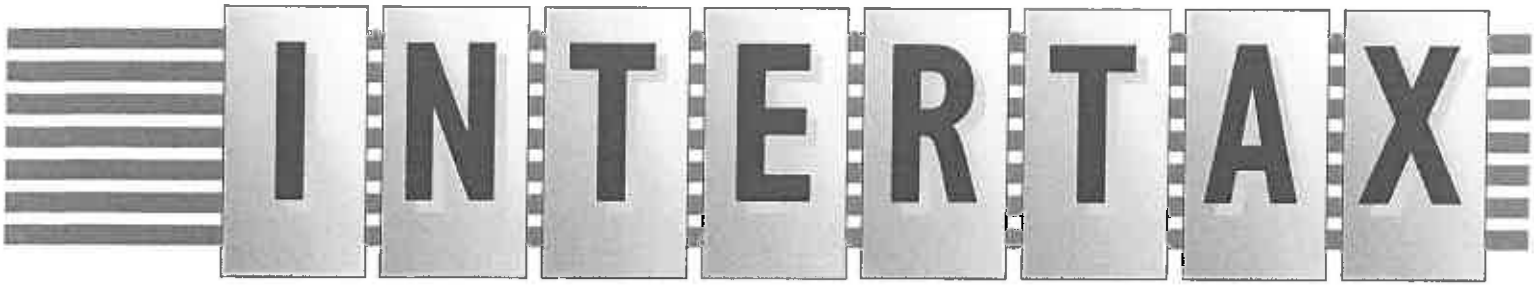

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ARTICLE

The BEPS Project: Disclosure of Aggressive Tax Planning Schemes

Philip Baker*

Action 12 of the Base Erosion and Profit Shifting (BEPS) Action Plan promises the development of new rules on disclosure of aggressive tax planning arrangements. This article examines the meaning of the phrase, the experience of the UK with Disclosure of Tax Avoidance Schemes, and raises some issues about the Organization for Economic Cooperation and Development (OECD) plans in this area.

Action 12 of the Action Plan on Base Erosion and Profit Shifting[1] reads as follows:

> **Require taxpayers to disclose their aggressive tax planning arrangements**
>
> Develop recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the administrative costs for tax administrations and businesses and drawing on experience of the increasing number of countries that have such rules. The work will use a modular design allowing for maximum consistency but allowing for country specific needs and risks. One focus will be international tax schemes, where the work will explore using a wide definition of 'tax benefit' in order to capture such transactions. The work will be coordinated with the work on cooperative compliance. It will also involve designing and putting in place enhanced models of information sharing for international tax schemes between tax administrations.

This action point is one of the 2015 deliverables of the Base erosion and profit shifting (BEPS) project. The Organization for Economic Cooperation and Development (OECD) has announced that a discussion draft on this action point will be published in March 2015; there will then be a public consultation, and a final report will be part of the deliverables at the end of September 2015. Like several other of the BEPS action points, this goes well beyond the tackling of base erosion and profit shifting by multinational companies: it has the potential to be a much broader proposal, designed to introduce more widely the disclosure of tax planning arrangements.

This article discusses certain aspects of the action point, including some discussion of the history of disclosure of tax avoidance schemes, particularly in the United Kingdom. The article also discusses how disclosure of aggressive tax planning arrangements under the BEPS proposal may differ from disclosure under national schemes, such as that in the United Kingdom.

1 AGGRESSIVE TAX PLANNING ARRANGEMENTS

As a starting point, something might be said about the term 'aggressive tax planning arrangements'. The action point requires disclosure rules for 'aggressive or abusive transactions, arrangements, or structures'.

The concept of aggressive tax planning seems to have originated within the OECD in the work of the Forum on Tax Administration which was established in July 2002 to bring together the heads of tax authorities in the OECD member countries and some non-OECD countries. The 'Seoul Declaration', issued after the meeting of the Forum in Seoul in September 2006, mentioned the development of a directory of aggressive tax planning schemes, and also the establishment of a study of the role of tax intermediaries in unacceptable tax minimization arrangements. The subsequent meeting, held in Cape Town in January 2008, discussed further the directory of aggressive tax planning arrangements, and also received the results of the Study on Tax Intermediaries.[2]

Notes

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1 OECD, July 2013.

