REPORTABLE SCHEMES

IN THE MEXICAN LEGISLATION:

A GUIDANCE

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SUMMARY*: I. Introduction. II. Keywords in the Mexican tax legislation related to Reportable Schemes. III. Legal scope of reportable schemes. IV. Conclusions.*

I. Introduction.

As part of the numerous reforms that the Mexican legislation has suffered as a consequence of its incorporation as a member State to the Organization for Economic Co-operation and Development (hereinafter OECD) in 1994, a bolder intent to cope with the combat of tax avoidance, tax havens, hybrid schemes and other mechanisms soundly described in the Base Erosion and Profit Shifting Actions (BEPS Actions)[1], the Mexican legislative branch has taken measures in order to incorporate many recommendations made by the OECD in order to combat these schemes that pose a great challenge for tax authorities worldwide[2].

One of these measures is the incorporation of reportable schemes into the Mexican legal system. It is important to notice that such reform entered into force on January 1 of 2020 and that reportable schemes are now part of the vast array of taxpayers' obligations. Nonetheless, the reform imposes obligations not only to taxpayers, but also to 'Tax Advisors' a new-fangled term of art which carries with itself a new legal concept, and a

[1] For a more detailed explanation on the BEPS Actions, please refer to the following website: https://www.oecd.org/tax/beps/

[2] Mexican Office of the Executive, *Initiative to reform provisions contained in the Income Tax Law, the Value-Added Tax Law, the Special Tax on Goods and Services, and the Federal Tax Code*, (2019) p. CXXIV.

new subject obliged to comply with certain provisions related to reportable schemes. Tax Advisors will be obliged to disclose reportable schemes from January 2021.

Thus, the purpose of this article is to guide the interested reader through this new set of rules that are undoubtedly relevant for making businesses in Mexico or for companies with third related parties abroad. In this sense, our main aim is not to criticize the content of the reform, but rather we will try to draw a useful map to navigate through this sea of provisions. To accomplish this task, it is imperative to dive into the offspring of the idea of reportable schemes, as well as defining clearly the province in which this reform is built.

II. Keywords in the Mexican tax legislation related to Reportable Schemes.

As a starting point in order to draw this map, it is mandatory to sum up the keywords included in the Federal Tax Code (hereinafter FTC) to understand the scope of the obligations directed to Tax Advisors and Taxpayers.

- **Tax Advisor**: It is considered as a tax advisor any natural or legal person that in the ordinary course of its activities carries out activities of tax consulting, and it is responsible or it is involved in the design, commercialization, organization, implementation, or administration of the totality of a reportable scheme for its implementation through a third party[3].

- **Obliged Tax Advisor:** The obliged tax advisors in terms of this Chapter, are those who are considered tax residents in Mexico or residents abroad who have a permanent establishment in national territory pursuant to the Income Tax Law, as long as the attributable activities to such permanent establishment are those carried out by a Tax Advisor[4].

[3] *Vid.* Federal Tax Code, Article 197 second paragraph.

Article 5-A of the FTC considers as a fiscal benefit any reduction, elimination or temporary deferral of a tax. This includes those benefits reached through deductions, exemptions, non-recognition of an income or accrued income, adjustments or lack of adjustments of the taxable base of a contribution, the recharacterization of a payment or activity, among others.

For an expanded view on this matter, please refer to the complete text of the FTC, available in: http://www.diputados.gob.mx/LeyesBiblio/pdf/8_090120.pdf

[4] *Íbidem, third paragraph.*

- **Fiscal benefit:** For purposes of this chapter, it is considered that a fiscal benefit is the monetary value derived from any of the criteria set forth in the fifth paragraph of Article 5-A of this Code[5].

- **Taxpayers obliged to disclose reportable schemes:** The obliged taxpayers in terms of this article are those resident in Mexico and residents abroad with a permanent establishment in Mexico pursuant to the Income Tax Law, when their tax returns provided in the tax provisions reflect the fiscal benefits of the reportable scheme. Such persons are also obliged to disclose in terms of this article when they conclude or carry out operations with third related parties abroad, and such schemes generate fiscal benefits in Mexico to the latter as a consequence of such operations[6].

