OECD issues discussion draft on mandatory disclosure rules under BEPS Action 12

Executive summary

On 31 March 2015, the Organisation for Economic Co-operation and Development (OECD) issued a discussion draft on mandatory disclosure rules under Action 12 (Disclosure of aggressive tax planning arrangements) of the base erosion and profit shifting (BEPS) project. The discussion draft makes a series of recommendations about the design of mandatory disclosure regimes intended to allow maximum consistency between countries while also being sensitive to local needs and to compliance costs. The discussion draft focuses in particular on international tax schemes, which are viewed as an area of special concern and the primary focus of the BEPS project. It notes that disclosure schemes that are intended to address domestic avoidance might not be sufficient to capture cross-border arrangements and provides recommendations for an alternative approach.

The discussion draft includes a statement that it does not necessarily reflect consensus views of the OECD Committee on Fiscal Affairs or the working group responsible for Action 12. It reflects preliminary consideration of the issues and identifies issues for public comment.

The discussion draft requests that comments be submitted by 30 April 2015. A public consultation meeting on Action 12 is scheduled for 11 May 2015. The BEPS Action Plan calls for final recommendations on the design of mandatory disclosure regimes to be made by September 2015.

Detailed discussion

The Action 12 discussion draft begins with an overview of key features of a mandatory disclosure regime and its interaction with other disclosure rules and compliance tools. It sets out options for the modular design of a mandatory disclosure regime. Finally, it includes a discussion of international tax schemes in particular and how these could be covered by a mandatory disclosure regime. With respect to the element of
Action 12 that is to focus on design and implementation of enhanced information sharing for international tax schemes, the document indicates that this work will be coordinated with the other parts of the BEPS Action Plan that involve information exchange, including Action 5 on harmful tax practices and Action 13 on transfer pricing documentation and country-by-country reporting.

The discussion draft considers the mandatory disclosure regimes that have been implemented in various countries to identify and evaluate design features that are commonly used. The United Kingdom’s Disclosure of Tax Avoidance Schemes rules are a particular focus of attention because they have been in place since 2004 and are perceived to have had considerable success in reducing aggressive tax avoidance. Other forms of disclosure, such as tax rulings, reporting obligations in tax returns, and voluntary disclosure rules are also considered. The discussion draft indicates that mandatory disclosure is found to be most effective for accomplishing the objectives of obtaining information early; allowing the promoters and users of aggressive tax arrangements to be identified; and deterring the use of such arrangements.

**Summary of design recommendations for mandatory disclosure regimes**

The existing mandatory disclosure regimes considered in the discussion draft are either “transaction-based” or “promoter-based.” The former depends on the tax authorities identifying transactions that taxpayers must report when they enter into them. “Promoter-based” regimes place the onus on promoters to disclose arrangements that display prescribed hallmarks. The design recommendations set forth in the discussion draft draw on elements from both kinds of regimes.

According to the discussion draft, all mandatory disclosure regimes should be enforced through financial penalties for non-compliance. Disclosure should include full details of how the arrangement work, why it is subject to disclosure, and who is using it.

**Who has to disclose:** The draft recommends that promoters should always be subject to disclosure obligations, although there could be a dual obligation on taxpayers as well. Where promoters have the primary disclosure obligation, the obligation should revert to the taxpayer when the promoter is outside the jurisdiction or asserts legal privilege or where the arrangement is developed by the taxpayer alone.

Where an arrangement is disclosed by a promoter only, the promoter should be required to draw up client lists and there should be a scheme reference number system. These client lists and reference numbers also are viewed as useful tools even when taxpayers are subject to their own disclosure requirement.

**Threshold conditions:** Mandatory disclosure regimes often have a threshold condition. For example, this might be a test of whether obtaining a tax advantage is a main benefit of the arrangement. Alternatively, a de minimis filter can be used. The discussion draft acknowledges that threshold conditions can be appropriate because they help keep the number of disclosures to a manageable level. However, the discussion draft indicates that a main benefit test should not be combined with a de minimis filter.

**Hallmarks:** In existing disclosure regimes, disclosure is triggered by an arrangement that includes certain hallmark characteristics. The discussion draft recommends that the existence of a single hallmark in respect of a scheme should be sufficient to give rise to a disclosure obligation.

Hallmarks can either be general or specific. General hallmarks include a promoter’s desire to keep the arrangement confidential or requirement of a contingent or premium fee. The discussion draft recommends that regimes adopt both these hallmarks and indicates that a regime also may adopt a hallmark that applies to standardized tax products as well.

The discussion draft also recommends that countries use specific hallmarks designed for their local circumstances. Examples of specific hallmarks include leasing transactions, transactions similar to those included on a black list, or transactions with counterparties in low tax jurisdictions. Individual countries are left to design the specific hallmarks most appropriate to their local circumstances and may attach a de minimis filter to individual specific hallmarks.
Timeframe for disclosure: The discussion draft recommends that a promoter must disclose an arrangement when it is available for use. Where there is a disclosure obligation on taxpayers, the timing of disclosure should be linked to implementation of the arrangement.

International tax schemes
The discussion draft indicates that cross-border transactions raise particular issues for disclosure regimes because it may not always be clear in one jurisdiction whether a tax advantage has been obtained in another jurisdiction. To address this, the discussion draft recommends that special hallmarks be developed for “cross-border outcomes.” These outcomes are broadly defined to include situations where taxpayers can obtain deductions for the same expenditure in two jurisdictions (such as where a sale and leaseback allows amortization of the same asset in two jurisdictions) or a tax deduction in one jurisdiction with no taxation on the corresponding income. Many such arrangements would be caught by the anti-hybrid rules proposed under BEPS Action 2 and could also be within the reach of other BEPS Actions such as Action 6 on treaty abuse or Action 7 on permanent establishment. The mandatory disclosure recommendations under Action 12 are intended to help tax authorities address aggressive tax avoidance that may not be addressed by the current BEPS project.

The discussion draft recommends that threshold conditions, such as the main benefit test, should not apply to arrangements with cross-border outcomes. This is because it is not always clear where a tax benefit arises in the case of a cross-border outcome. The discussion draft also recommends that taxpayers should only be required to disclose an arrangement to which they are a party or where the cross-border outcome arises in their group.

Implications
The discussion draft is the first draft of the output to be produced under BEPS Action 12. If the OECD’s final recommendations under Action 12 are followed, more jurisdictions can be expected to establish mandatory disclosure regimes. Jurisdictions with existing mandatory disclosure regimes also can be expected to make changes to their rules as a result of the recommendations under Action 12.

Companies should evaluate how the proposed recommendations in the discussion draft may impact them, stay informed about developments in the OECD and in the countries where they operate or invest, and consider participating in the dialogue regarding the BEPS project and the underlying international tax policy issues.

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