Comments to the OECD Discussion Draft on BEPS Action 12 "Mandatory Disclosure Rules"

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, appreciates the opportunity to provide comments on the OECD Discussion Draft on Action 12 on Mandatory Disclosure Rules. In our view, the recommendations generally reflect current "best practices". However, ICC would like to comment on a few of the suggested recommendations that it finds troublesome.

Coordination with Master File, Local File and Country-by-Country Reporting

ICC believes that information that is required to be provided as part of transfer pricing documentation should not generally be required to be provided separately through mandatory disclosure regimes.

Thresholds for Disclosure

Use of a main benefit test as a threshold for disclosure – The use of a main benefit test to determine whether disclosure is required, particularly if the test is "one of the main benefits" rather than the main benefit, may result in a test that violates the first design principle: "mandatory disclosure rules should be clear and easy to understand". As that design principle points out[1] the main purpose test will result in the following consequences: taxpayers will be uncertain whether disclosure is required, transactions that governments would want to be made aware of may be omitted, and taxpayers may be subject to penalties when they genuinely believed disclosure was not required.

Hypothetical application of generic hallmarks – ICC strongly objects to the use of hypothetical generic hallmarks. Taxpayers should be judged by their actions, not by what they might have done. This is especially true in the case of premium fees. The notion that the promoter could have charged a premium fee when they did not, involves too many levels of second guessing of the actual conduct of the parties.

Hallmarks for loss transaction – ICC urges caution against the inclusion of acceleration of losses as a standard for determining whether a loss transaction ought to be disclosed. How does one determine whether a loss has been accelerated? For example, would the disposition of an asset qualify as acceleration? This test also seems inconsistent with identifying the transfer of losses as a hallmark – either the loss is realised and recognised by the transferor (and perhaps accelerated?) or the loss carries over to the transferee. Loss trafficking seems a far greater concern. Economic losses that have been realised ought generally to be recognised and allowed (subject to any general limitations on the ability to use losses). The ability to claim these losses might be especially significant in an economic downturn.

International Tax Schemes

ICC is highly concerned about the suggestions on International Tax Schemes. The general thrust seems to be to create a reporting obligation to a country even though that country may not have a tax interest in the so-called "international tax scheme". The Discussion Draft

[1] Discussion draft paragraph 20.

recommends that “domestic taxpayers should be under an obligation to disclose a cross-border arrangement to the reporting jurisdiction even if they are not a direct party to the cross-border outcome.”[2] In ICC’s view, the more appropriate approach would be that the parties to the transaction should have the obligation to report. Any country is free to adopt mandatory disclosure rules and a country’s failure to do so, should not impose excessive obligations on taxpayers that are not direct parties to a reportable transaction.

The materiality standard[3] is flawed in two respects. First, it is undefined. Second, it is not clear how, even if it were defined, the domestic taxpayer would be in a position to apply the second half of the test, since the information on the tax consequences to the other parties to the transaction may not be in the possession of the domestic taxpayer.

Further, although the Discussion Draft does not deal with reporting between countries, reporting this information to the country that is not affected by the cross-border arrangement will undermine the principle benefits of the mandatory reporting regime which are early identification of issues and the ability to respond quickly. Any information provided to a jurisdiction that is not a party to the transaction would likely have to go through a treaty exchange process, meaning the affected jurisdiction would not obtain the information until that process was complete and this might not be before the information becomes available through other channels such as the tax return including transfer pricing documentation. Thus, the proposed reporting with respect to so-called "international tax schemes" would create an unreasonable and uncertain reporting burden on international taxpayers with limited benefit to the affected jurisdiction.

Some Tax Authorities now publish the International Tax Schemes they consider to be aggressive. ICC recognises that this may not always be practical because of the need to keep the lists updated. For this reason it is unlikely that, in isolation, the publication of such lists could fully address the BEPS concerns but it is important to find the right balance between the burden on the taxpayer and that on the tax administrations and not to shift the balance too far onto the taxpayer.

In particular, paragraph 230 raises the issue of reporting with respect to cross-border tax planning schemes that are incorporated into acquisitions, refinancing or restructurings. The OECD’s guidance with respect to the master file and local file will require reporting on these transactions both globally and locally if the transaction affects the local country business. Additional reporting will likely be duplicative and will potentially significantly increase taxpayers’ costs. Significantly increased costs are especially likely in this area because of the modular design of the rules. Modular design will result in differences across jurisdictions as countries pick and choose those parts of the modules that serve their purposes and thus reporting will be unique to each country that adopts a mandatory disclosure regime. This runs counter to the design principles under Action 13, under which the OECD was attempting to achieve consistent reporting that would result in cost savings for multinationals.

[2] Discussion Draft, paragraph 241.
[3] Discussion Draft, paragraph 243.

The International Chamber of Commerce (ICC)
Commission on Taxation

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy. Founded in 1919, and with interests spanning every sector of private enterprise, ICC's global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.