- **Scheme:** It is considered as a scheme, any plan, project, proposal, consulting, instruction or recommendation disclosed in an express or tacit way with the object of materializing a series of juridical acts. It is not considered as a scheme, the completion of a procedure before the authority or the taxpayer's defense in tax controversies[7].

- **Reportable scheme:** It is considered as a reportable scheme, any scheme that generates or may generate, directly or indirectly the obtention of a fiscal benefit in Mexico and has any of the following characteristics[8]:

- **Generalized reportable scheme:** It is considered as a generalized reportable scheme, those intended to be commercialized in a massive way to any kind of

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[5] *Vid.* Federal Tax Code, Article 199, penultimate paragraph.

[6] *Ibidem*, last paragraph.

[7] *Vid.* Federal Tax Code, Article 199 second paragraph.

[8] *Ibidem,* first paragraph.

Overall, the necessary characteristics in order to deem a scheme as reportable are those who try to avoid the application of the Standard for Automatic Exchange of Financial Account Information in Tax Matters by the OECD (CRS); try to avoid the application of Article 4-B of the Income Tax Law; involve the abuse of double taxation treaties in order to obtain a fiscal benefit; involves the avoidance of constituting a permanent establishment in Mexico pursuant to the Income Tax Law and the double taxation treaties to which Mexico is a State Party.

For a detailed view on the characteristics to consider a scheme as reportable please refer to Article 199 of the FTC, available in: http://www.diputados.gob.mx/LeyesBiblio/pdf/8_090120.pdf

taxpayer or to an specific group of them, and albeit they require a minimum or null adaptation to be suited to the specific circumstances of the taxpayer, the way to obtain the fiscal benefit is the same[9].

- **Personalized reportable scheme:** It is considered as a personalized reportable scheme, those which are designed, commercialized, organized, implemented or administered to the particular circumstances of a specified taxpayer[10].

III. Legal scope of reportable schemes.

A. Origins of the reportable schemes' reform.

As a preliminary matter to explain the scope of reportable schemes in Mexico it is important to dive in the origins of the incorporation of this new set of rules into the Mexican legal system.

The initiative to reform the provisions of the FTC refer to the Final Report of Action 12 of the BEPS Project[11] as the baseline in which the reform was purposed. Additionally, such initiative refers to the implementation of rules alike in the United Kingdom, specifically the Disclosure of tax avoidance schemes (DOTAS). Although the Mexican initiative does not expressly refers to the Proposals for the Amendment of Council Directive 2011/16/EU (hereinafter DAC 6), we refer to this source given its importance in the subsequent domestic and international efforts to fight tax elusion, and due to the similarities shared between the provisions set forth in the FCT and the content of DAC 6.

One of the motivations of the Mexican legislative branch to include this new set of rules is that these are obligations that have been proved to provide pertaining information on tax elusion structures and schemes, which has led to the implementation of legislation intended to avoid the operation of these structures before they incur in an important loss of tax revenue for the State.

Accordingly, the purpose of this sub-chapter is to explain the cornerstones on which the Mexican reportable schemes is constructed.

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[9] *Íbid*, third paragraph.

[10] *Íbidem.*

[11] *Op. Cit.* Mexican Office of the Executive, p. CXXIV. *Cfr*. OECD (2015), Mandatory Disclosure Rules, Action 12-2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241441-en

1. The United Kingdom experience (DOTAS).

The rules for disclosure of reportable schemes in the United Kingdom depends directly on the nature of taxes. Namely, a specific set of rules is applicable for direct and indirect taxes.

There are three different disclosure regimes in the United Kingdom designed to combat tax avoidance: the VAT disclosure regime (VADR), the Disclosure of Tax Avoidance Schemes: VAT ant other indirect taxes (DASVOIT), and the Direct tax (including Apprenticeship Levy) and National Insurance contributions (DOTAS)[12].

