STEP Policy Points

The OECD Mandatory Disclosure Rules

Executive summary

The OECD’s Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures (Mandatory Disclosure Rules) bring in a new layer of reporting that will increase the burden on intermediaries. STEP has raised serious concerns with the proposals and is seeking further consideration of them at national level in the UK.

OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures

OECD International Exchange Framework for Mandatory Disclosure Rules on CRS Avoidance Arrangements and Opaque Offshore Structures

STEP consultation response

Lines to take

- The current hallmarks are too broadly drafted and risk causing confusion.
- The retrospective elements of the proposals will pose major implementation challenges and may be unconstitutional in some jurisdictions.
- In their current form the rules will threaten legal professional privilege.
- The plans will create a duty for citizens to inform on one another. STEP asks for further, lengthier and detailed consideration of such changes at a national level, given the inadequate length of the previous consultation period and the potential impact of the Mandatory Disclosure Rules.

Context

In December 2017, the OECD published a consultation document outlining its proposed mandatory disclosure rules for Common Reporting Standard (CRS) avoidance arrangements and offshore structures.

The consultation ran for just over a month, closing on 15 January 2018.
The OECD document defines the terms ‘CRS Avoidance Arrangement’ and ‘Offshore Structure’, in both instances providing hallmarks to further outline what the proposed rules will apply to. There are sections on what will be required of intermediaries, for example within 15 days of making an avoidance scheme available the intermediary would have to disclose the relevant information about it to their tax administration. The remaining sections deal with reportable information and the penalties that may be put in place for breaches of the rules.

The consultation received 29 responses from different organisations and individuals. There are a number of recurring themes throughout the submissions, for example:

- Respondents were concerned that the wording reasonably be expected to know of a CRS Avoidance Arrangement or an Offshore Structure could be interpreted differently in different jurisdictions. Some responses suggested changing it to an actual knowledge standard and including a main purpose test.
- The hallmarks were considered to be too broad.
- The timing of the consultation’s publication was criticised, as was the limited amount of time allowed for responses to be made.

A number of other points were raised; some of which are noted on the OECD website.¹

On 9 March 2018, the OECD adopted the new rules without substantial changes being made. The rules have been submitted to the G7 presidency.

**STEP’s response**

STEP’s submission covered a number of areas, but concentrated on the following three points:

- The undesirability of imposing on citizens a legally enforceable duty to inform on one another.
- The challenge to the rule of law posed by retrospective legislation.
- The entitlement of citizens to obtain confidential independent professional advice about the application of the law to their particular circumstances.

In line with the other responses mentioned above, the submission noted that the hallmarks, as currently drawn, are too broad as well as that the

consultation period was inadequate given the short timeframe and the fact that it took place over the Christmas period.

Branches may request help and advice about responding to the issue in their own areas from STEP’s Public Policy department staff by emailing policy@step.org

Stakeholders

Initially, the key stakeholder in this area was the OECD.

Governments that are part of the CRS will be important as they will have the responsibility of implementing the finished rules in their own jurisdictions where they will have effect.

STEP branches may find it useful to collaborate with legal and tax professional bodies in their own jurisdictions in making submissions to their government.

Disclaimer

This guidance is intended to be informative and not an exhaustive statement of the law. While reasonable endeavours are taken to ensure that information is accurate and up-to-date as at the date of publication it does not represent legal advice. STEP and its contributing authors do not accept liability or responsibility for any loss or damage occasioned to any person acting or refraining from acting on any information contained therein.

Updated 07 January 2021