2 OECD, Study into the Role of Tax Intermediaries, ISBN 978-92-64-04179-0 (OECD, Paris 2008).

The Study is interesting in this context since the Glossary attached to it contains the only definition in this context of 'aggressive tax planning':

> **Aggressive tax planning.** This refers to two areas of concern for revenue bodies:
> **Planning involving a tax position that is tenable but has unintended and unexpected tax revenue consequences.** Revenue bodies' concerns relate to the risk that tax legislation can be misused to achieve results which were not foreseen by the legislators. This is exacerbated by the often lengthy period between the time schemes are created and sold and the time revenue bodies discover them and remedial legislation is enacted.
> **Taking a tax position that is favourable to the taxpayer without openly disclosing that there is uncertainty whether significant matters in the tax return accord with the law.** Revenue bodies' concerns relate to the risk that taxpayers will not disclose their view on the uncertainty or risk taken in relation to grey areas of law (sometimes, revenue bodies would not even agree that the law is in doubt).

This definition suggests that the focus of the OECD's concern with regards to aggressive tax planning relates either to schemes or arrangements that achieve a result not foreseen by the legislators, or that rely upon an uncertain tax position. Frankly, this is not a particularly helpful approach to identifying aggressive tax planning. The first leg relies upon an understanding of what was and was not foreseen by legislators: in all too many cases, the legislature has neither any clear idea of what it wishes to achieve by tax legislation, nor makes it intentions clear in any form that could give helpful guidance to taxpayers. The second leg of the definition gives no clear indication of the degree of uncertainty in the tax position. There may be many matters where there is some uncertainty, but the application of the law to the facts creates a situation where there is a very high probability that the taxpayer would be successful if a matter were litigated. On the other hand, there are clearly tax arrangements that may be based upon a view of the law where there is a less than 50% chance that the taxpayer would be successful. It is not without significance that this explanation of 'aggressive tax planning' is vague and difficult to apply in practice.

One suspects that the real target of concern for most revenue authorities involves two types of arrangements. First, mass-marketed arrangements which may or may not achieve a result that may have been foreseen by the legislators, and may or may not involve an element of uncertainty in tax law, but which cumulatively have a significant impact on tax revenue.[3] The second type of arrangements are ones that are not mass-marketed, and may only be available to one taxpayer or a small number of taxpayer, but which result in a massive reduction in the tax liability of that (almost certainly corporate) taxpayer.[4]

Two further points might be made about the OECD's existing work with regard to aggressive tax planning.

First, both the Seoul Declaration and the communique after the Cape Town meeting referred to the OECD's Aggressive Tax Planning Directory. This is described in the OECD website as follows:[5]

> The work of the Aggressive Tax Planning (ATP) Steering Group is supported by the ATP Directory, a secure online resource for government officials which is intended to help governments keep pace with aggressive tax planning.
> **Content**
> The directory contains information on scheme types, how they were detected, and what governments are doing about them. It does not contain any taxpayer-specific information (i.e., they do not disclose the identity of the taxpayers involved) and thus protects taxpayer privacy. Schemes set out fact patterns and the legal provisions being exploited. The inclusion of a scheme shows that one or more countries thought it useful to share information on a scheme with other interested countries, but it does not indicate any legal or other judgment about the scheme on the part of the OECD or its membership.
> **Purpose**
> The purpose of the directory is to enable member countries to better and more quickly understand new schemes, facilitate their detection, adapt risk management strategies and identify successful legislative and administrative countermeasures.
> **Access**
> Access is limited to government officials that (i) are from OECD member countries and (ii) actively contribute to the directory.

While little is known outside of the OECD or the tax authorities involved with the Directory, it seems clear that it is a repository of information about the workings of certain forms of aggressive tax planning arrangements which have been reported by those OECD member countries who actively contribute to the Directory. This would appear to respond to the phenomenon where a tax planning arrangement was devised in one country, operated there for a time until the local revenue authority

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3 Examples from the United Kingdom would be various forms of employee benefit trusts or arrangements for the offset of losses against capital gains.