We highlight that the United Kingdom's legal system provides a comprehensible regime depending on the formal classification of taxes. This is a distinctive point with respect to the generic disclosure regime provided in the FTC. Therefore, to the extent of the content of this article, we will refer only to the DOTAS regime given that the Mexican reportable schemes regime is predominantly related to direct taxes (the Income Tax), specifically in the rules that determine the characteristics of a reportable scheme, and those related to the subjects obliged to disclose such scheme.

a) Subjects obliged to disclose.

With respect to the subjects obliged to disclose the schemes, there are different categories to determine whether or not a person is obliged to disclose a scheme, this is another distinctive point with respect to the Mexican FTC regime. While the FTC only recognizes the category of 'Tax Advisor' and 'Obliged Tax Advisor', the DOTAS regime sets forth the classification of 'Scheme promoter', 'Scheme introducer', and 'Scheme designer'[13].

b) Characteristics of a reportable scheme.

The DOTAS regime is extent, it provides several tests in order to consider whether a scheme should be disclosed. The main tests are (**i**) The benign test; (**ii**) The non-adviser

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[12] HM Revenue and Customs (HMRC) 'Disclosure of tax avoidance schemes' (Tax Avoidance, 4 February 2014) https://www.gov.uk/guidance/disclosure-of-tax-avoidance-schemes-overview#the-rules, accessed 18 August 2020.

[13] HM Revenue and Customs (HMRC) Guidance: 'Disclosure of tax avoidance schemes (DOTAS)' (1 April 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701190/DOTAS-March.pdf, accessed 18 August 2020, p. 20. *Cfr.* Finance Act 2004, Part 7 (s.306 to s.319) (as amended by s108 of FA2007, s116 of and Sch38 to FA2008, s56 of and Sch17 to FA2010, s215 of FA2012, s223 of FA2013, s284 of FA2014, s117 of and Sch17 to FA2015 and s104 FA2016

test; and (**iii**) The ignorance test. It is interesting that in the definition of the 'Scheme designer' -which transposed to the Mexican legislation is the 'Tax advisor'- it is mandatory that a person fulfills the criteria set forth by at least one of these tests.

c) Similarities shared between the DOTAS regime and the FTC.

As previously appointed, there are distinctive points between the DOTAS rules and the FTC. Notwithstanding these points, certain similarities exist in the characterization of a scheme that should be disclosed; as well as the criteria in order to determine a person obliged to disclose a scheme.

It needs to be noted that the three main tests provided in the DOTAS rules respond to specific hypotheses related to the residence of the person involved in the design, development, or implementation of a scheme. Namely, depending on the specific facts in which a scheme is detected, a special test will be applicable.

Furthermore, the subsidiary responsibility for disclosing a scheme to the taxpayer[14] is a critical match point which has been adopted by the Mexican legislation in article 198 of the FTC.

2. Action 12 of the BEPS Project.

The 2015 Final Report on Mandatory Disclosure Rules by the OECD is the most regarded source for States willing to implement such provisions in their domestic legislations. The BEPS Action 12 provides the key pieces needed to create an effective disclosure system in order to combat and prevent aggressive tax planning, as well as deterring the abuse of double taxation treaties in cross-border transactions.

According to the BEPS Action 12, the key design features of a mandatory disclosure regime include the following features: who reports, what information to report, when the information has to be reported, and the consequences of non-reporting[15].

The main objective of mandatory disclosure regimes is to increase transparency by providing the tax administrations with early information regarding potentially aggressive or abusive tax planning schemes and to identify the promoters and users of those schemes[16].

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[14] *Vid. Op. Cit.* HM Revenue and Customs (HMRC) Guidance: 'Disclosure of tax avoidance schemes (DOTAS)', paragraph 3.11, p. 28.

[15] OECD (2015), *Mandatory Disclosure Rules, Action 12 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p.10.

[16] *Íbid,* p. 9.

This view is completely shared by the Mexican legislative branch in the text of the Initiative for Reform of the FTC[17].

Ostensibly, the Mexican legislation follows -almost by the book-, the key design principles of mandatory disclosure regimes. This is clear from the *ratio legis* of the reform that introduced the Reportable schemes obligations into the FTC and from the legal framework surrounding the subjects obliged to disclose, what needs to be disclosed, and the consequences of non-disclosure.

