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Via e-mail

MandatoryDisclosure@oecd.org

OECD

On behalf of IFA Grupo Mexicano, A.C. (Mexican Branch of the International Fiscal Association) kindly find below our comments on the Public Discussion Draft on Action 12 of the BEPS Action Plan –"Mandatory Disclosure Rules" ("MDR").

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.

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

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

Sincerely,

IFA Grupo Mexicano, A.C.