



South African Revenue Service

**Mandatory Disclosure Rules
for addressing
CRS Avoidance Arrangements and
Opaque Offshore Structures**

**Stakeholder Consultation Meeting
29 August 2022**

The Global Forum on Tax Transparency & Exchange of Information in Tax Matters (GFTEI)



What is the OECD Global Forum?

- The **G20 in 2013** endorsed the OECD global model and new single standard for Automatic Exchange of Information (AEOI)
- **Purpose** of AEOI = fight tax evasion and ensure tax compliance through **international cooperation**
- Global Forum = key international body implementing **International Tax Standards on Tax Transparency** e.g. exchange of information on request (**EOIR**) and **AEOI**
- Global Forum currently has about **158** members
 - **EOIR: 148** committed jurisdictions
 - **AEOI: 110** committed jurisdictions
- **Mandate** of Global Forum = To ensure **high standards of transparency** and EOI around the world through monitoring & peer reviews to effect a **level playing field** between jurisdictions

Mandate of the OECD Global Forum 2023-2025

- During the November 2021 Global Forum Plenary, it was agreed that the Future Direction of the Global Forum's Monitoring and Peer Review Processes by the PRG & APRG will essentially comprise:

Three axes agreed



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Where in the OECD does the Global Forum fit in?

Forum on Tax Administration

Enduring Programmes

Capacity Building Network

Large Business Programme

JITSIC

Tax Debt Management Network

Projects

Communities of Interest

Supporting Measures

Committee on Fiscal Affairs

CFA Subsidiary bodies
(see previous page)

Special Programmes

OECD Network on Fiscal Relations Across Levels of Government

OECD Oslo Dialogue

Task Force on Tax and Development

Co-ordinating Body of the Convention on Mutual Administrative Assistance in Tax Matters

Global Forum on VAT

Global Forum on Transparency and Exchange of Information for Tax Purposes

Steering Group

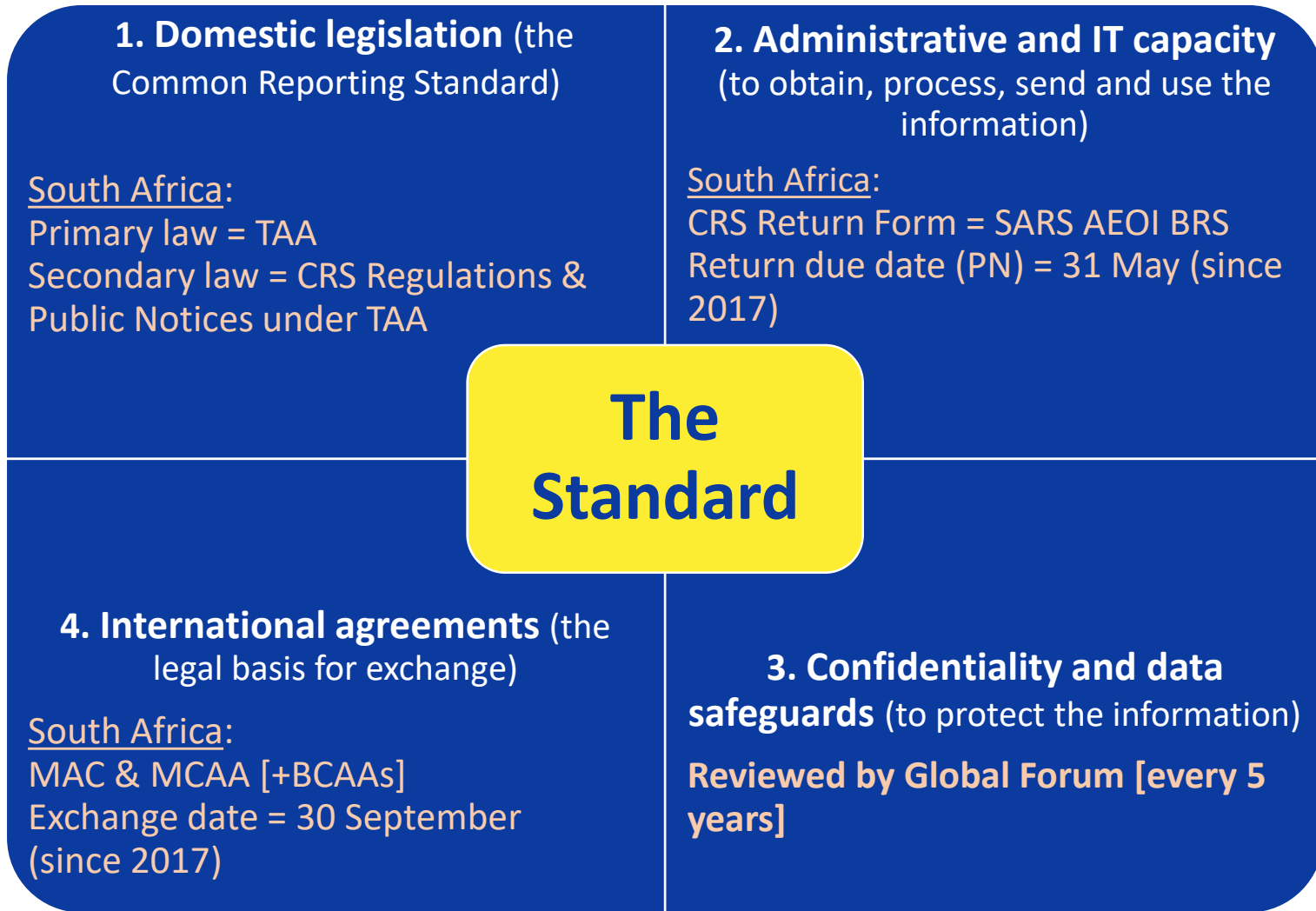
EOIR Peer Review Group [PRG]