4 Examples from the United Kingdom would be the highly artificial, structured finance arrangements which may result in a very large reduction in tax or a very substantial tax repayment for the one or a few taxpayers who enter into the arrangement.

5 http://www.oecd.org/ctp/aggressive/oecdaggressivetaxplanningdirectory.htm.

had sufficient information to take counter-measures – such as legislation – to tackle the arrangement. Subsequently, the same arrangement is implanted into a second or third country, where it was unknown previously to the tax authorities, and another period of years transpires before the arrangement is countered in that country. The Directory would allow a much more rapid transmission of information between tax authorities, so that the countries into which the arrangement is transplanted would be forewarned and forearmed when dealing with it.

Second, following on from the 2008 Study into the Role of Tax Intermediaries, the OECD has developed its work on aggressive tax planning arrangements, including the publication of a 2011 Report on Disclosure Initiatives.[6] This is the first, and relatively recent, examination by the OECD of the disclosure of aggressive tax planning arrangements. The report discusses six different strategies adopted by a number of OECD member countries to deal with aggressive tax planning. The strategies involve:

(a) early mandatory disclosure rules;

(b) additional reporting of specific relevance to aggressive tax planning;

(c) use of questionnaires;

(d) co-operative compliance programs;

(e) rulings regimes; and

(f) penalty linked aggressive tax planning disclosure rules.

The countries that have adopted some of these strategies for dealing with aggressive tax planning included: Canada, Portugal, United Kingdom, United States, New Zealand, Australia, and Netherlands. The Report has an annex which provides an overview of mandatory early disclosure rules under the regimes existing in Canada, Ireland, Portugal, United Kingdom and the United States. The Report, which was approved by the Committee on Fiscal Affairs contains a recommendation that OECD member countries concerned with aggressive tax planning should review the various disclosure initiatives discussed in the Report, with a view to evaluate the introduction of those best suited to their particular needs and circumstances.

Given this recommendation made in 2011, one is tempted to ask why the matter needed to be revisited under Action Point 12 of the BEPS Project. Some discussion of that question best follows a short discussion of the experience of the disclosure of tax avoidance schemes in the United Kingdom.

2 Experience of the disclosure of tax avoidance schemes in the United Kingdom

The United Kingdom was not the first country to introduce mandatory disclosure of aggressive tax planning schemes. The UK introduced its system of Disclosure of Tax Avoidance Schemes ('DOTAS') in 2004.[7] In the 1980s, the United States had begun to focus on the use of abusive tax shelters, and began to require shelter promoters to maintain a list of customers who acquired those shelters. The US established an Office of Tax Shelter Analysis. In the years since 1983 the US has strengthened the legislation, including obligation on advisers to disclosure various reportable transactions and to maintain lists of purchasers of tax shelters.

The United Kingdom legislation focuses on tax avoidance schemes that have a number of specific hallmarks. Over the years since 2004, the taxes covered by DOTAS have been widened, and the number of hallmarks has expanded as well. The primary responsibility under the DOTAS legislation falls on the promoter of the scheme that displays the relevant hallmarks to notify HM Revenue and Customs within five days of a notifiable scheme being made available to the public. The disclosure requires identification of sufficient detail that revenue officials can understand how the scheme achieves a tax benefit for those who use it. Once a scheme is notified by a promoter, Her Majesty's Revenue and Customs (HMRC) supply a reference number which has to be given to any customers who implement the scheme. These customers are then required to put that reference number on their annual, self-assessment tax return. This allows HMRC to identify every taxpayer who has purchased and implemented a particular scheme. Anecdotal evidence is that the inclusion of a DOTAS reference number on a tax return is almost certain to result in an audit of that particular taxpayer.

Where the promoter is not resident in the United Kingdom, or where the disclosure of the scheme by the promoter would infringe legal professional privilege (i.e., if the promoter was a law firm whose clients enjoy legal professional privilege), then the duty to notify HMRC defaults to the user. Penalties are imposed for non-disclosure of schemes: these penalties have been significantly increased in recent years.[8]

The general impression of the UK experience with the DOTAS scheme is that it has been positive in reducing marketed tax avoidance schemes. The 2011 OECD Report

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6 Tackling Aggressive Tax Planning through Improved Transparency and Disclosure – Report on Disclosure Initiatives (OECD, Paris, February 2011).

