ACTION 12: MANDATORY DISCLOSURE RULES

Background Documents:

OECD Discussion Draft: March 31st, 2015
BIAC Response: April 30th, 2015
OECD Report: October 5th, 2015

Last updated: 30 November 2015

TOPIC	BIAC COMMENTS	OECD RESPONSE
General	1. It would be a more appropriate objective to establish clear "best practices," rather than broader "building block" recommendations.	Final report follows a modular approach allowing countries to address specific needs and risks.
	2. Mandatory disclosure regimes (MDR) and Co-operative Compliance programs should be treated as distinct risk management strategies. Exemptions from mandatory disclosure requirements should be provided to companies entering into co-operative compliance relationships.	There are no exceptions from a mandatory disclosure for companies entering into co-operative compliance relationships. Each program is independent.
	3. Confidentiality of disclosures: Clear guidelines & provisions are required to ensure information is protected & shared appropriately.	There are no guidelines addressing the confidentiality of disclosure.
	4. New MDR should be implemented on a forward looking basis (i.e. not retroactive disclosure of transactions)	There is no reference to whether the implementation should be prospective or retroactive.
	5. EU automatic exchange of tax rulings: MDR should take into account how and if such rulings will be disclosed to other relevant jurisdictions to avoid duplication.	Although not limited to the EU case, para. 274 of the final report provides that to avoid unnecessary compliance costs, a taxpayer should not be required to duplicate the disclosure of information that is already fully and fairly disclosed under another domestic reporting obligation.
duplication of disclosures	6. An MDR 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.	Both MDR and GAAR are mutually complimentary from a compliance perspective. However, for disclosure purposes the definition of "reportable scheme" would generally be broader than a "tax avoidance scheme" under GAAR.
	7. Penalties should not be applied more than once in relation to a particular transaction.	Comment not acknowledged. There is no reference to duplication of penalties.
	8. Information provided as part of TP Documentation should not be demanded again under a MDR	Para. 274 of the final report provides that in order to avoid unnecessary compliance costs, MDR should allow a taxpayer to incorporate, by reference,

		information made available to a country under Action 13.
	9. Report of key provisions of foreign law relevant to the elements of the disclosed transaction: penalties should not be applied to taxpayers due to understandable errors or omissions in their disclosures	Comment not acknowledged. Key provisions of foreign law that are relevant to the cross-border outcomes should be disclosed and understandable errors or omissions do not impede imposing a penalty.
	10. MDR should identify one jurisdiction to report for a specific tax arrangement, rather than having multiple reporting requirements across several jurisdictions.	Comment not acknowledged. Where an international scheme has a substantive connection with a jurisdiction, that jurisdiction could require disclosure of that scheme.
	11. The disclosure of any tax arrangement that may have negative tax consequences is overly-broad.	Comment not acknowledged.
Promoters	12. Disclosure of a "scheme" should not be required unless and until the tax plan of such a scheme is adopted.	The final report recommends disclosing a scheme once it is available in order to maximize the tax authority's ability to react.
	13. Disclosure of taxpayer's name by a promoter should not be required unless the taxpayer has adopted the plan.	The final report recommends disclosing a scheme once it is available. The information to disclose includes name, taxpayer number and details of transaction.
	14. A secondary advisor should not be required to report.	The principles surrounding the definition of promoters are so broad that they could include secondary advisors to certain extent. A secondary advisor, e.g., could provide assistance or advice with respect to organising or managing the tax aspects of a transaction that causes the transaction to be a reportable transaction.
Penalties	15. Monetary penalties should be related to the 'tax saving' or 'tax liability' and not be a specific sum.	One of the factors suggested to be considered in setting penalty levels includes setting percentage based penalties based on the transaction size or extent of tax savings. Other factors that might be considered include negligence, deliberate non-compliance or level of fees. However, Countries remain free to introduce penalties coherent with their domestic laws.
	16. Non-monetary penalties should be related to the actual tax liability or other tax related obligations (e.g. an extension of a statute of limitations)	Comment not acknowledged. Final report does not provide exact guidelines in this regard, although includes as examples the extension of statute of limitations and the denial of tax benefits arising from the scheme.
Hallmarks	17. BIAC strongly objects to 'hypothetical generic hallmarks'	Countries can choose whether or not to adopt a hypothetical approach or adopt purely factual objectives tests.
	18. BIAC cautions against the inclusion of 'acceleration of losses' as a hallmark for a transaction to be disclosed. The DD does not	Box 2.7 (hallmarks for loss transaction) includes as a principle the 'acceleration of losses'. The final report does not explain when a loss should be considered

	clearly explain when a loss should be considered "accelerated".	"accelerated".
International Tax Schemes	19. The DD does not offer a 'safe harbor' (for instance, for small companies) from reporting obligations	No safe harbour included in the final report. It considers that if the monetary thresholds are set at level that avoids over-disclosure, there should be no need to apply a threshold requirement to filter-out irrelevant or non-material disclosures.
	20. BIAC strongly recommends that best practices adopt timing requirements consistent with pre-existing reporting regimes (annual or quarterly tax return filings).	No reference to timing of the disclosures under the chapter on international tax scheme.
	21. Para 241: The creation of a reporting obligation by countries that do not have a tax interest in the "international tax scheme" is inappropriate.	Para. 241 of the DD is para. 242 of the final report and it still considers that domestic taxpayers should disclose a cross-border arrangement to the reporting jurisdiction even if they are not a direct party to the cross-border outcome.
	22. Para. 230: reporting cross-border tax planning "schemes" regarding 'acquisitions, refinancing or restructuring'. Master file and local file already require reporting of these transactions, both globally and locally, if the transaction affects the local country business	Para. 230 of the DD remains as para. 230 of the final report and its wording remains almost unchanged. Reference to acquisitions, refinancing or restructuring is still included.
Materiality standard	23. The materiality standard in the DD is unclear.	The final report provides more elements to take into account when considering the materiality standard. Now it includes that a monetary amount facilitates certainty, it should be set by reference to the economic and tax consequences of the transaction entered into by the domestic taxpayer (or payments made by or to that taxpayer), and should be measured over the lifetime of the arrangement.
	24. The DD does not deal with reporting between countries.	The final report has a new chapter dealing with exchange of information. Members of the JITSIC Network are encouraged to exchange information and the exchange could include information obtained under a MDR.