Despite having this organization of provisions that follow the key design principles contained in the BEPS Action 12, a critical filter has been overlooked by the Mexican legislative branch: this is the *De-minimis filter*.

a) ***De-minimis filter***.

The *De-minimis* filter is a tool that can be used as an alternative to, or in addition to a broader threshold test that could operate to remove smaller transactions[18].

While in the *ratio legis* of the reform that incorporates the reportable schemes regime into the FTC an express reference to this filter is made, the enforceable legislative text of the FTC lacks the content of such filter. In other words, the Reportable schemes regime is so broad, that even small transactions could be reportable in spite of their small value[19].

We deem that this is a key point to bear in mind when making business in Mexico, that require a corporate restructure since it is irrelevant whether the transaction is small. As long as such transactions falls within the scope of Article 199 of the FTC, this will be reportable.

Lastly, we submit that the lack of the *De-minimis* filter in the Mexican legislation will eventually lead to higher costs and a higher administrative burden both por taxpayers and the Mexican Revenue Administration Service (SAT), which is incompatible with the purposes and principles set forth in the BEPS Action 12[20].

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[17] *Op. Cit.* Mexican Office of the Executive, p. CXXIV. "*El referido Reporte establece que el objetivo principal de los regímenes de revelación es incrementar la transparencia al otorgar a las administraciones fiscales información oportuna acerca de esquemas potencialmente agresivos y de planeación fiscal abusiva* […]".

[18] *Op Cit.* OECD (2015), *Mandatory Disclosure Rules, Action 12 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, p. 39 para. 87.

[19] *Vid.* Article 199 of the FTC. The criteria to consider a scheme as reportable is based upon the solely interaction of rules or the intention to avoid the application of rules contained in a Direct Tax Law (the Income Tax Law), but no reference to the value of such transactions is established.

[20] Cfr. Op. Cit. OECD (2015), *Mandatory Disclosure Rules, Action 12 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, p. 38 para. 87.

3. The proposals for the amendment of Council Directive 2011/16/EU, and Directive 2018/822 (hereinafter jointly referred as DAC 6 Directives).

In order to truly understand the origins of the incorporation of the Reportable schemes regime into the Mexican legal system, resort need to be made to the DAC 6 Directives. The purpose of this subsection is to briefly address this important source.

While at a first glance it would appear that the mandatory disclosure regimes has its origin in the BEPS Action 12 Report of 2015, it remains true that the Council Directive 2011/16/EU was the first directed effort to combat aggressive tax planning schemes, tax fraud and tax evasion[21].

Due to this fact, we pinpoint the main characteristics of the DAC 6 Directives:

- It broadly reflects the objectives of the BEPS Action 12 Report of 2015.
- It allows tax authorities to take the pertaining measures when potentially aggressive tax structures are designed and implemented.
- It informs the tax authorities in their risk's assessments and tax audits.
- It discourages those who promote, use or design aggressive tax schemes from the implementation of such schemes.

We highlight that the DAC 6 Directives reflect international cooperation understood as a general principle of international law[22]. In this sense, the content of these Directives is different with respect to the previously analyzed sources (DOTAS and BEPS Action 12), given that the DAC 6 Directives are built around the principle of international cooperation between the European Union Member States[23].

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[21] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77|799|EEC [2011] OJ L64/1. Recital (1).

[22] *Vid.* (Statute of the International Court of Justice (Conclusion 24 October 1945) (ICJ Statute) art 38).

[23] *Íbid,* Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77|799|EEC. Recital (2): "[…] *In order to overcome the negative effects of this phenomenon, it is indispensable to develop new administrative cooperation between the Member States'*

This is relevant given that ever since the issue of the DAC 6 Directives in 2011, an intense international work with the aim to fight tax elusion and aggressive tax planning schemes has been developing worldwide.

Perhaps the most noticeable breakthrough of these Directives is the creation of the Mandatory Automatic Exchange of Information, which according to Article 3.9 of the Council Directive 2011/16/EU means the "*systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals. In the context of Article 8, available information refers to information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State*"[24].