7 The main legislation is in s.308ff and Sch. 36 of the Finance Act 2004. There have been subsequent amendments in several years, particularly in Finance Act 2008 and Finance act 2014.

8 Further details about the DOTAS legislation can be found on the HMRC website at: http://www.hmrc.gov.uk/aiu/index.htm.

on Disclosure Initiatives[9] provides statistics for the period from the introduction of the scheme on 1 August 2004 to 31 March 2010. For that period, the statistics show that 2035 direct tax schemes and 893 indirect tax schemes were disclosed. It further states that the disclosures had informed some forty-nine anti-avoidance measures, and cut off over GBP 15 billion in avoidance opportunities.

Subsequent statistics for the period to 31 March 2014[10] show that only 300 direct tax schemes, sixty-one schemes involving Stamp Duty Land Tax, and perhaps no more than twenty indirect tax schemes, were disclosed in that four-year period. The reduction in the number of disclosed schemes is generally taken as evidence that fewer such schemes are now being invented and offered to customers. As the 2011 OECD Report indicates, anecdotal evidence suggests that the disclosure rules have changed the economics of tax avoidance in the United Kingdom.

That being said, recent statistics from HMRC indicate that the UK tax gap remains at 6.8% of all tax liabilities (a total of GBP 34 billion), of which avoidance makes up GBP 3.1 billion and 'legal interpretation' another GBP 4.5 billion.[11] This suggests that the DOTAS scheme has been only partially successful. The disclosure of tax avoidance schemes has no impact on other elements of the tax gap, which include: error, failure to take reasonable care, criminal attacks on the tax system, evasion, non-payment of tax, and the hidden economy.

3 The BEPS action point on disclosure of aggressive tax planning arrangements

With some background in the history of the disclosure of tax planning arrangements, it is now possible to turn to Action 12 of the BEPS Action Plan and comment on the possible future developments here.

One question that is perfectly reasonable to ask is this: given that in 2011 in the Report on Disclosure Initiatives[12] the OECD Committee on Fiscal Affairs recommended member countries to review disclosure initiatives with a view to evaluating the introduction of those best suited for their particular needs and circumstances, why is it necessary for this to be revisited as part of the BEPS Project?

It is possible that there has been further experience by those member countries that have mandatory disclosure regimes in the period since 2011, which would merit revisiting the issue. However, in the three years since that report, significant new experience is unlikely. More likely, instead, is that the OECD wishes to use the tsunami of support for the BEPS Project to go beyond merely encouraging member countries to introduce mandatory disclosure regimes and positively mandating them to do so. Clearly, there are many member countries of the OECD that have not heeded the 2011 recommendation to introduce mandatory disclosure regimes: if all had done so, then Action 12 would be unnecessary. One explanation of the OECD's decision to include Action 12 is to increase pressure on all member countries of the OECD, as well as on the non-OECD countries in the G20 that are participating in the BEPS Project, to introduce mandatory disclosure rules. There is a parallel here in the September 2014 paper on Action 6 and Treaty Abuse, which moves towards a recommendation that all tax treaties should contain at least a minimum level of anti-abuse measures.[13] There is also a parallel in the way in which the OECD has in recent years used the peer review process under the Forum on Transparency and Exchange of Information to encourage/pressurise countries to sign up to the Multilateral Convention on Administrative Assistance. If this explanation is correct, then the OECD is using the bandwagon of the BEPS Project to encourage/pressurise countries that have not previously decided to introduce mandatory disclosure of aggressive tax planning arrangements to do so.

The UK DOTAS scheme is fundamentally a domestic scheme, of concern almost exclusively to the UK tax administration. The scheme was never envisaged specifically to target international arrangements, or to supply the United Kingdom with examples of schemes to report to the OECD's Aggressive Tax Planning Directory. No doubt some of the schemes notified under DOTAS have had a cross-border element, and some may have been notified to that Directory, but there is nothing to suggest that that was the main purpose of the introduction of DOTAS. The main purpose of DOTAS was to reduce the period of time between the invention of a marketed tax avoidance scheme and the point in time when HMRC became aware of the scheme and the loophole/interpretation of the legislation on which it relied for its success. This in turn allowed HMRC to react much more quickly by introducing counteracting legislation, occasionally backdated to the time when the scheme had

Notes

9 Referred to above.

10 Available at http://www.hmrc.gov.uk/avoidance/stats.pdf.

11 HM Revenue and Customs, Measuring the Tax Gap, 2014 edition (released 16 Oct. 2014) available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364009/4382_Measuring_Tax_Gaps_2014_IW_v4B_accessible_20141014.pdf.

