Opinion Statement PAC 1/2018 on the OECD Consultation regarding Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

(Prepared by CFE on behalf of the Global Tax Advisers' Cooperation Forum)

Submitted to the OECD on 15 January 2018

We will be pleased to answer any questions that you may have concerning the GTACF comments. For further information, please contact the Chair of CFE Professional Affairs Committee Wim Gohres at wim.gohres@nl.pwc.com *or the CFE Brussels Office at* brusselsoffice@cfe-eutax.org *+32 2 761 00 91, Avenue de Tervuren 188A, B - 1150 Brussels.*

In der Beschränkung zeigt sich erst der Meister, und das Gesetz nur kann uns Freiheit geben.

(The master shows himself by restriction, and only the law will set us free.)

Johann Wolfgang von Goethe (1749-1832)

1. Introduction

On 11 December 2017, the OECD released a "consultation document"[1] under cover of a media release[2] which invited submissions by 15 January 2018. The public discussion draft is 44 pages in length and contains mandatory disclosure rules for two loosely connected subjects, the avoidance of reporting under the Common Reporting Standard ("CRS") and the use of 'opaque' offshore structures.

2. Consultation period and stakeholders' involvement

The first exchanges on the CRS rules date from 2017 and a lot of countries have not begun the exchange[3]. The CRS rules are primarily aimed at financial institutions and are quite complicated themselves. The disclosure rules regarding opaque offshore structures are complicated as we will see hereafter. The GTACF therefore wants to emphasize that the consultation period is too short for the complicated subjects at hand and that as a result it is difficult to see the true value of this consultation. In view of the call for penalties on non-complying intermediaries and reportable taxpayers, the short consultation period running over public holidays in most countries runs the risk of underestimating the impact that the proposal may have for those involved and the uncertainty which may stem therefrom. In light of these considerations, GTACF recommends an additional consultation period. Such an extension would allow professional associations such as GTACF to gather comprehensive internal feedback from our member organisations, therefore more meaningful consultation input and technical refinement of the proposed course of action. We will endeavour to partake in any subsequent consultations on this very important subject.

Having said this, GTACF will comment on some of the most salient aspects of the proposal, but cannot claim to be exhaustive or even thorough in its comments. Nonetheless, GTACF hopes that its comments may contribute to the discussion of the proposal.

3. Position of the GTACF

GTACF's main concern is that the scope for an obligation to report is too broad and the test to decide whether a report is necessary is quite challenging. We fear that this creates uncertainty for intermediaries and taxpayers involved and could result authorities receiving large quantities of information about quite innocent arrangements sent to reduce the risk of failing to comply. This would ultimately present those authorities with large quantities of meaningless data from which it is difficult to identify activities that are the target of the proposals. Although the OECD definition of intermediaries includes tax advisers as 'service providers', this definition remains somewhat vague. It involves persons who are involved in the implementation of the structures, but it remains unclear how

[1] http://www.oecd.org/tax/beps/Discussion-draft-mandatory-disclosure-rules-for-CRS-avoidance-arrangements-offshore-structures.pdf (accessed 29 December 2017)

[2] http://www.oecd.org/tax/oecd-seeks-input-on-new-tax-rules-requiring-disclosure-of-crs-avoidance-arrangements-and-offshore-structures.htm (accessed 29 December 2017)

[3] http://www.oecd.org/tax/transparency/AEOI-commitments.pdf

much diligence is appropriate to expect before giving tax advice. Tax advisers assist their clients in complying with the complicated tax laws and rules on national and international level and advise their clients on these rules and how to organize their affairs in order to be compliant with such laws and rules. As such, tax advisers stand beside their clients and do not and should not have a commercial interest other than serving their clients while remaining professionally independent from all parties, including their clients.

The present proposal is aimed at a wide group of consultants and true intermediaries, regulated or not, amongst which there may be tax advisers. It is therefore good to remember that only a small part of the tax advisers are actually involved in the area the proposal seeks to regulate and that these tax advisers will provide their services within the boundaries of the relevant laws and jurisprudence.