Thus, it is clear that the aim of these Directives is to promote international cooperation to fight and prevent aggressive tax planning schemes, through the Mandatory Automatic Exchange of Information which cannot be implemented but only through the establishment in domestic legislations of mandatory disclosure regimes (*e.g.* DOTAS in the United Kingdom).

B. Legal scope of the Reportable schemes' regime in Mexico.

Having made a brief recount of some of the most important sources that were consulted by the Mexican legislative branch to introduce a mandatory disclosure regime in Mexico, this subsection explains the way in which such provisions are settled.

We highlight that as of January 1, 2020 the mandatory disclosure regime entered into force for taxpayers. However, as of January 2021 Tax Advisors are obliged to comply with the disclosure provisions set forth in the FTC.

Additionally, pursuant to the Eighth Transitory Article Section II of the FTC, the reportable schemes to be disclosed are those that are designed, commercialized, organized, implemented from 2020, or prior to such year when any of its tax effects are reflected in the fiscal years that follow 2020. In this case, the taxpayers are solely responsible to disclose such schemes[25].

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tax administrations. There is a need for instruments likely to create confidence between Member States, by setting up the same rules, obligations and rights for all Member States."

[24] *Op. Cit.* Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77|799|EEC. Article 3.9.

[25] *Vid*. Federal Tax Code, Eighth Transitory Article Second Paragraph. […] "*Los plazos previstos para cumplir con las obligaciones establecidas en los artículos 197 a 202 del Código Fiscal de la Federación, empezarán a computarse a partir del 1 de enero de 2021. Los esquemas reportables que deberán ser revelados son los diseñados, comercializados, organizados, implementados o administrados a partir del año 2020, o con anterioridad a dicho año cuando alguno de sus efectos fiscales se refleje en los ejercicios fiscales*

1. Subjects obliged to disclose: The Tax advisor.

As a starting point of this explanation, the concept of 'Tax advisor' is relevant for understanding the subjects obliged to disclose a Reportable scheme. We analyze from a legal standpoint the definition of 'Tax Advisor' contained in Article 197 of the FTC:

> *Article 197: Tax advisors are obliged to disclose the generalized and personalized reportable schemes to which this Chapter refers to the Revenue Administration Service.*
>
> ***It is considered as a tax advisor any natural or legal person that in the ordinary course of its activities carries out activities of tax consulting, and it is responsible or it is involved in the design, commercialization, organization, implementation, or administration of the totality of a reportable scheme for its implementation through a third party.***
>
> […]
>
> (emphasis added)

From the reading of this article there are two requisites to deem a natural or legal person as Tax advisor:

- That such person, in the ordinary course of its activities, carries out activities of *tax consulting*. (we highlight that the FTC does not define the term '*tax consulting*').

- That such person is responsible, or is involved in the design, commercialization, organization or implementation of the totality of a reportable scheme or places such reportable scheme for its implementation through a third party.

We stress that in order to a person to be considered as a tax advisor, such person needs to fulfill with both criteria: (**i**) to carry out activities of *tax consulting*, and (**ii**) to be involved in the totality of the implementation, commercialization, etc. of a reportable scheme (or alternatively, provide the reportable scheme to a third party for its implementation). Furthermore, in accordance with the first paragraph of Article 197 of the FTC, the scope of

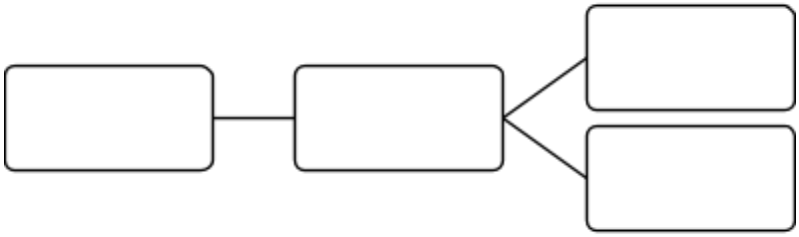
comprendidos a partir de 2020. En este último supuesto los contribuyentes serán los únicos obligados a revelar" […].

application of the obligation to disclose reportable schemes is limited to those persons that are considered as Tax Advisors.