12 Referred to above.

13 See OECD/G20 Base Erosion Profit Shifting Project, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances (September 2014), recommendations related to treaty shopping.

been notified and HMRC appreciated the potential loss of tax that might arise.

For BEPS Action 12, the potential advantages of a wider take-up of the mandatory disclosure of abusive schemes may be slightly different.

First, where these schemes rely upon a loophole or a particular interpretation of international tax provisions, the disclosure may reduce the period of time before revenue authorities in several countries become aware of the loophole or interpretation. This would allow the OECD to lead moves for an early action to remedy the loophole or ensure that the interpretation is not viable. Suppose, for example, that several revenue authorities receive disclosures of an aggressive tax planning arrangement which relies upon a particular loophole in treaties based upon the OECD Model, or a particular interpretation of that Model. This would allow the OECD to identify at an earlier point the fault with the Model, and put forward proposals to remedy it.

A good example would be the 'commissionaire' arrangements, which rely upon a particular interpretation of Article 5(5) of the OECD Model dealing with dependent agents. The interpretation which led to these commissionaire structures has been known to many OECD countries for perhaps a decade or more. However, it is only now, in Action 7 of the BEPS Project, that the OECD is to develop changes to the definition to prevent commissionaire arrangements.

This aspect of the more widespread use of mandatory disclosure rules could tie in both with Action 6 on tax treaty abuse, and, in particular, with Action 15 – the development of a multilateral instrument to modify bilateral tax treaties.[14] The multilateral instrument is conceived as a way of streamlining the process of amending multiple bilateral tax treaties. There is limited advantage in revenue authorities simply knowing that a loophole exists in tax treaties based upon the OECD Model, or of a particular interpretation of those treaties, which is providing an opportunity for tax avoidance arrangements, if there is no easy way of amending those treaties. The multilateral instrument would provide the mechanism for making those multiple amendments. Thus, the more widespread use of mandatory disclosure would tie in with Action 15 and the multilateral instrument.

A second purpose of encouraging a more widespread use of mandatory disclosure of aggressive tax planning schemes is to prevent the transposition of those schemes from one country to another. As explained above, it has been a phenomenon in the past that a tax avoidance scheme that was used to the point at which it was countered in one country, might subsequently find a new home in another country. Mandatory disclosure, coupled with a more effective method of communication between different countries, could stop this spread of schemes. It is notable in that context that Action 12 ends up by referring to 'designing and putting in place an enhanced model of information sharing for international schemes between tax administrations'. The OECD may have in mind here either an enhancement of the Aggressive Tax Planning Directory, or some new, rapid clearing house for information about aggressive tax planning schemes.

There is a parallel here with the discussion in the report on Action 5 of the BEPS Project, on Countering Harmful Tax Practices.[15] The report recommends the compulsory spontaneous exchange of rulings related to preferential regimes between the countries concerned. It proposes that the Forum on Harmful Tax Practices develop a framework for compulsory spontaneous information exchange between countries with regard to tax rulings. The details are yet to be worked out, but no doubt may involve a possible role for the OECD as a clearing house for rulings. In a similar way, the OECD might act as a clearing house for disclosed aggressive tax avoidance schemes, so that other countries that might perhaps be the targets of the schemes would be notified and could take preventive measures.

There may be a third advantage to a broader use of mandatory disclosure of tax avoidance schemes. Certain of the arrangements that involve base erosion or profit shifting rely upon a mismatch of the treatment between two different countries. The most obvious example are the hybrid mismatch arrangements discussed under Action 2 of the BEPS Project, particularly where there is a deduction in a country of the payer but a non-inclusion of income in the country of the payee.[16] In certain circumstances, one or other of the countries may be unaware of the mismatch in tax treatment in the other country. An increase in the mandatory disclosure of tax avoidance schemes may highlight much earlier the fact that a particular arrangement relies upon a mismatch, which can then be notified to the other country concerned.