In this respect it is important to notice once again that the proposal asks for reporting on what are, in itself, legitimate arrangements and structures. If the purpose of any activity directed to avoiding reporting is to evade taxes (or any other illegal purpose) the conduct is for that reason illegal, and usually subject to the heavy penalties associated with tax evasion or other financial crime[4].

GTACF and its member organisations fully support the combat against tax evasion and expect their members not to be part of any form of tax evasion. GTACF notes that in the end the taxpayer is the one primarily responsible for his affairs and feels that the proposal puts a disproportionate responsibility on the 'intermediaries' especially in view of the call for sanctions. Making such intermediaries the addressees of the proposed rules, sends out the message that taxpayers themselves bear no or little responsibility for their affairs and that they are more or less subject to what intermediaries propose to them.

GTACF also notes that the description "CRS avoidance arrangement" in itself suggests that there is an obligation to use only financial instruments that would be subject to CRS exchange. Similarly, the word 'avoidance' can be seen as suggestive of complicity. CRS obliges financial institutions to exchange information of their clients for tax purposes, but in no way obliges taxpayers to use only financial instruments provided by financial institutions, nor is there an obligation to have their dealings signed off by a tax adviser. GTACF feels it would be more appropriate to extend the scope of the CRS to other entities. This would better serve the purpose of establishing clarity in the reporting obligation, as opposed to putting the reporting onus on the intermediaries. In doing so, the reporting would become much more factual and aimed at situations that, at this stage, are not subject to CRS reporting.

GTACF is concerned that tax advisers would have an obligation to disclose steps taken by their clients, when they, acting as advisers may not know whether or when the steps have been taken, and the steps themselves (choosing one type of investment rather than another) might intrinsically be very commonplace and not motivated by tax evasion or any other illicit purpose. It seems to us that the approach adopted internationally in respect of Anti Money Laundering legislation should be adopted and the disclosure obligation focussed on where there are doubts of illegality. Indeed, where AML legislation already applies there should not be a requirement to disclose the same transaction to multiple authorities.

Also, any requirements imposed on advisers (who are 'intermediaries' within the OECD definitions but, in acting as advisers, are not in reality parties to any of the transactions undertaken), should reflect their position as owing duties of confidentiality to their clients and not necessarily knowing what their clients have implemented. In many countries, there is no precedent for imposing obligations in such circumstances (other than AML legislation). Where, as for example in the UK's DOTAS legislation,

[4] Cotorceanu, Peter: Hiding in plain sight,(2015) 21 Trusts & Trustees 1050 (Oxford)

advice that is given can become reportable, this is in the first instance the generic nature of the advice that is believed to produce a tax advantage. The scope of the obligation is tightly defined to try to ensure that appropriate confidentiality obligations are respected, that the regime is not disproportionately onerous to operate, and the disclosures made are focussed on matters likely to be of interest to the authorities, who if confronted with routine disclosure of even legitimate transactions, would encounter difficulty in 'seeing the wood for the trees'. Any requirements going further than AML rules should follow the same approach.

4. Definition of CRS Avoidance Arrangements

GTACF believes that a technical refinement of the definitions used by the OECD would result in better clarity and compliance with any relevant obligations subsequently. Similarly, GTACF believes that clarity of legislation and rules in general is essential element in preserving taxpayers' rights and enforcing existing legal obligations.

Conversely, asking intermediaries to report on insufficiently precise or vaguely drafted rules would result in uncertainty. Focusing on clarity of the CRS or other legislation will better ensure that such weaknesses are subsequently eliminated.

A CRS 'Avoidance' Arrangement is any Arrangement for which it is reasonable to conclude that it is designed to, marketed as or has the effect of circumventing CRS legislation or exploiting the absence thereof.

If an arrangement has the effect of 'circumventing' CRS legislation, it is of little interest that it may or may not be designed or marketed as such. In fact, once it is established that CRS legislation is not 'applicable' (instead of 'circumvented'), that should suffice. It is therefore not easy to see the added value of the elements 'designed' and 'marketed'. The question is therefore what the proposal is really aiming at, all arrangements which have the effect of 'circumventing CRS' or the reporting on arrangements which are actually intended to do this. There would be some logic in aiming at those arrangements which were actually intending to avoid CRS, however in GTACF's opinion only if the intention was actually aimed at tax evasion.