In sum, whether the aforementioned criteria is not met, a person cannot be considered as Tax Advisor and, consequently, such persons would not be obliged to comply with the provisions set forth in Chapter One Title Six of the FTC (the mandatory disclosure regime).

2. Characteristics of Reportable Schemes.

As previously appointed in the Second Chapter of this Article, the Reportable Schemes' regime provided in the FTC distinguishes two kinds of Schemes:



We direct the reader's attention to the fact that the Reportable Schemes' regime establishes as Scheme "*any plan, project, proposal, consulting, instruction or recommendation disclosed in an express or tacit way with the object of materializing a series of juridical acts*", and as Reportable Scheme "*any scheme that generates or may generate, directly or indirectly the obtention of a fiscal benefit in Mexico*" and has any of the characteristics established in the Sections of Article 199 of the FTC.

In addition, there is a subsequent subdivision with respect to Reportable Schemes in generalized and personalized. The first ones are "*those intended to be commercialized in a massive way to any kind of taxpayer or to an specific group of them, and albeit they require a minimum or null adaptation to be suited to the specific circumstances of the*

taxpayer, the way to obtain the fiscal benefit is the same", and the second ones are "*those which are designed, commercialized, organized, implemented or administered to the particular circumstances of a specified taxpayer*""[26].

Accordingly, the Scheme is the continent, while the Reportable Scheme is the content. We assert that the disclosure obligations are only applicable to the latter, therefore, there could be schemes that generate a fiscal benefit, but that will not be deemed as reportable due to the lack of characteristics provided in Article 199 of the FTC.

Likewise, the *ratio legis* of the Initiative to reform the FTC supports this assertion:

> "[…] *It is important to clarify that these requisites (the obtention of a fiscal benefit and the characteristics of Article 199) must be jointly met. Namely,* ***it does not suffice that a fiscal benefit in Mexico is obtained, in order to consider the Scheme as reportable, but it needs to contain any of the characteristics contained in the provisions herewith proposed***[27]."
>
> (emphasis added)

Thus, it does not suffice that such Scheme generates a fiscal benefit in Mexico, but it also must contain any of the characteristics provided in Article 198 of the FTC[28].

3. Taxpayer's subsidiary responsibility to disclose.

Article 198 of the FTC establishes the hypotheses in which the taxpayer is obliged to disclose a Reportable Scheme:

> *Article 198: Taxpayers are obliged to disclose the reportable schemes in the following hypotheses:*
>
> *I. When the Tax Advisor does not provide to the taxpayer the identification number of the reportable scheme issued by the Revenue*

[26] *Vid.* Article 199 of the FTC.

[27] *Op cit.* Mexican Office of the Executive, *Initiative to reform provisions contained in the Income Tax Law, the Value-Added Tax Law, the Special Tax on Goods and Services, and the Federal Tax Code*, (2019) p. CXXVI.

[28] *Inter alia:* Schemes who try to avoid the application of the Standard for Automatic Exchange of Financial Account Information in Tax Matters by the OECD (CRS); try to avoid the application of Article 4-B of the Income Tax Law; involve the abuse of double taxation treaties in order to obtain a fiscal benefit.

Administration Service, and neither provides the certificate that the scheme is non-reportable.

II. *When the scheme has been designed, organized, implemented and administered by the taxpayer. In such cases, when the taxpayer is a legal person, the natural persons whose are the responsible tax advisors for the reportable scheme, that participate or are shareholders of such taxpayer, or those who maintain a subordinate relationship will not be obliged to disclose as long as the requisites established in Article 200 Section II of this Code are fulfilled.*

III. *When the taxpayer obtains a fiscal benefit in Mexico derived from a reportable scheme that has been designed, commercialized, organized, implemented or administered by a person that is not considered as a tax advisor pursuant to Article 197 of this Code.*