AEOI Peer Review Group [APRG]

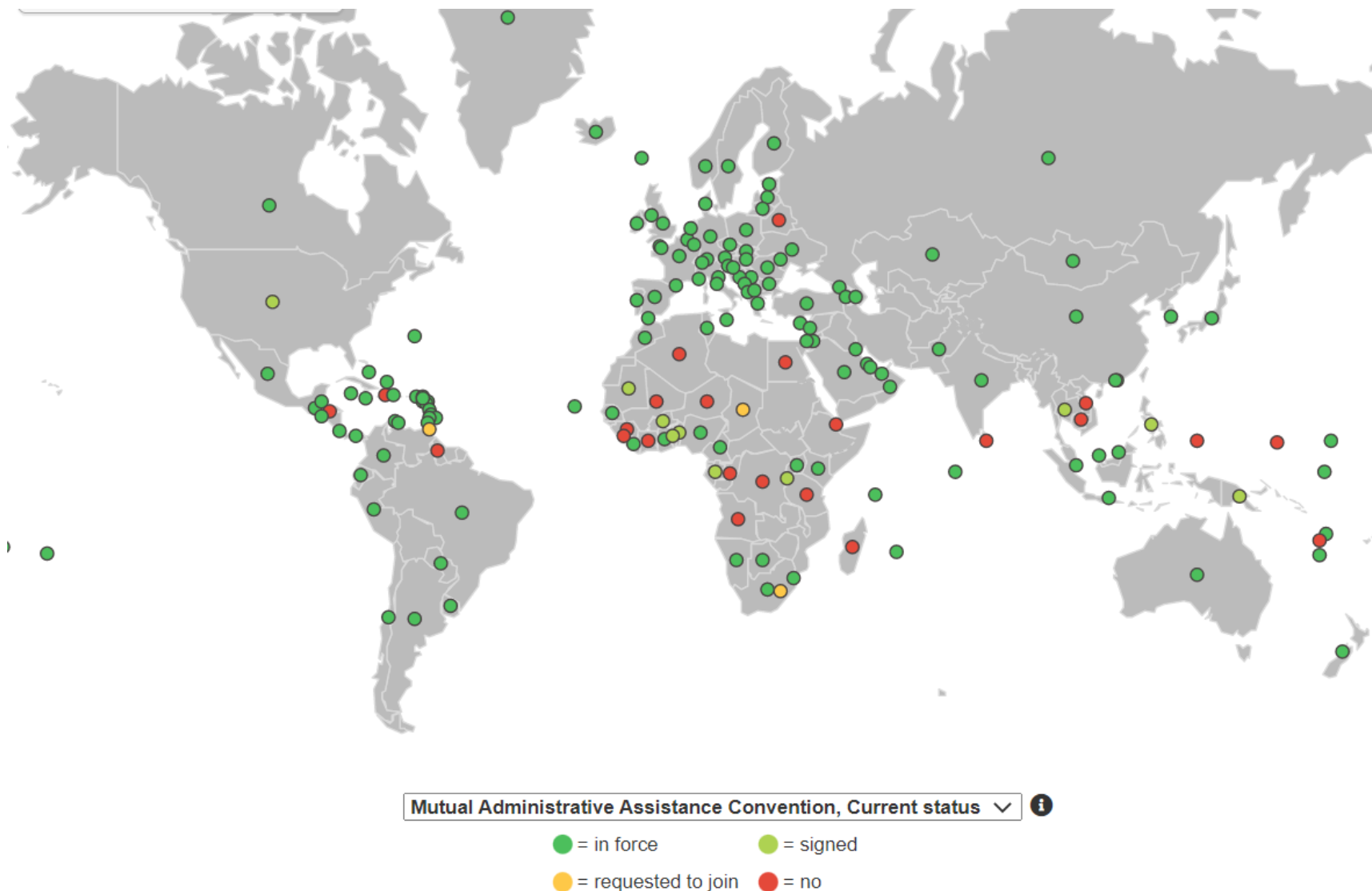
The OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters

- New global common Standard for AEOI
- The AEOI Standard comprises:
 1. The Common Reporting Standard
 2. The OECD CRS Commentaries + CRS Implementation Handbook + Interpretive FAQs
 3. Multilateral Exchange Agreements (MAC & MCAA)
 4. AEOI .XML Schema = basis for SARS AEOI BRS & return filing
 5. Common Transmission System (CTS) for international exchange
- CRS under South African Law
 - Enabling provisions in Tax Administration Act (TA Act)
 - CRS Regulations issued under TA Act (“international tax standard”)
 - AEOI .XML Schema in place
 - = Used for AEOI under CRS, US Foreign Account Tax Compliance Act (FATCA) and Country-by-Country Reporting under BEPS Action 13 (CbCR)

