OECD: Mandatory disclosure rules for addressing CRS avoidance arrangements

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The CIOT has responded to the OECD's recent public discussion draft paper on Mandatory disclosure rules for addressing common reporting standard (CRS) avoidance arrangements and offshore structures.

The OECD published its paper in response to the Bari Declaration issued by the G7 Finance Ministers in May 2017, and in the light of information on offshore tax planning released by media organisations, such as the 'Paradise Papers'. This, combined with information collected through the compliance activities of a number of tax authorities, has led the OECD to propose a new disclosure regime for certain intermediaries (promoters and service providers) of CRS avoidance arrangements and certain offshore structures where the beneficial ownership is opaque. Information will then be exchanged between tax authorities.

The proposed model is intended to apply to arrangements and structures that are used for tax evasion purposes. However, the CIOT notes that in many cases these types of arrangements are used for legitimate purposes. The challenge will be to design a system that gives tax authorities the information they want without placing excessive administrative burdens on compliant taxpayers and their advisers or duplicating existing reporting requirements.

The main points the CIOT makes in its response are:

- Transparency and confidentiality – tax authorities that introduce the new disclosure rules must ensure that they have, and will enforce, full confidentiality of taxpayer information. A balance needs to be struck between taxpayers' right to secrecy for legitimate reasons and tax authorities' right to information; neither can be total. We therefore suggest that absolute confidentiality must be guaranteed to make these proposals work.
- Compliance – we foresee two potential problems tax authorities will have to confront in legislating to force intermediaries to disclose information:
    - Any intermediary who knowingly provides the sort of advice that is being targeted is already guilty of aiding and abetting tax evasion. Is it likely that this intermediary, who is already committing a criminal offence, is going to comply with new disclosure requirements?
    - Compliance requires the taxpayer to provide the intermediary with truthful information. Is a taxpayer who is intending to tell lies to tax authorities going to tell the truth to their adviser if they know it will undermine their purpose?

  However, the proposal will at least make it harder for taxpayers to succeed in telling lies to tax authorities so the aim in designing the new regime must be to make it as effective as possible.

- The role of tax professionals – the vast majority of professional tax advisers would never knowingly advise on any structure in relation to tax evasion. Our Professional Conduct in Relation to Taxation rules are completely clear on this. We accept that it is possible that a structure could be used for evasion by someone determined to break the law, but it is extremely unlikely that they would be doing it with a professional tax adviser alongside them.

- Defining the hallmarks – since tax evasion or fraud can take place regardless of the form in which a taxpayer's business is, or investments are, organised, the challenge will be to define what it is that tax authorities really want and to ensure that the legislation/hallmarks are appropriate and clearly defined, so that advisers and tax authorities alike do not face an onerous compliance burden and tax authorities are not inundated with information they neither need nor want.
- Duplication – any new disclosure system should not duplicate existing reporting obligations, in particular, advisers should not be obliged to provide tax authorities with information that they will already be receiving from other sources, such as under international Exchange of Information Agreements. There is already a danger of having more than one regime to achieve the same objective, given that some of the targets will be within UK's new 'criminal offence of corporate failure to prevent the criminal facilitation of tax evasion' or one of the other tax avoidance/tax evasion/anti-money laundering regimes.
- Notification – there must be no stigma, or unforeseen consequences, attached to notification. The requirement must be to disclose arrangements on a wholly non-judgemental basis in order to provide the tax authorities with information, which they can then check and decide what, if any, action to take with the intelligence.
- UK law – further consultation by the UK government will be essential to determine how the proposals will be implemented in the UK.
- CRS avoidance hallmark:
  - The CRS avoidance hallmark captures any arrangement where it is reasonable to conclude that it has been designed to circumvent or marketed as, or has the effect of [our emphasis added], circumventing the CRS. In our view, the words 'has the effect of' widen the scope of the hallmark enormously. We suggest the scope could be narrowed by having a second filter for 'has the effect of' transactions that excludes those where it is reasonable to conclude that there is no CRS avoidance.
  - An arrangement will be treated as circumventing CRS legislation where it exploits inadequate implementation of CRS legislation and/or undermines or exploits weaknesses in the due diligence applied by a financial institution. We question how a UK adviser would be able in practice accurately to identify the existence of such inadequate implementation or weaknesses in due diligence that result in their otherwise legitimate arrangements having the effect of circumventing CRS. We think it is unreasonable to expect an adviser to do this so we suggest that it will be necessary for HMRC and other tax authorities to risk assess CRS jurisdictions, and make their findings public.
- There is special provision for CRS avoidance arrangements for high value accounts (more than $1m) entered into after 15 July 2014 but before the effective date of the rules. These are to be reported within 180 days of the effective date of the Mandatory Disclosure Rules. Assuming it is possible to legislate in the UK for what appears to be retrospective legislation, this proposal is, in our opinion, unreasonable. It is likely to be extremely difficult and impractical for an intermediary to comply with, as they would have to trawl back over several years' of data which undoubtedly will not have been kept in a way that makes identification of disclosable arrangements easy. It will be less difficult to comply once appropriate systems and processes have been set up.
- Offshore structures – we can foresee that the main issue for intermediaries will be having enough information to know whether a structure falls within the hallmarks or not.

The CIOT's response can be found on the CIOT website.