case, any entity that could demonstrate that it was unaware of any “scheme” should be exempt from any potential penalties.

Example 38 illustrates both flaws with the materiality test. Paragraph 272 provides that A Co must report as it is a direct party to a cross-border outcome and the transaction has material tax consequences for B Co. Again there are no facts justifying this assumption. A client list may

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6 Discussion draft paragraphs 257 through 261.
7 Discussion draft paragraphs 262 through 269.
8 Discussion draft paragraphs 270 through 274.
or may not have substantial value, but if the issue is the materiality of the tax benefit then should the outcome not depend on the relative value of that benefit to the tax liability of B Co? If A Co does not have information concerning B Co’s overall tax situation how will A Co apply this test?

Further, although the Discussion Draft does not deal with reporting between countries, reporting this information to the country that is not affected by the cross-border arrangement will undermine some of the principle benefits of the mandatory reporting regime: quick identification of issues and the ability to respond quickly. Any information provided to a jurisdiction that is not a party to the transaction would likely have to go through a treaty exchange process, meaning the affected jurisdiction would not obtain the information until that process was complete and this might not be before the information becomes available through other channels such as the tax return including transfer pricing documentation. Thus, the proposed reporting with respect to so-called "international tax schemes" would create an unreasonable and uncertain reporting burden on international taxpayers with limited benefit to the affected jurisdiction (which may have considered and rejected a mandatory disclosure regime).

Given the limited utility of mandatory reporting that would be implemented through treaty exchange, USCIB recommends that tax authorities publish international tax schemes they consider aggressive or make a list of such tax schemes available to other tax authorities. Making any list public has the advantage of warning taxpayers away from aggressive planning techniques. The JITSC list (which is not public) may assist governments in identifying tax planning ideas that are of concern. Accessing this data base may be a better way for a government to get early information that would be useful to them than requiring taxpayers that are not party to the transaction to report the transaction while relying on exchange of information through the tax treaty network to provide the information to the affected jurisdiction.

Paragraph 230 raises the issue of reporting with respect to cross-border tax planning “schemes” that are incorporated into acquisitions, refinancings or restructurings. The OECD’s guidance with respect to the master file and local file will require reporting on these transactions both globally and locally if the transaction affects the local country business. Additional reporting – especially before the usefulness of the master file, local file and country-by-country reports has been evaluated – will likely be duplicative and will potentially significantly increase taxpayers’ costs. Significantly increased costs are especially likely in this area because of the modular design of the rules. Modular design will result in differences across jurisdictions as countries pick and choose those parts of the modules that serve their purposes and thus reporting will be
unique to each country that adopts a mandatory disclosure regime. This runs counter to the
design principles under Action 13, under which the OECD was attempting to achieve consistent
reporting that would result in cost savings for multinationals.

Sincerely,

William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)
DISCUSSION DRAFT “BEPS ACTION 12: MANDATORY DISCLOSURE RULES”

Valente Associati GEB Partners
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To the kind attention of: Committee on Fiscal Affairs
(MandatoryDisclosure@oecd.org)

30 April 2015

[Privileged]
Summary

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1 General Comments

The Discussion Draft “BEPS ACTION 12: MANDATORY DISCLOSURE RULES” released on March 31, 2015, intends to provide “an overview of the key features of a mandatory disclosure regime and considers the effectiveness based on available data from those countries with such regimes” (OECD Discussion Draft on Action 12, p. 6). Moreover, it sets out framework as well as options for the design of a mandatory disclosure regime, outlining how international transactions could best be captured by such a regime.

One of the challenges which the Tax Authorities will be facing consists in the lack of exhaustive and relevant information on aggressive tax planning schemes. Prompt availability of information allows for an effective response to the risk of taxable base erosion, through interventions on the normative framework, or the implementation of tax compliance programs.

Studies by the OECD show that regimes providing for mandatory disclosure allow that the above aims be achieved and appear as being more effective – to such purpose – when compared to other forms of disclosure. They provide, as a rule, disclosure of information obligations for taxpayers and their consultants/promoters, influencing thus the behavior of such parties which might be induced to adopt aggressive tax strategies.

Therefore, Valente Associati GEB Partners (VAGP) is most appreciative of the OECD’s endeavours to offer some guidance in order to design a proper and effective mandatory disclosure regime.

The compass of the mandatory disclosure proposal seems to be, however, far too extensive; as such, the possibility for successfully achieving the envisaged objectives could be highly unlikely. The proposal would “draw in” far too many transactions so that the volume of data acquired could be too massive for Tax Authorities to possibly process it in a significant or in-depth manner. Most importantly, it is worth emphasizing that the bulk of such information could in all likelihood reveal regular and entirely admissible non-aggressive tax planning cases, rather than tax avoidance situations.
In the VAGP’s view, the Discussion Draft could give – to all effects – the impression that tax avoidance should not be regarded as the exception, but as the rule. There is no quantitative support to substantiate such conjecture; in any case, such an impression does not truthfully or fairly represent actual facts.

2 Special Observations

Effectiveness of the proposed regime

Combining a sweeping network of regimes with penalties on non-disclosure that are excessive might provoke a conservative reaction from the business world, as disclosure might by far exceed the set objectives/targets. As a matter of fact, this would create considerable difficulties for Tax Authorities to duly and actually filter and process all acquired data and information.

As such, both, businesses and governments would considerably benefit from a careful and rather accurate formulation of the relevant objectives. Furthermore, advising governments to strictly limit their initial objectives to such schemes that are most harmful would be opportune. It would be advisable to abstain from crafting a sweeping provision to “catch everything” from the very onset.

This would not only be useful, but even necessary, to structure a sound and sustainable basis for mandatory disclosure rules in order to successfully reduce the volume of aggressive tax planning schemes.