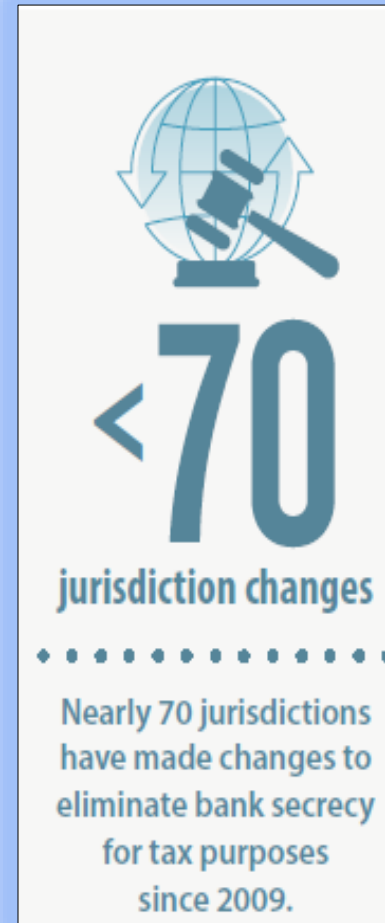
AEOI building blocks that need to be in place



AEOI Standard : ± 144 commitments to implement



The Global Forum: 10th Anniversary Report 2021



Global Forum's 10th Anniversary Report at <http://www.oecd.org/tax/transparency/global-forum-10-years-report.pdf>

THE AEOI STANDARD: A BRIEF OVERVIEW



An overview of the CRS : 5 steps

Step 1

Custodial Institution, Depository Institution,
Investment Entity, Specified Insurance Company

Reporting
Financial
Institutions

Step 2

review their

Depository, Custodial, Investment
& 'Cash Insurance' Accounts

Financial
Accounts

Step 3

to identify

Account Holder = foreign
tax resident?

Reportable
Accounts

Step 4

by applying

Due
diligence
rules

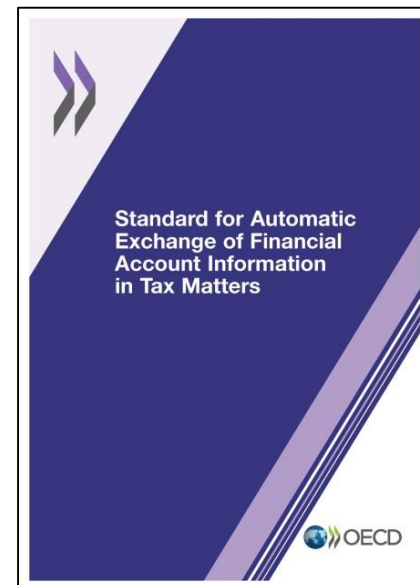
Step 5

and then

Report the
relevant
information

> To SARS

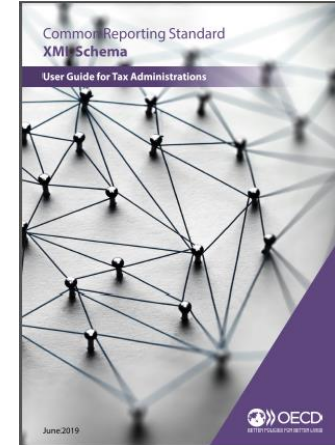
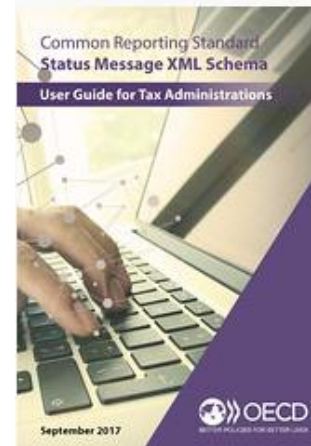
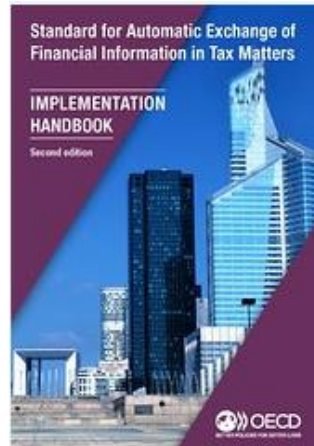
↓
AEOI



TO:

1. Obtain valid self-certification of tax residency of Account Holder :
 - a) Natural person => the person
 - b) Legal entity/arrangement => the Controlling Person / Beneficial Owner
2. Verify correctness of self-certification

AEOI Standard: OECD Sources



[CRS-related Frequently Asked Questions](#)



<http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>

Working Party 10 on AEOI and Tax Compliance

- **Mandate of WP10**

- Drafted and develops the Standard including the CRS & OECD Commentaries on the Standard & OECD CRS Implementation Handbook & OECD CRS-related FAQs
- Developing advanced standards for AEOI, e.g.:
 - Mandatory Disclosure Rules on CRS Circumvention Schemes & Opaque Offshore Structures (MDR) [Published]
 - Model Reporting Rules for Digital Platforms (DPI) [Published]
 - Crypto-Asset Reporting Framework (CARF) & Amendments to CRS [Not published > CFA approval anticipated in Sept 2022]

- **Future Work:** Use of EOIR for VAT purposes; Cross-border assistance in tax recovery; Rulings; etc.