GTACF is of the opinion that the exploitation of the absence of CRS legislation cannot and should not be part of the definition. As indicated above there is no ethical or legal requirement to be subject to CRS legislation. If there is no CRS legislation this cannot be a reason for reporting. If this is felt as a shortcoming, the CRS legislation should be expanded. On a more technical level GTACF feels that this makes the definition so broad that it will become unclear when it is actually applicable and thus creates uncertainty for taxpayers and intermediaries alike. In view of the fact that it is proposed that involved persons should be sanctioned, this shall result in legal uncertainty.

Definition 1.1.(c) is aimed at reporting in cases where the due diligence procedures used by Financial Institutions show weaknesses. GTACF feels that logically the CRS or other legislation should be amended to ensure that such weaknesses are eliminated instead of asking intermediaries to report on them. The proposal indicates that these hallmarks are developed in the light of experience of a number of tax administrations. GTACF therefore advocates to focus on the more principled issues, such as clarity of the rules.

In the OECD Consultation commentary under 16) it is explained that 'reasonable to conclude' is to be determined from an objective standpoint without reference to the subjective intention of the persons responsible for the design, marketing or using the scheme. This approach seems somewhat confusing. The test will be satisfied where a reasonable person in the position of a professional adviser with a full

understanding of the terms and consequences of the arrangement and the circumstances in which it is designed, marketed and used would come to this conclusion. GTACF points out that in view of the broad hallmarks such a professional adviser will have problems concluding this. The question is therefore how intermediaries and other people involved should be able to make such a distinction, when no professional adviser is involved.

5. Definition of Offshore Structures

GTACF believes that these definitions are quite complicated to understand and therefore implement in practice, under threat of sanctions.

GTACF points out that the definitions set out in Chapter 2 are complex as they refer to each other which results in circular referrals e.g. 1.1 Offshore structure and 1.4 Opaque Ownership structure. This actually reads as: ”An Offshore Structure is a Passive Offshore Vehicle held through an Opaque Ownership Structure which is a Ownership Structure allowing a natural person to be Beneficial Owner of a Passive Offshore Vehicle.”

Definition 1.3 regarding Passive Offshore Vehicle excludes Institutional Investors, but that seems counterintuitive. In fact, such legal person/arrangement is still passive, the ownership in itself does not change that. It would make more sense to exclude this situation from Opaque Ownership Structures.

The definition of Beneficial Owner refers to the FATF recommendations but then expands this which leads to a partial repetition. It would be better to adhere to the FATF glossary by repeating that definition without embellishments.

GTACF therefore feels that this part of the proposal will be very difficult to implement and/or understand by those persons actually responsible under the threat of sanctions, to report on this. Once again it is pointed out that the mere fact that there is an offshore structure does not say anything about the legitimacy of the structure. There can be many good reasons for this. The definitions do not seem to make an exception for Offshore Structures in situations where relevant authorities are informed about ownership details.

6. Disclosure requirements

The definition of an Intermediary incorporates Promoters and Service Providers. A Promoter means any person who is responsible for the design or marketing of a CRS ‘Avoidance’ Arrangement or Offshore Structure. A Service Provider means any person who provides Relevant Services in circumstances where the person could reasonably be expected to know that the Arrangement is a CRS ‘Avoidance’ Arrangement or Offshore Structure.

The group of people that become subject to the reporting obligation can and will be therefore very broad. For a disclosure on what is in effect a legitimate arrangement GTACF feels this is not balanced. GTACF points out that if the arrangement is not legitimate those involved will be subject to criminal law and can be punished but will in all probability not be active in making disclosures. This proposal for practical purposes is thus not aimed at the latter group and therefore the reporting obligations should be reasonable and clear.

