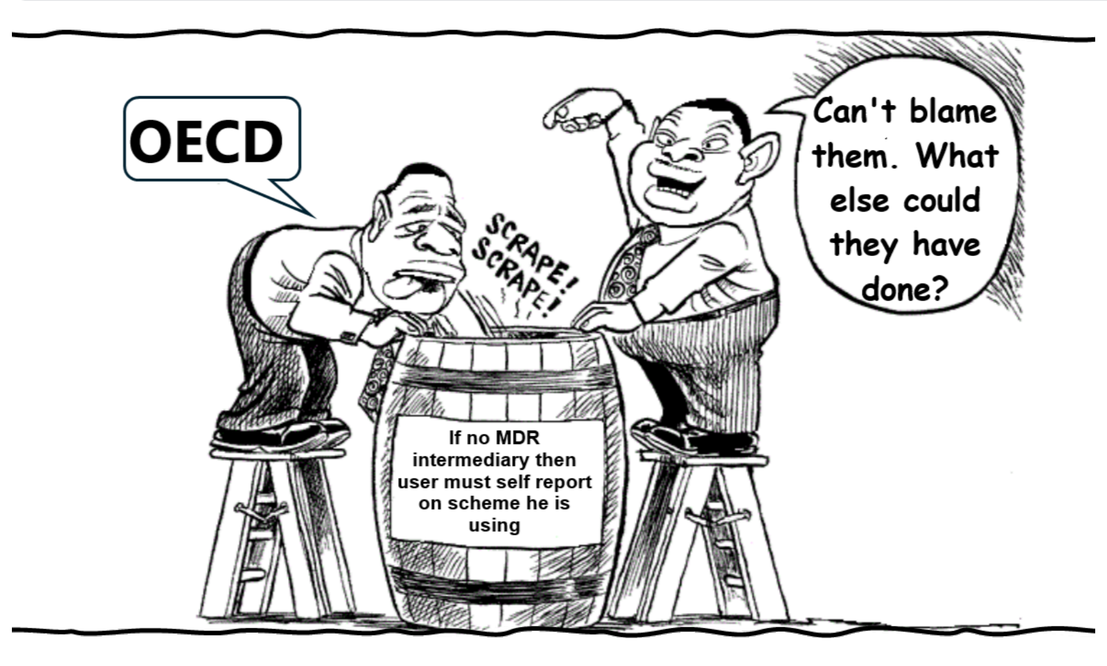

Can't be blamed if you're confused about financial penalties if using structures not subject to CRS. Don't confuse with the toothless MDR

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Bear in mind, this article deals with the automatic exchange of information aspect of structures. It is not concerned with structures to whose primary goal is to obtain a tax benefit, such as converting income to capital gains, double tax deduction in multiple jurisdictions, contrived steps to absorb losses in acquired companies, etc.

EU version of OECD's Mandatory Disclosure Rules - Directive Administrative Assistance (DAC8)

The infamous Hallmark D - Specific hallmarks concerning automatic exchange of information and beneficial ownership

1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of Financial Account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. Such arrangements include at least the following:
   (a) the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account;
   (b) the transfer of Financial Accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of Financial Account information with the State of residence of the relevant taxpayer;
   (c) the reclassification of income and capital into products or payments that are not subject to the automatic exchange of Financial Account information;
   (d) the transfer or conversion of a Financial Institution or a Financial Account or the assets therein into a Financial Institution or a Financial Account or assets not subject to reporting under the automatic exchange of Financial Account information;
   (e) the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of Financial Account information;
   (f) arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.

D(1) Undermining CRS reporting obligations

2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:
   (a) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and
   (b) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and
   (c) where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable.

D(2) Non-transparent/opaque arrangements where beneficial owners made unidentifiable

Penalties for not disclosing

'*Article 25a*

Penalties

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8ab, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.';

- For example, UK MDR penalties for not disclosing CRS avoidance structures is GBP 5,000 plus GBP 600 a day not disclosed. With penaltiey up to GBP 1m if daily penalty insufficient detterence
- The promoter of the arrangements is usually responsible for disclosing. However, there are circumstances **where the person using the arrangements must disclose**. They are:

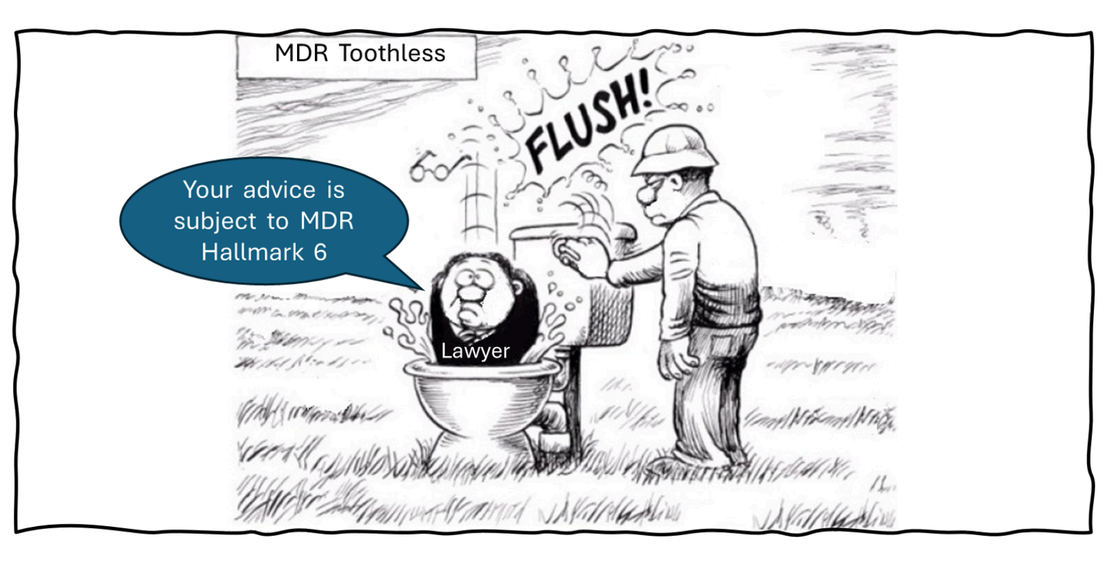
  - if the promoter is a non-UK promoter who has not disclosed

  - if a lawyer is unable to disclose due to legal professional privilege

  - if there is no promoter — for example, it's an in-house scheme

So get this, if a non-participating MDR resident, eg. a Swiss resident intermediary designs/promotes/supplies the avoidance scheme and a domestic lawyer advises their clients on the scheme, then only the user of the scheme must dob himself in....

Read "Uninformed reading my structures that are not reportable for CRS, blurt out 'MDR Hallmark 6, so you're screwed' are ignoramuses."



MDR not a BEPS Minimum Standard. It is not prescriptive.

- Worse, the OECD Global Transparency Forum does not peer review or pressurise countries to implement MDR (god knows why not)
- So many countries like Switzerland, Brazil, Norway gave the finger to teh OECD on MDR. Canada ha sits own weird version of MDR, not related to CRS

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Swiss Confederation

Federal Department of Finance FDF
State Secretariat for International Financial Matters SIF

16 April 2018

SIF's position on the introduction of disclosure rules for intermediaries

Before the introduction of new rules: focus on effective implementation of the AEOI standard worldwide

To ensure the effectiveness of the global AEOI standard from the outset, the G7 finance ministers called on the OECD in May 2017 to examine possible measures to prevent circumvention of the AEOI standard. The OECD subsequently adopted model disclosure rules for intermediaries in March 2018. These should apply if an intermediary sets up an offshore structure for a client that aims to circumvent the AEOI, for example. The proposed disclosure rules are simply a recommendation, i.e. jurisdictions are free to introduce corresponding rules into their national law.

Switzerland is committed to compliance with international standards in the area of tax transparency. It is actively working to ensure that these are effectively implemented worldwide and that any loopholes are closed within the framework of the existing legal foundations.

Switzerland considers the introduction of more extensive requirements for intermediaries to be premature at this stage. It therefore welcomes the fact that the model disclosure rules adopted by the OECD do not constitute a new minimum standard. Switzerland believes that jurisdictions should gain initial experience with the AEOI before introducing any comprehensive disclosure requirements. If it becomes clear that there are significant gaps in the AEOI standard, Switzerland will support the consideration of targeted measures to ensure the effectiveness of the AEOI.

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Hardly any country outside EU has implemented MDR, and no new country has done so for years

- This means there are a vast pool of intermediaries out side MDR countries that can be non-reportable intermediaries, combined with domestic lawyers in user's jurisdiction
- To date, there are still ignaramuses saying many countries will join MDR

There are no financial penalties in CRS specifically mentioned when avoiding it.

There are several mentions of anti-avoidance in the CRS and its commentary, but I'll bet dollars to doughnuts that no authority or reporting FI has ever applied them, eg.:

- Equity and debt interest only applies to Investment Entity trusts but equity and debt interests in other types of FIs could apply if those interests were establishe dto avoid reporting. Thi sis a subjective call by the underlying FI, an dwhose to determine the interest wer eset up to avoid CRS?
- Using GAAR principles, i.e. ignore transactions that have a purpose to avoid tax... is crazy and not workable in practise

  - Shifting assets to non-participating jurisdictions but continue to service client as if he never moved, then CRS says ignore the shift (but shift to US is OK becaus ethey reciprocate!! dumb OECD)

  - Reduce balance to zero before year end and move assets back after year end to report low balance. Ignore the shift.

  - Start new company every two years to qualify as a non-reportable Active NFE even if assets are financial assets

Summary

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