The agreement on mandatory disclosure rules should be framed in the context of a fair dialogue between Tax Authorities and taxpayers. The discussion should be carried out under the acknowledgement of the need for an adequate protection of the fundamental rights of taxpayers.

In VAGP’s view, whether countries receiving information more swiftly would actually lead to a prompter response to undesirable tax schemes is a debatable matter. This would be true strictly to the extent that excluding undesirable tax schemes would not require a legislation change. Contrarily, this would mean that countries would
be required to amend their laws on the very first hint of an undesirable tax scheme (even prior to the possibility of any Court to issue a ruling on such scheme), which could be reasonably expected to create legal uncertainty.

Constant changes triggered by so-called “signals” would randomly occur throughout the year within the legislative framework. An unstable legislative climate would considerably harm the investment scenario. The realistic consequence is that a considerable length of time would have to elapse before legislative action could actually be commenced.

**Coordination with cooperative compliance**

VAGP’s position on the issue is that in order to optimize mandatory disclosure regime, the OECD ought to add constructive support elements instead of merely proposing the implementation of further reporting requirements and consequent non-compliance penalties, which would also corroborate the remarks contained in the Action Plan and the Discussion Draft hereof, i.e., that work will be coordinated with the one related to cooperative compliance.

It goes without saying that companies engaging in cooperative compliance vis-à-vis their national Tax Authorities, should not be subject to the said mandatory disclosure rules, given that within a cooperative compliance context, both Tax Authorities and enterprises/corporations had already entered into prior mutual agreements to share such kind of information. Furthermore, the said exemption would serve the meaningful purpose of stimulating, on the one side, more Countries to create effective cooperative compliance arrangements and, on the other, more companies to engage in the same with their national Tax Authorities, all of which would thus achieve the objective set forth by the OECD, i.e., to optimize cooperative compliance and significantly develop an effective administrative cooperation between/among Tax Authorities.

That would not only enhance effectiveness, but would considerably reduce the volume of information to be shared, which would make the measures being accepted by businesses. For enterprises which are tax compliant, the requirements proposed by the OECD would merely represent a further and unwelcome administrative onus.
According to the Discussion Draft, mandatory disclosure rule are not necessarily intended to expose only aggressive tax planning schemes, but any tax arrangement that may have negative tax consequences.

In VAGP’s view, mandatory disclosure regime should apply exclusively to matters of a tax nature, and should not be extended to any commercial consequences. Mandatory disclosure rules are desirable for identifying mass marketed pre-packaged schemes, not all international tax arrangements. Otherwise, they impose a considerable compliance burden for the vast majority of companies and groups, receiving tax advice.

Coordination with other BEPS Actions

The OECD should explicitly state that it intends to flesh out BEPS recommendations to buttress international tax rules and regulations. Consequently, remarks under the other Action Points must be included into the final formulation of the stated objectives.

Aggressive tax planning schemes that were actually thwarted by other BEPS Actions need not be comprised in mandatory disclosure rules. At the same time, matters already addressed under other BEPS Action Points need not be included again under the Discussion Draft hereof as this means a further and unnecessary burden for businesses.

The compliance burden on both taxpayers and advisers – as well as on tax administration – should be reasonable and minimal. In this context, mandatory disclosure rules should identify one jurisdiction for a specific tax arrangement. A multiple reporting requirement to Tax Authorities in different jurisdictions regarding a specific tax plan should be avoided.

According to VAGP, coordination with obligations under transfer pricing documentation rules should be achieved. Consequently, information to be provided as part of said documentation (Masterfile, Country-file or country-by-country reporting template) should not be submitted under mandatory disclosure regime as well.
Administrative cooperation and confidentiality

As far as international tax schemes are concerned, the question is how to streamline and optimize mandatory disclosure within an international framework.

In VAGP's view, the issue as to the manner in which disclosed information is automatically shared between/among Tax Authorities should be further explored. Confidentiality is a key-issue. All information and data exchanged should be particularly protected and, as such, any access to the said information ought to be restricted to such countries that are directly involved in the relevant international tax scheme and have implemented measures in compliance with OECD recommendations.

Legal certainty

To advocate legal certainty, taxpayers should be strictly and exclusively judged on their actions. Business requires certainty especially when dealing with an entity as influential on its business as the Tax Authorities.

The role of promoters is relevant, as far as confidentiality of schemes and premium fee (so-called “generic hallmarks”) issues are concerned. In VAGP’s opinion, results achieved in terms of mandatory disclosure would be much more effective if national governments were to directly treat such issues with promoters in order to find an agreement on were they may or may not be warranted.

According to VAGP, an update on the disclosure regime should be kept, while focusing on the transactions requiring mandatory disclosure, i.e., on those which might be aggressive tax planning schemes. A special mechanism should be implemented to avoid that not all transactions, but only those representing aggressive tax planning schemes, be subject to mandatory disclosure.

The recipient of a tax plan proposed by a promoter might choose not to follow up on the plan, for reasons which could be unrelated to the tax plan itself. The disclosure at the moment that a tax plan is proposed not only is irrelevant, but it could damage the taxpayer. Linking a taxpayer name to a proposed tax structuring plan may
negatively affect the taxpayer relationship with the Tax Authorities, especially in cases when the taxpayer did not follow the tax advice.

A professional advisor may be requested to provide his opinion regarding a tax plan which has been created by the taxpayer. This situation may give rise to some issues regarding legal attorney privilege as well as ethical rules. The different approaches to legal attorney privilege by all countries involved should be taken into consideration.

Penalties

Penalties for non-compliance ought to be proportional to the offence and not to the tax savings. They may be increased in case of recurrent non-compliance by the taxpayer.