- **Mandate of WP10 Expert Subgroup (ESG)**

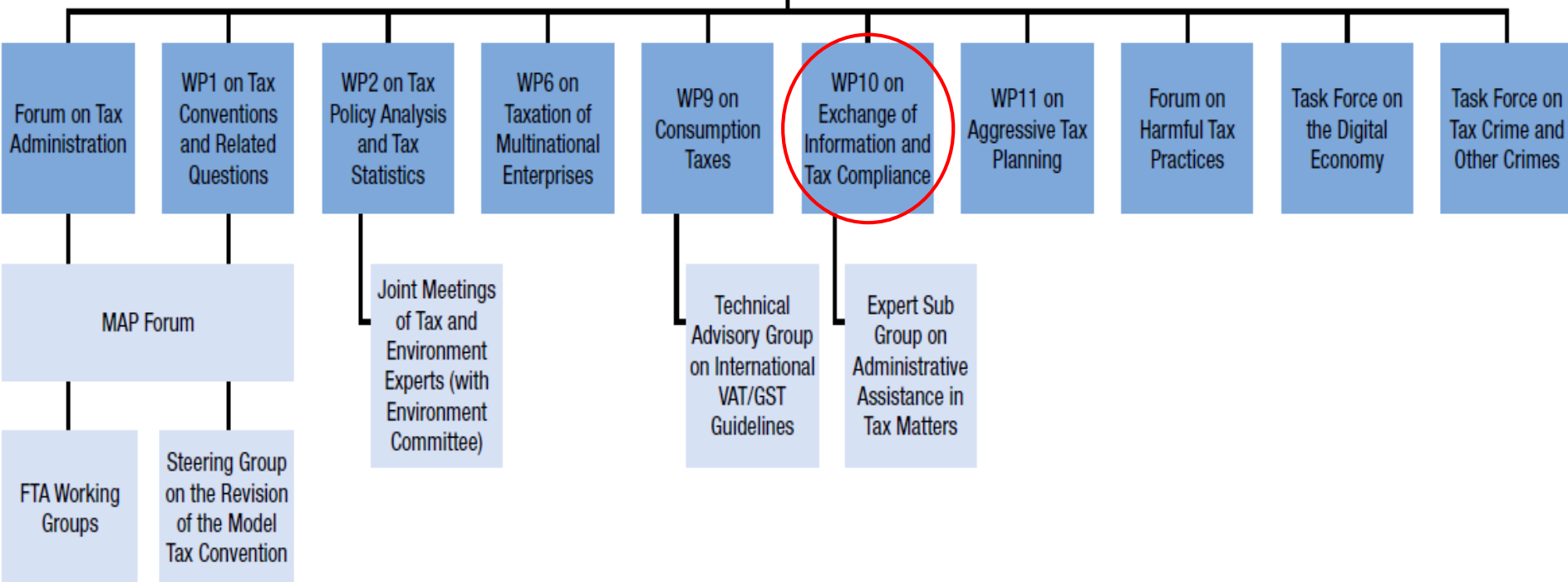
- Technical design & development of .XML schemas for AEOI Standard
- CTS related problems

Where does Working Party 10 & ESG fit in?

OECD COMMITTEE ON FISCAL AFFAIRS

CFA Bureau

Steering Group of the Inclusive Framework on BEPS



The CRS & International Financial Flows

- **Impact on Foreign Accounts** - OECD study shows that wider EOI use and implementation driven by the Global Forum associated with:
 - Global reduction in **foreign-owned bank deposits** in international financial centres (IFC) by **24% (USD 410 billion)** between 2008 and 2019
 - An average reduction in IFC bank deposits owned by non-IFC residents of **22%**

Global Forum's [10th Anniversary Report](#)

- **Illicit Financial Flows**

- Recent studies done by the OECD, as well as the 2022 UNECA and UNCTAD Country Pilot project, shows that in excess of **USD 3.5 and 5 billion in IFFs have left South Africa** every year over the last decade
- This estimate, which represents approximately 1-1.5% of South African annual GDP, is derived from the **estimated USD 40 and 54 billion in hidden South African-owned assets** held in IFCs in 2018 (this study used amongst other anonymized exchanged CRS data)

OECD (2022), *Assessing Tax Compliance and Illicit Financial Flows in South Africa*, OECD Publishing, Paris, <https://doi.org/10.1787/e8c9ff5b-en>.

Mandatory Disclosure Rules on CRS Circumvention Schemes & Opaque Offshore Structures (MDR)







The MDR: What led to the MDR?

