

Grasp the nettle

STEP MUST GET ON THE FRONT FOOT AND SECURE THE CONFIDENTIALITY OF DATA EXCHANGED UNDER TRANSPARENCY INITIATIVES, SAYS **WILLIAM AHERN**

For years, we at STEP and similar professional associations have been on the back foot concerning policy. This defensive stance was a result of a miscalculation in terms of how to respond to the rapidly changing regulatory landscape, and our failure to comprehend the sheer power and zeal of those in the press, government and non-government agencies when it came to their agenda of near complete transparency internationally in the financial affairs of our clients, for both tax and non-tax reasons.

MISSED A TRICK

I was slow to understand what was really happening and how to effectively respond to it. While I never condoned tax cheating, I nonetheless resented the way powerful governments and their cabals bullied the offshore centres into reforms designed to collect and exchange information, while many of those same bullies refused to practise what they preached. And I clung onto what now seem quaint notions, such as national sovereignty being a very good reason why one nation should not enforce the tax debts of another (*Government of India v Taylor* [1955] AC 491). I also fretted about what use those same governments would make of financial information they were entitled to have access to in order to raise taxes – and I still do. Nor did I know that so many supposedly reputable institutions and their clients would be demonstrated to have behaved so badly, surely with the connivance of at least some of their advisors.

But now I recognise that, by failing to see the signs and seeking to meet circumstances early with a certain amount of guile (well, not so much guile, but at least a cold and clear-eyed strategy), we in fact helped fuel the fire of those we faced. This allowed authorities not just to achieve their legitimate goals but to dangerously over-reach, as the swing of the pendulum inevitably does.

Perhaps if we had not confused confidentiality and tax, we may not be where we are now. By this I mean we should have immediately recognised the undeniable right of governments to information

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they need to raise taxes and fight crime, but hammered home the equally undeniable right of the taxpayer to demand that this same information be kept safe by governments and used only for these purposes. Now we are faced with the sophistry of those who argue that, if you want to keep your finances close, you must have something sinister to hide. If we had recognised governments' right to this information, perhaps we would not be faced with the inscrutable and hegemonic beast that is the US *Foreign Account Tax Compliance Act* and its spawn, the Common Reporting Standard (CRS) – or with the extraordinary proposition that tax collectors and crime fighters somehow need the beneficial ownership information of companies and trusts to be completely open to the public.

TIME TO FIGHT

How do we, as a professional body, respond at this critical juncture? We must now truly get with the programme and not just look down our noses at tax cheating as shabby behavior, but thunder against and help governments root it out, while somehow not becoming tax collectors ourselves. Then, and only then, will we be able to fight the real fight, which is to make sure there are real checks, balances and sanctions to prevent the leakage and misuse of information that is rightly private and confidential.

In recognising governments' right to access this information, we must remind them that it is not an absolute right – it comes with very serious strings attached. This is where we can make a real difference. We must ensure that only information that is actually necessary to raise taxes and fight crime is made available and exchanged. There is much room for improvement here in the CRS. We must make sure information is only provided to governments who can secure its confidentiality and its legitimate use. And, finally, I believe that, if we have any real hope of achieving these goals, we must create meaningful sanctions for all custodians of this information who fail to secure it.

Some say we have left our run too late. That may be true. But we must try nonetheless.