This also means that GTACF feels that the reporting obligations if any should be limited to situations where the arrangement is actually implemented. GTACF points out that ‘making available’ is one of the few key elements which are not defined. For example, the United Kingdom’s Disclosure of Tax Avoidance Schemes (DOTAS) has a clear guidance on this subject.

The proposed disclosure of CRS arrangements entered into after 15 July 2014 is in fact retrospective if not retroactive. For reporting on arrangements which are not illegal GTACF feels this will be disproportionate specifically in view of the uncertainty in respect of 'what' to report and 'who' should report.

7. Information reporting

The reporting should enclose names, address, contact details, jurisdictions of tax residence and tax identification number (TIN) of the person making the disclosure, any Reportable Taxpayer (in which case also the birth date should be reported) and any Client or Intermediary and furthermore the details of the arrangement.

GTACF is concerned that part of this proposal actually entails reporting on other people such as the taxpayer, the actual client, potential users and other intermediaries involved. Non-compliance to this would be sanctioned. GTACF feels that the proposal in this respect goes beyond what one may expect of the citizens of democratic states and points out this reporting on other people is actually required where *per se* no illegitimate arrangements are in order.

For CRS one should also report those features for which it is reasonable to conclude that they are designed to, marketed as, or have the effect of, 'circumventing' CRS. For the Offshore Structures similar language applies. GTACF feels that this borders on self-incrimination and at least will breach the equality of arms. Especially for tax advisers this will be very awkward. For taxpayers this reporting as soon as such an arrangement is made available, may actually endanger their free access to tax advice.

8. Penalties

The commentary states that the regime needs penalties for both intermediaries and taxpayers to ensure compliance. However, GTACF reiterates that it would be disproportionate to impose penalties for not reporting legitimate arrangements in a situation where it is unclear whether these are covered by the proposal or not. GTACF clearly stands against tax evasion, however imposing a penalty for non-cooperation with self-incrimination is in fact at odds with the principles of the rule of law.

9. In conclusion

GTACF therefore concludes that the proposal as such puts an unfair obligation on intermediaries and especially on tax advisers and their clients that could ultimately prove ineffective because compliant intermediaries (as defined) could seek to protect their position by reporting matters that are in reality of no interest to the authorities.

The broad definitions of the proposal combined with the penalties make for a situation where those involved could be penalized for what may be a legitimate arrangement. GTACF feels that better clarity of CRS legislation will supersede the need for mandatory disclosure rules. Finally, GTACF is of the opinion that the part of the OECD proposal related to Offshore Structures will be very difficult to implement in practice.

About the Global Tax Advisers' Cooperation Forum

The Global Tax Advisers' Cooperation Forum (GTACF) was established in 2014 by CFE Tax Advisers Europe, the Asia-Oceania Tax Consultants Association (AOTCA) and the West African Union of Tax Institutes (WAUTI). The GTACF is a platform for tax advisers to provide a global response to international tax initiatives and to strengthen tax technical and policy cooperation.

CFE Tax Advisers Europe is the umbrella organisation of the European tax advisers. Our members are 30 professional organisations from 24 European countries with more than 200,000 individual members. GTACF aims to safeguard the professional interests of tax advisers, to exchange information about international and national tax laws and policy, professional law, and to contribute to the coordination of tax law and policy in Europe. CFE is registered in the EU Transparency Register (no. 3543183647-05).

AOTCA is the umbrella organisation of the Asia and Oceania tax advisers. Our members are 20 professional organisations from 17 Asian and Oceania countries with more than 400,000 individual members. Like CFE, AOTCA aims to safeguard the professional interests of tax advisers, to exchange information about international and national tax laws and policy, professional law, and to contribute to the coordination of tax law and policy in its region.

WAUTI aims to harmonize taxation practice in West Africa, and to promote the highest professional standards of competence and integrity among practitioners in member states. In order to have a forum for technical and educational development, information sharing and enhancement of Tax Practice and Administration, The Chartered Institute of Taxation of Nigeria (CITN) and The Chartered Institute of Taxation of Ghana (CITG) in collaboration with Revenue agencies in the West African Region have formed The West African Union of Tax Institutes (WAUTI).