- **Transparency and AEOI**
 - Disclosure under CRS become a reality in over 100 jurisdictions in **2018** with over **€102 billion of additional tax revenue** identified – thus world became smaller for taxpayers seeking to hide undeclared assets
 - With the help of **advisors & financial intermediaries**, taxpayers continue to try hiding offshore assets & fly under CRS reporting radar
 - Also, jurisdictions that offer **tax incentives** to individuals to encourage them to take up tax residence in that jurisdiction:
 - Involve temporary/permanent exemptions from tax on foreign source income - obtaining such tax residency only require the resident to have **minimal presence** in that jurisdiction
 - A person who is tax resident in **more than one jurisdiction** use such certificate to not declare, for CRS purposes, the fact that he or she is a tax resident in another jurisdiction
 - **Citizenship and residence by investment (CBI/RBI) schemes**
 - Schemes revealed through experience of tax administrations & information disclosed through CRS & online and jurisdictional research

The MDR: The Bari Declaration by the G7

- In light of these schemes, the G7 Finance Ministers, in the **Bari Declaration issued in May 2017** stated:
 - OECD must start discussing possible ways to address arrangements:
 - Designed to circumvent reporting under the CRS, or
 - Aimed at providing beneficial owners with the shelter of non-transparent structures
 - These discussions should include consideration of **model mandatory disclosure rules** inspired by the **approach taken for avoidance arrangements outlined within the BEPS Action 12 Report**

The information to be reported [CRS]

Information type	Information
<p>To identify the Account Holder</p> 	<ul style="list-style-type: none"> Name Address Jurisdiction(s) of residence Where available and required: <ul style="list-style-type: none"> TIN(s), Date of birth, Place of birth <p>Target of CRS Avoidance Arrangements / Opaque Offshore Structures</p> 
<p>To identify the accounts and Financial Institution</p> 	<ul style="list-style-type: none"> Account number Name and identifying number of the Financial Institution
<p>In relation to financial activity in the account</p> 	<ul style="list-style-type: none"> Account balance or value (or the fact the account was closed in-year) For <u>depository accounts</u>: interest paid For <u>custodial accounts</u>: interest, dividends, other income and gross proceeds paid For <u>other accounts</u>: gross amount paid

The MDR: What arrangement or structure?

- **CRS Avoidance Arrangements** are arrangements that are:

- designed to circumvent
- marketed
- have the effect of

circumventing the CRS, as implemented in domestic laws.

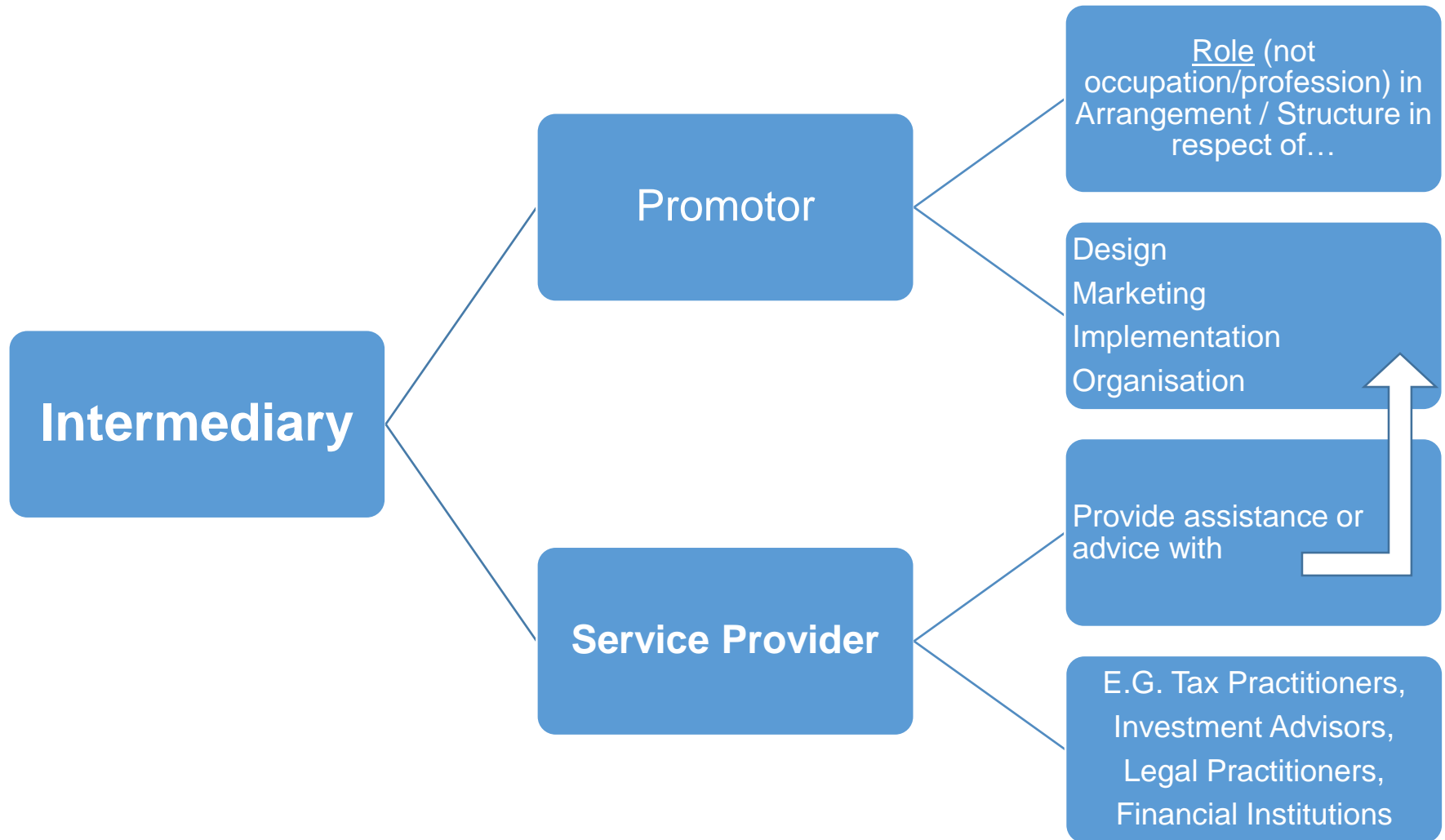
An arrangement circumvents the CRS where it **avoids the reporting of CRS** information to all **jurisdictions of tax residence** of the taxpayers (account holders) in a way that undermines the **policy intent of the CRS**.