These three points made above show that, from the point of view of the BEPS Project, there are potential advantages to a wider employment of measures for the compulsory disclosure of aggressive tax planning schemes, which go beyond the reasons why a country like the United Kingdom introduced DOTAS as a domestic measure.

Notes

[14] See OECD/G20 Base Erosion and Profit Shifting Project, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties (OECD, September 2014).

[15] OECD/G20 Base Erosion and Profit Shifting Project, Countering Harmful Tax Practices more Effectively, Taking into Account Transparency and Substance (OECD, September 2014), Ch. 4 Part B.

[16] OECD/G20 Base Erosion and Profit Shifting Project, Neutralising the Effects of Hybrid Mismatch Arrangements (OECD, September 2014).

4 Critical considerations for the BEPS disclosure of aggressive tax planning arrangements

Once the OECD's proposals for disclosure of aggressive tax planning schemes are published in March 2015, it will be possible to examine them more critically and in more detail. At this point, however, it may be helpful to flag up two particular points that require consideration.

First, the identification of 'aggressive tax planning arrangements' requiring disclosure is critical. The definition contained in the Glossary to the Report on Tax Intermediaries provides very little real guidance on the arrangements that are the target of the disclosure rules. By comparison, the UK legislation proceeds by identifying a series of hallmarks which have to be displayed by a scheme before its disclosure is required. If the BEPS proposals rely upon the definition in the Glossary, the identification of disclosable schemes will lack sufficient certainty to satisfy even the basic requirements of the rule of law. The OECD will have to work much harder and with a much greater specificity to produce proposals with sufficient certainty.

Second, one issue that has never been fully addressed in the context of the disclosure of tax avoidance schemes is the issue of confidentiality. The disclosure of a tax avoidance scheme, and that a particular taxpayer has engaged in that scheme, is prima facie a breach of the right to privacy and confidentiality. Such a right can be found, for example, in Article 8 of the European Convention on Human Rights. The right is not an absolute one, but for a disclosure of confidential information to be justified its disclosure must be in accordance with law, necessary in a democratic society, and for the protection of certain interests, such as the economic well-being of the country. In theory, the disclosure of tax planning schemes may be justifiable on these grounds, but there is a balance to be carried out here between the protection of the right to privacy and the public interest in the disclosure of the scheme. If a system of mandatory disclosure targets only schemes that have been widely marketed and which have a significant financial impact, or bespoke schemes that have, of themselves, a very large economic impact, the more likely it is that the disclosure can be justified. By contrast, trying to draw the net too wide, there is the danger that the balance between the rights of the taxpayer and the protection of the public interest has been located at the wrong point.

More specifically, it is hard to doubt that a taxpayer has a right to take legal advice as to the tax consequences of any particular course of conduct, and to act on that advice once given. The danger of mandatory schemes of disclosure is that they may deter either a taxpayer from taking legal advice as to the tax consequences (in the knowledge that the taking of advice may need to be disclosed), or may deter the giving of advice if the advice was to go down the route of a disclosable scheme. In the United Kingdom, a limited aspect of this potential conflict was tackled with regard to legal professional privilege: where the person who would otherwise be required to disclose a scheme owes a duty to protect information subject to legal professional privilege, then that person may not disclose the scheme and, instead, the customer is required to disclose the scheme. Whilst this might neatly side-step the potential embarrassment for the legal advisor who would otherwise have to disclose privileged information, it does very little by way of protecting the right to confidentiality or the right to take legal advice in a privileged environment.

Potential interference with right to privacy and confidentiality, and the right to give and receive legal advice, are inherent problems with any system that requires compulsory disclosure of advice given to a taxpayer, even if that advice involves the details of a tax planning scheme. To avoid interfering with those rights, any OECD proposals will have to target only truly *aggressive* tax planning schemes. It will be interesting to see in March 2015, when the OECD produces the discussion draft on Action 12, whether this balance has been adequately respected.