FOSTERING THE EFFECTIVENESS OF REPORTABLE ARRANGEMENTS PROVISIONS BY ENHANCING DIGITALISATION AT THE SOUTH AFRICAN REVENUE SERVICE

by

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ABSTRACT

Maladministration at the South African Revenue Service (SARS) resulted in the loss of public trust and negative implications on voluntary tax compliance and may encourage taxpayers to partake in aggressive tax planning schemes. This maladministration also resulted in the degeneration of SARS systems whilst technology advanced internationally. Digitalisation at SARS is crucial to address aggressive tax planning that has become more advanced as a result of the mobility of the digital economy. This study used a qualitative research methodology based on exploratory research which involved literature reviews of textbooks and articles in order to provide recommendations of how digitalisation can be adopted by SARS with a specific focus on ensuring the effectiveness of the South African Reportable Arrangements legislation. The operation of the South African Reportable Arrangements legislation was explained in order to benchmark it against the design features and best practices recommended by the OECD in Action 12 of the BEPS project and to highlight how digitalisation can enhance these provisions.

Recommendations made considered the current state of digitalisation at SARS, how other countries' tax administrations have become more digitalised and practical concerns to be borne in mind when deciding the appropriate technology. The study found that there are a handful of recommendations remaining on how South Africa could improve reportable arrangement legislation without unnecessarily increasing the compliance burden.

Digitalisation techniques that could be considered are advanced analytics, artificial intelligence, blockchain technology and Application Programme Interfaces. The study proposed, amongst others, that these could be adopted by SARS to be able to gather information from various sources in real time to identify further characteristics of aggressive tax planning, perform completeness checks on reported transactions and re-deploy resources to investigate pre-identified possible reportable transactions.

Keywords: Reportable arrangements, digitalisation, advanced analytics, blockchain technology, artificial intelligence and machine learning, application programme interface

TABLE OF CONTENTS

1 INTRODUCTION

The main purpose of any tax administration is to generate enough revenue to meet the needs of the country (OECD, 2019a:p 66). These needs may differ for each country. In South Africa, this includes improving existing public infrastructure, improving healthcare and educational facilities and investing in social development and security, to name a few as per the 2020/21 Budget Speech (National Treasury, 2020:p v). The more revenue a tax administration can generate, the more the government can create opportunities for economic development.

An effective tax system is critical to ensure the continuous economic development of a country. Such effectiveness is dependent on several factors which can change as the economic landscape of the country evolves. Amongst others, these factors include a legal framework that balances the rights of taxpayers and powers of the tax administration; streamlined processes that do not result in excessive compliance costs and administrative burdens and mechanisms that ensure integrity of systems and procedures (International Monetary Fund, 2011:p 22). Another important factor is that technology should be incorporated as far as possible to gather and process information, to perform risk assessments, to share information with other government agencies and to support decision making and policy formulation within the tax administration (International Monetary Fund, 2011:p 22). This is especially so in the current Fourth Industrial Revolution which has been characterised by advancements in technology that are converging to have a profound impact on what is considered the norm (Schwab, 2017:p 1). This has resulted in the digitalisation of the global economy. Digitalisation has been implemented in three main components: Firstly, “digitisation” relates to the conversion of analogue information and coding it into zeroes and ones so that a computer can use this information for various purposes (Bloomberg, 2018:p 2). Secondly, digitalisation refers to digitising an entire process and system (Bloomberg, 2018:p 5). Thirdly, business transformation can include multiple digitalisation projects that modify businesses and its strategy (Bloomberg, 2018:p 5).

The term digitalisation is distinguished from digitisation, the latter meaning the “conversion of analogue data (esp. in later use images, video and text) into digital form” (Oxford

English Dictionary). Digitalisation is defined as “adoption or increase in use of digital or computer technology by an organisation” (Oxford English Dictionary). As the subject of this work relates to SARS and its increased use of digital technology, the term digitalisation is the focus of this work.

However, digital developments have placed more focus on digital disruption than on digital facilitation. Digital disruption is when a system can only be efficient when it needs to be re-designed in its entirety (Campbell & Hanschitz, 2018:p 2). Digital facilitation involves implementing new technology to make old systems more efficient (Campbell & Hanschitz, 2018:p 2). If tax administrations could utilise digital disruption to its full potential, they would be in a better position to respond to taxpayer needs effectively and enhance tax compliance which would ensure more revenue collection that could enhance a country’s economic development. The ultimate goal of a tax system should be “compliance by design” so that non-compliance is not an option within the system and compliance burdens on a taxpayer are at the absolute minimum (OECD, 2019a:p 32, 59).

Operating a tax administration that relies mainly on manual systems can be quite costly. Digitalisation offers an opportunity for tax administrations to take advantage of various innovative tools that are becoming available and can make it possible to achieve desired results in a shorter time period at a lower cost. The OECD highlighted that many tax administrations around the world that have benefited from digitalisation have an operating budget that is less than 1% of total revenues collected (OECD, 2019a:p 21).