- **Opaque Offshore Structures** are structures that:

- Involve use of **passive entity** (Passive Offshore Vehicles)
- In a **jurisdiction other** than jurisdiction of tax residence of one or more of the beneficial owners
- Designed to, marketed as or have effect of **disguising the identity** of the **controlling person(s) / beneficial owner(s)**

Amongst others, this may include use of **nominee shareholders**, the exercise of indirect **control** over entities or use of **jurisdictions with weak rules** for the identification of beneficial owners.

The MDR: Who has a Reporting Obligation?



The MDR: Who has a Reporting Obligation?

- MDR imposes **reporting obligation** on:
 - Range of intermediaries (**Promoters & Service Providers**) to disclose CRS circumvention schemes to the tax authorities
 - Reporting of **structures** that hide beneficial owners of offshore assets, companies and trusts
- **Service Providers: Opaque Offshore Structures**
 - Definition of Service Provider in respect of an Opaque Offshore Structure covers persons that provide **advice or assistance** in respect of structure's:
 - Design
 - Marketing
 - Implementation
 - Organisation
 - To the extent that person can **be reasonably expected to know** that it is an Opaque Offshore Structure as defined
- **Service Providers: CRS Circumvention Schemes**
 - This may for instance include advice provided by a **legal practitioner, accountant or financial advisor**, as well as **account management / compliance services**
 - May include **Financial Institutions** IF it can “**reasonably be expected to know**” that Arrangement falls within definition of CRS Avoidance Arrangement

The MDR: CBI/RBI schemes

- OECD citizenship and residence by investment (CBI/RBI) scheme guidance issued in 2018
- Certain CBI/RBI schemes allow foreign individuals to obtain citizenship or temporary or permanent residence rights based on local investments or against a flat fee, to circumvent CRS reporting
- **OECD guidance reiterates that FI may not rely on a self-certification or Documentary Evidence where it knows / has reason to know, that self-certification is incorrect / unreliable**
- OECD advises that FIs should:
 - Take into account when reviewing self-certifications / documents of tax residency
 - High-risk CBI/RBI schemes
 - When performing their CRS due diligence obligations
 - To determine client's real residency for CRS reporting (irrespective of MDR)
- In making this determination, FIs should take into account the information of potentially high-risk CBI/RBI schemes

<https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment>

OECD Published CBI/RBI Schemes

Jurisdiction	Name of CBI/RBI scheme
Antigua and Barbuda	Antigua and Barbuda Citizenship by Investment
Antigua and Barbuda	Permanent Residence Certificate
Bahamas	Bahamas Economic Permanent Residency
Bahrain	Bahrain Residence by Investment
Barbados	Special Entry and Residence Permit
Cyprus	Citizenship by Investment: Scheme for Naturalisation of Investors in Cyprus by Exception
Cyprus	Residence by Investment
Dominica	Citizenship by Investment
Grenada	Grenada Citizenship by Investment
Malta	Malta Individual Investor Programme
Malta	Malta Residence and Visa Programme
Saint Kitts and Nevis	Citizenship by Investment
Saint Lucia	Citizenship by Investment Saint Lucia
Seychelles	Type 1 Investor Visa
Turks and Caicos Islands	Permanent Residence Certificate via Undertaking and Investment in a Home
Turks and Caicos Islands	Permanent Residence Certificate via Investment in a Designated Public Sector Project
Turks and Caicos Islands	Permanent Residence Certificate via Investment in a Home or Business
United Arab Emirates	UAE Residence by Investment
Vanuatu	Development Support Programme
Vanuatu	Self-Funded Visa
Vanuatu	Land-Owner Visa
Vanuatu	Investor Visa

Jurisdiction	Name of the CBI/RBI Scheme	Residence documentation
Panama	Reforestation Investor Permit	Panamanian ID cards with reference code "PRP-FOR"
Panama	Economic Solvency Permit	Panamanian ID cards with reference code "PRP-SEP"
Panama	Friendly Nations Permit	Panamanian ID cards with reference code "PRP-PA"

Note: The information in the table reflects the current state of the OECD's analysis of CBI/RBI schemes and will be updated on an ongoing basis.

