Joint Opinion Statement FC 7/2015 and PAC 1/2015

on Mandatory Disclosure Rules

(BEPS Action 12)

Prepared by CFE and AOTCA

Submitted to the OECD

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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

[1] http://www.oecd.org/ctp/aggressive/discussion-draft-action-12-mandatory-disclosure-rules.pdf
[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):

<u>Provide clarity for promoters and taxpayers on what should be reported</u>

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.

<u>Prevent over-reporting and limit compliance burden</u>

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[3] seems 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.

<u>Fee-related hallmarks</u>

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[4]. 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[5]. 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.

<u>Hypothetical hallmarks</u>

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.

<u>Defining a reportable international scheme</u>

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.

<u>Who is to disclose and penalties</u>

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)

<u>Effect of MDR on tax ruling requests</u>

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.

<u>Risk of prejudice</u>

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 inacceptable 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[6].

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

[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[7]. 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?

[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?