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Confederation of Swedish Enterprise - Comments on the OECD Public Discussion Draft entitled: "BEPS Action 12: Mandatory Disclosure Rules" 31 March 2015 - 30 April 2015

The Confederation of Swedish Enterprise is Sweden's largest business federation representing 49 member organizations and 60 000 member companies in Sweden, equivalent to more than 90 per cent of the private sector.

The Confederation of Swedish Enterprise is pleased to provide comments on the OECD Discussion Draft entitled "BEPS Action 12: Mandatory Disclosure Rules" 31 March 2015 - 30 April 2015 (hereinafter referred to as the Draft).

General Comments

The Confederation of Swedish Enterprise appreciates the opportunity to provide comments on the OECD discussion Draft.

We are concerned about a number of issues in the Draft. To start out, the Draft contains a number of proposals but very little guidance. Considering the additional compliance burden an introduction of Mandatory Disclosure Rules (MDR) would entail for taxpayers, it is essential that the OECD provides sufficient guidance to tax administrations in order for the nationally implemented requirements to be clear and precise.

Another concern with the Draft is the wide hallmarks proposed to determine when a tax scheme must be disclosed. This comes as no surprise since the Action Plan on BEPS states that the definition of "tax benefit" under Action 12 should be wide to capture international tax schemes.

Although that may very well be the case, the fact that the definition is so wide will also lead to that a huge number of transactions, being of little interest from a BEPS perspective, also will have to be reported. This will not only increase the

administrative burden for taxpayers, but will also have a negative effect on tax administrations' ability to process the information.

An essential objective of a MDR is to work as a deterrent. However, if the sheer volume of data received prevents a tax administration from processing the information in an efficient way this may cause the deterrent effect to be weakened instead of strengthened.

To illustrate this, it can be mentioned that, in 2009, the Swedish National Audit Office conducted an evaluation on how the Swedish Tax Administration processed information gathered from the automatic exchange of information system. It was found that the information was poorly and ineffectively processed by the tax administration. As a consequence, a lot of information was never used. The Swedish National Audit Office According found that this lack of effective processing of information diminished the tax administration's ability to maintain the deterrent effect of the information exchange system and in the long run the ability to secure tax revenues.[1]

Consequently, should countries decide to introduce MDR, the Confederation of Swedish Enterprise would strongly advocate a more narrow definition of hallmarks, thereby lowering the compliance burden for taxpayers and allowing tax administrations to focus on relevant tax schemes.

A reference point in this respect could be a threshold similar to what is found in national General Anti Abuse Rules (GAARs). This would leave taxpayers and promoters with only one definition to monitor, instead of two or more. This would also enhance the deterrent effect of the MDR, since taxpayers and promoters know that if the tax scheme is such that it needs reporting, there is also a clear risk of the GAAR being applied on the tax scheme. Narrowing the definition, similar to the relevant GAAR, would also ensure that the information disclosed is indeed relevant for the tax administration to look at. The downside is that the thresholds in GAARs normally tend to be rather vague. Naturally a clear and precise rule would be preferable. Nonetheless, GAAR type definition would definitely be preferable compared with the proposed approach in the Draft.

The introduction of a MDR will significantly increase the compliance burden for taxpayers. According to the Draft a key design principle when introducing a MDR is that "Mandatory disclosure rules should balance additional compliance cost to taxpayers with the benefits obtained by the tax administrations". Consequently it is important to coordinate Action 12 with Action 13 in order to avoid duplicating requests for information. The confederation of Swedish Enterprise urges the OECD to take this into consideration when formulating the hallmarks. Information that has already been disclosed under other action points should not have to be reported

[1] Riksrevisionen, Internationell Skattekontroll *Skatteverkets informationsutbyte med andra länder,* RiR 2009:24.

again. Considering the scope of the BEPS project we are concerned about the overall effect of the additional compliance cost that will be imposed on taxpayers. Proportionality must be upheld not only in relation to the individual action points but also in relation to the combined effect of all actions.

Sweden does not have MDR, but taxpayers still have extensive obligations to disclose relevant information to the Tax Administration. Balancing the additional compliance cost to taxpayer with the benefit obtained by the tax administration, it can be questioned whether it is justifiable for countries like Sweden to introduce MDR.

Thresholds and Hallmarks

The Draft proposes a number of hallmarks in order to identify tax schemes that should be disclosed. In addition different thresholds are also discussed. One of the thresholds suggested is a *main benefit test* or a *one of the main benefits test*. As we have stated previously in our comments to Action 6, we believe that such wording is too unclear and subjective and will open up for arbitrary assessment. Should however a benefit test be applied, we would strongly recommend that *the main benefit test* is chosen. A threshold focusing on *one of the main benefits* is far too vague and would result in a disclosure rule that is far from what is stated as one of the design principle in the Draft; namely that a MDR “should be clear and easy to point to understand”.

Among the hallmarks discussed a *hypothetical generic hallmark* is mentioned. The Confederation of Swedish Enterprise strongly objects to the use of such a hallmark. The legal certainty for taxpayers is jeopardized if a hypothetical generic hallmark is used. Instead taxpayers should be judged by their actions and not by what they might have done. Especially the mentioning of the possibility for a promoter to charge a premium fee when they did not is greatly worrying, as this would involve far too much second guessing and undermine certainty for taxpayers.

Another hallmark mentioned is for *loss transaction.* The Confederation of Swedish Enterprise believes that a loss transaction hallmark that includes acceleration of losses as one of the standards will give rise to major difficulties. Determining if a loss has been accelerated is not easy and such a rule will therefore further increase uncertainty for taxpayers.

Penalties

The Confederation of Swedish Enterprise is of the view that penalties for non-disclosure should not be proportioned to the tax savings or tax liability. In a lot of situations it is impossible to determine how extensive the tax benefit of a tax scheme is or might be. This would depend on how the tax scheme is used and will surely

lead to disputes between taxpayers and tax administrations regarding how the tax benefit should be calculated. Therefore we propose a fixed amount to be applied to reduce any risk of disputes.

International Tax Schemes

The Draft does in section IV deal with the disclosure of international tax schemes. This chapter also gives rise to a number of concerns.

The Confederation of Swedish Enterprise believes that before a MDR is implemented, a clear and unequivocal design of the international disclosure chapter must be provided. This is not the case with the current Draft.

The Draft recommends that taxpayers that are not a direct party of the cross-border outcome should be obliged to disclose a cross-border arrangement. In our view, this seems overly zealous and go beyond what is necessary to target BEPS issues. It should be sufficient that only parties directly involved in the transaction have a reporting obligation.

The Draft does not elaborate on how the disclosed information is to be shared among tax administrations. Disclosed propriety information needs to be subject to strong safeguards of protection and the access to such information should be limited to countries that have a direct interest in the international tax scheme. That the country have implemented the OECD recommendations could be another requirement to gain access to the disclosed information.

On behalf of the Confederation of Swedish Enterprise

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