The MDR: “Reasonably be expected to know”?

- Whether person can reasonably be expected to know that Structure = Opaque Offshore Structure, will depend on **nature of the services** provided in respect of the Structure **and whether person** has:
 - a) **actual knowledge** of / **readily available information** on, the **features** of Structure within the definition of Opaque Offshore Structure, and
 - b) given the type of services provided, person can reasonably be expected to **have the expertise** to understand that this is an Opaque Offshore Structure.
- This should generally not affect FI in their **ordinary banking activities**:
 - FI that, as part of ordinary banking activities, opens account for non-resident entity, may hold sufficient information to determine whether it is offshore,
 - BUT would, in ordinary circumstances, be **unlikely have access to information** that would allow FI to determine whether entity is **passive** or **held through an Opaque Structure**.
- On the other hand, for example, if a **company service provider** in jurisdiction which has **not adequately implemented the FATF transparency standards** sets up companies in its own jurisdiction, which are **clearly passive** in nature (e.g. they all have the same postal box address), on behalf of person whom he **knows is marketing** the use of such entities as Opaque Offshore Structures, the **company service provider** will be considered a **Service Provider** in respect of such Structures.

The MDR: What information must be reported?

- **Intermediary (Promotor & Service provider):** Information to be disclosed include:
 - All steps & transactions that
 - Form part of the Arrangement/Structure
 - Including:
 - Key details of underlying investment, organisation and persons involved in the Arrangement or Structure
 - The relevant tax details of the Clients and users of the Arrangement or Structure
 - The relevant tax details of any other Intermediaries, but only to extent that such information is within the Intermediary's knowledge, possession or control
 - Marketing materials, structure diagrams, presentations & other documents that provide context or explain the structure or arrangement in further detail
 - All jurisdictions where a CRS Avoidance Arrangement or Opaque Offshore Structure has been made available for implementation

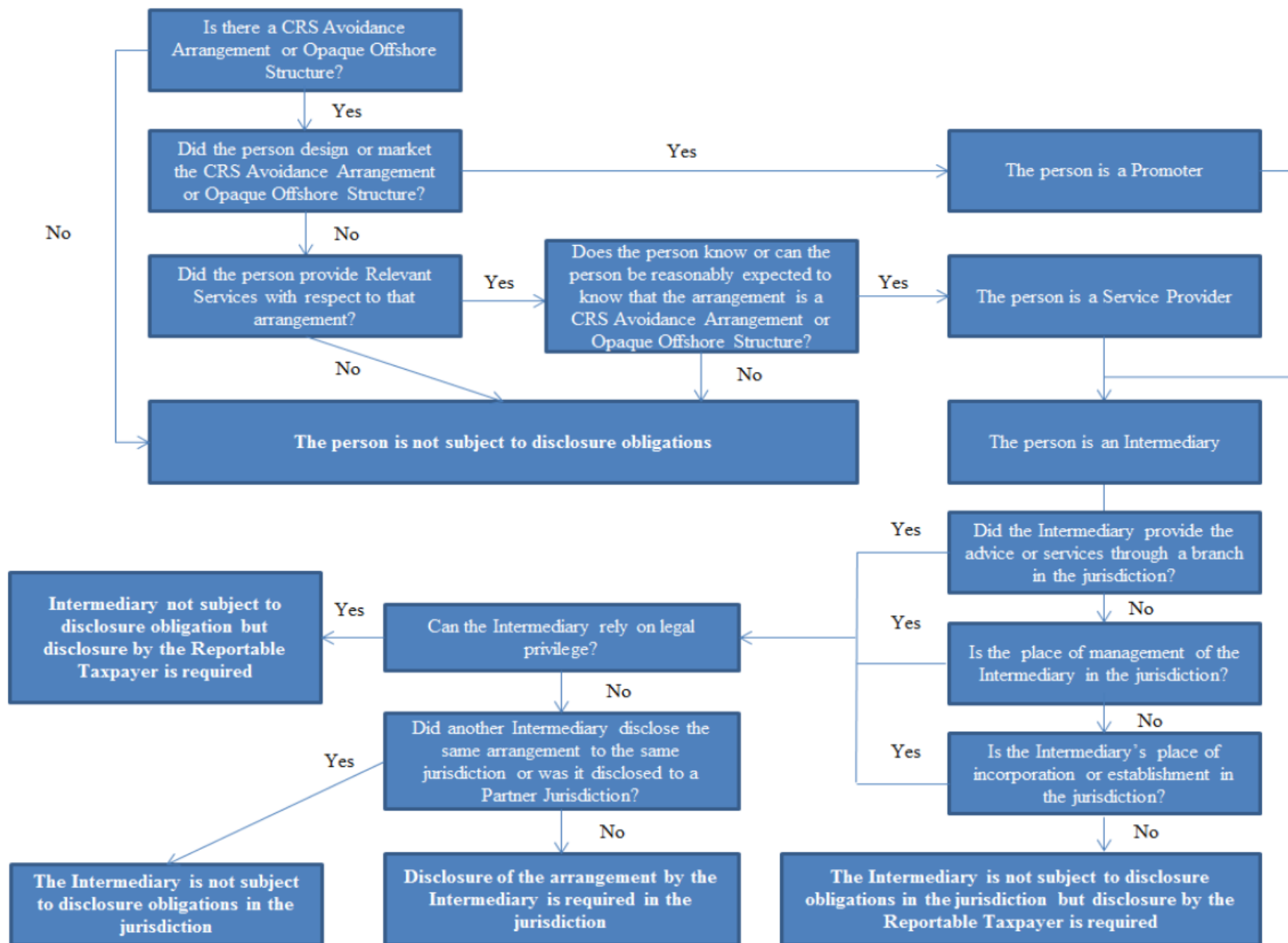
The MDR: Where & when must information be reported?