IV. *When the tax advisor is a resident abroad with no permanent establishment in national territory in terms of the Income Tax Law, or when having a permanent establishment, the attributable activities to such establishment are not those carried out by a tax advisor in accordance to Article 197 of this Code.*

V. *When there is a legal impediment for the taxpayer to disclose the reportable scheme.*

VI. *When there is an agreement between the tax advisor and the taxpayer for the latter to be the obliged to disclose the reportable scheme.*

In this sense, it is convenient to appoint that pursuant to Article 197 of the FTC, *prima facie,* the subjects obliged to disclose Reportable Schemes are the Tax Advisors. Nonetheless, the six hypotheses contained in Article 198 of the FTC establish the subsidiary responsibility for the taxpayers to reveal such schemes which, among others, include the hypothesis in which the tax advisor does not provide the non-reportable

certificate to the taxpayer, or when the taxpayer obtains a fiscal benefit thorough a Reportable Scheme that has been designed or implemented by a person that is not deemed as Tax Advisor in terms of Article 197 of the FTC.

Therefore, Article 198 foresees that a Reportable Scheme could be disclosed not by the Tax Advisor, but by the taxpayer.

a) The non-reportable certificate.

Likewise, it is important to highlight that, even when a Scheme is non-reportable given that it does not share any of the characteristics enlisted in Article 199 of the FTC, there exists an obligation for the Tax Advisor to issue a non-reportable certificate to the taxpayer in which it justifies the reasons why such Scheme is non-reportable[29].

In this sense, Article 198 Section I of the FTC sets forth that:

> *Article 198:* ***Taxpayers are obliged to disclose the reportable schemes*** *in the following hypotheses:*
>
> *I.* ***When the Tax Advisor does not provide to the taxpayer the identification number of the reportable scheme issued by the Revenue Administration Service, and neither provides the certificate that the scheme is non-reportable****.*
>
> […]
>
> (emphasis added)

Accordingly, even if a Scheme is non-reportable, whether the Tax Adviser does not issue the non-reportable certificate that contains the reasons that justify why such Scheme does not fall in the criteria set forth in Article 199 of the FTC, the legal consequence of such default is the recharacterization of the Scheme as if it was reportable.

[29] *Vid.* Article 197 Seventh paragraph of the FTC.

IV. Conclusions.

a) The Mexican mandatory disclosure regime established in Title VI of the FTC is predominantly a direct tax-directed regime.

b) Certain similarities are shared between the DOTAS regime in the United Kingdom and the Reportable Schemes' regime provided in the FTC, specifically with respect to the subsidiary responsibility of the taxpayer to disclose a Scheme.

c) Although the Mexican legislative branch refers to the content of BEPS Action 12 as a justification to incorporate a mandatory disclosure regime, it overlooked a key design concept contained in BEPS Action 12, the *De-minimis* filter.

d) We assert that the lack of the *De-minimis* filter will eventually lead to higher costs and administrative burdens both for the taxpayer and the Tax Advisors.

e) The lack of the *De-minimis* filter should be considered when assessing every transaction concluded between companies, given that the FTC oblige to disclose a Scheme irrespectively of their monetary value.

f) Notwithstanding the lack of reference in the Mexican legislation to the DAC Directives, it is one of the most important sources to understand the origin of mandatory disclosure regimes worldwide, due to its reflection of international cooperation.

g) The scope of application of the Reportable Schemes' regime is limited to Tax Advisors, and subsidiary, to taxpayers.

h) There could be Schemes that generate a fiscal benefit but, given that they do not share any of the characteristics provided in Article 199 of the FTC, these would be non-reportable.

i) Article 198 of the FTC allows the possibility that a Scheme would be Reportable, but not by the Tax Advisor, but by the taxpayer due to its subsidiary responsibility.

j) Even when there is no obligation to disclose a Scheme, the Tax Advisor is obliged to issue a non-reportable certificate that justifies why such Scheme is non-reportable.

k) In case that a Tax Advisor does not issue the non-reportable certificate, such omission bears with itself the recharacterization of the Scheme as Reportable,

despite not having any of the characteristics enlisted in Article 199 of the FTC, and its disclosure by the taxpayer.