- Reported to:
 - Tax authorities of **each jurisdiction** with which the Intermediary has a **nexus** [through SARS under domestic MDR]
 - The **reporting nexus** is either:
 - (i) the **jurisdiction** in which the Intermediary has a **branch** through which the arrangement / structure was made available or through which services were provided
 - (ii) the jurisdiction where the Intermediary is **resident** or has **its place of management**
 - (iii) the jurisdiction where the Intermediary is **incorporated or established**
- **When** must the information be reported?
 - Within **thirty days** from moment it makes the arrangement / structure **available for implementation** to other Intermediaries or taxpayers, i.e. when the Promoter has **completed** material design elements of the arrangement or structure and has **communicated** these elements to its client and/or taxpayer

The MDR: Disclosure obligations of taxpayers?

- The rules impose a direct disclosure obligation on **Reportable Taxpayers** where the **Intermediary is not required to comply** with equivalent disclosure obligations due to the fact that:
 - The Intermediary is **outside the scope** of the rules
 - Bound by the requirements of **professional secrecy**In these cases, the Reportable Taxpayer has to provide **all relevant information** on the arrangement or structure that is within its knowledge, possession or control.
- Reason for imposing **secondary disclosure obligation** on taxpayer is to **support the integrity of the CRS** and to prevent the **taxpayer from insulating itself** from the effect of the rules

HIGH LEVEL OVERVIEW OF THE OPERATION OF THE MDR FOR A PARTICULAR JURISDICTION



The MDR: Sanctions

- **Section 212(1)(b)** of TA Act:
 - Person referred to definition of intermediary in the CRS regulations
 - Who fails to disclose the information required to be disclosed under the regulations

= Liable to a 'penalty', for each month that the failure continues (up to 12 months), in the amount of—

 - (i) R50 000, in the case of Service Provider \neq the Promoter
 - (ii) R100 000, in the case of the Promoter
- **Section 241(1)** – SARS may lodge **complaint with controlling body** against a person (part of profession governed by the 'controlling body') did / **omitted to do** anything that (e.g.) was intended to assist taxpayer to avoid / unduly postpone performance of obligation imposed on taxpayer under tax Act (CRS)
- **Section 241(2)** - SARS may lodge **complaint with RCB** if RTP (e.g.) gave an opinion contrary to clear law with regard to matter relating to tax Act (CRS issued under TA Act = a tax Act)

The MDR: How will information be exchanged?

- Jurisdiction where Intermediary **makes the disclosure** and the jurisdiction where the taxpayer is **resident** must have an **exchange of information relationship** (MCAA or BCAA) in place to ensure that the information reaches the **jurisdiction of tax residence of the relevant taxpayer**
- This is **necessary** so that MDR:
 - Meet their **objective** of providing additional information to tax authorities for their tax compliance activities
 - Have a **deterrent effect** against the design, marketing and use of the targeted arrangements and schemes
- OECD has developed an exchange of information framework for the MDR under the **Multilateral Convention on Mutual Administrative Assistance (MAC)**
- **MAC** currently has over **115 participating jurisdictions** & offers the most **global international legal basis** for exchange of information disclosed under MDR

The MDR: Effective date?

- Effective date of MDR = **1 March 2023**
- Disclosure of pre-effective date **CRS Avoidance Arrangements: Promotor** must disclose Arrangement within **180 days** entered into after **29 October 2014** and before **1 March 2023** —
 - where Arrangement **implemented** on/after 29 October 2014 but before 1 March 2023; and
 - person was a **Promoter** in respect of that Arrangement,
- irrespective of whether that person provides **Relevant Services** in respect of that Arrangement **after** 1 March 2023
- unless aggregate balance/value of Financial Account subject to the CRS Avoidance Arrangement less than **U.S.\$1,000,000**
- **Rationale** for ‘retrospective’ application:
 - **Delayed effect of CRS:** CRS was first published on 15 July 2014 but only started to enter into effect as of 2016 or later
 - This provided a **window of opportunity** to implement CRS Avoidance Arrangements prior to effective date of CRS Legislation
 - Rule apply only if Promoter has **actual knowledge** of Arrangement

Questions...