South Africa’s tax administration, which is referred to as the South African Revenue Service (SARS), has incorporated aspects of digitalisation into its systems. These include: the implementation and regular updates of the e-filing system that enables electronic submission of returns and supporting documentation, and the “the help you eFile” functionality on e-Filing, providing online storage of all SARS correspondence sent via e-filing and electronic submission of tax clearance certificates. These digital systems have reduced the operating cost at SARS to 0.84% of total revenue collection (SARS, 2019a:p 56).

Beyond reducing cost of revenue collection, digitalisation of tax administration can also play a big role in ensuring that taxpayers are transparent in their tax affairs – which can also increase revenue collection. Taxpayers often avoid taxes by legally structuring their tax affairs in order to ensure the lowest possible tax liability (*CIR V Challenge Corporation Limited [1987] AC 155*). This can be achieved through tax planning where a taxpayer undertakes a transaction using the option that carries the lowest possible tax burden, or tax avoidance whereby a taxpayer minimises their tax liability using the legal methods available in the legislation (Benn, 2013:p 7). Therefore, tax planning and tax avoidance can be considered comparable concepts (Benn, 2013:p 7). Tax transparency is impeded when taxpayers engage in "aggressive tax planning" whereby they exploit loopholes in legislation or mismatches between countries' legislations, or by using legislation for purposes other than for which it was originally intended (European Commission, 2017:p 1; OECD, 2008:p 10; Oguttu & Kayis-Kumar, 2019:p 87-88). Aggressive tax planning also involves taxpayers taking a favourable tax position without disclosing whether that position is in terms of the legislation (OECD, 2008:p 11; Oguttu & Kayis-Kumar, 2019:p 87-88). Aggressive tax planning goes beyond tax avoidance and tax planning, as it entails entering into transactions that have virtually no economic benefit to the taxpayer other than the benefit of reducing their tax liability (IOTA, 2011:p 7-8).

One of the measures that South Africa put in place to address aggressive tax planning and thus enhance tax transparency is the "Reportable Arrangements" legislation, which was introduced in 2006 under the Taxation Laws Amendment Bill. The legislation acts as an early warning signal for SARS when taxpayers engage in aggressive tax planning (SARS, 2006:p 58). Transparency is critical to deterring aggressive tax planning. In the Fourth Industrial Revolution, it is critical for an effective tax system to have as much transparency as possible in taxpayer affairs without unnecessarily increasing taxpayer compliance burdens. Digitalisation at SARS will therefore play a great role in ensuring the transparency required under this legislation.

Digitalisation will also enable the ease of identifying parties to reportable arrangements as required by this legislation, that may not be on SARS' radar.

1.1 THE PROBLEM STATEMENT

Over the last few years, the South African public lost confidence in SARS' ability to meet revenue targets due to the maladministration that took place during 1 April 2014 to 31 March 2018 (Judge R. Nugent, 2018:p 21; SAICA Academic Symposium, 2019:p 2-3). As a result, the integrity of SARS has been questioned locally and internationally. Therefore, the Nugent Commission was appointed to investigate the affairs of SARS. The Commission concluded that there was "massive failure of integrity and governance at SARS" (Judge R. Nugent, 2018:p 3). This has had exceptionally negative implications on voluntary tax compliance as taxpayers feel that the system is prejudiced.

The Nugent Commission Report shows that maladministration at SARS included the suspension of the SARS' modernisation programme in December 2014 (Judge R. Nugent, 2018:p 62). This modernisation programme entailed the digitalisation of SARS by moving away from paper-based operations to fast track the tax collection process, accumulate data for analysis and provide employees with capacity for more productive tasks (Judge R. Nugent, 2018:p 22).The freezing of this programme resulted in degeneration of the SARS system whilst technology advanced internationally (Judge R. Nugent, 2018:p 25). This negatively impacted on the revenue authority that was once so successful that other revenue authorities and international academic institutions visited it to study its success (van Loggerenberg & Lackay, 2016:p 19).

As a result of the maladministration, there were many resignations from SARS in critical roles such as those involved in developing digital tools to reach revenue targets with fewer resources and at a lower cost (SAICA Academic Symposium, 2019:p 2-4). With effect from 1 May 2019, the government appointed a new SARS Commissioner who committed to reverse the negative impacts on the revenue administration (SARS, 2019a:p 3-4). It is of utmost importance that the new administration at SARS determines the correct approach to effectively and efficiently revamp the modernisation and digitalisation of its tax administration in a way that is pro-active rather than reactive.

Digitalisation at SARS is imperative because aggressive tax planning has become more advanced as a result of the mobility of the digital economy and the various electronic resources available to taxpayers. Digitalisation can also play a big role in quantifying the tax gap in a country (OECD, 2016a:p 28). The tax gap represents the variance between the revenue collected by the revenue authority and the amount of revenue it would have collected if all taxpayers paid what was legitimately owing by them (Evans, 2018:p 4). It is acknowledged that it is difficult to quantify the tax gap because it arises from elusive actions like aggressive tax planning (van Loggerenberg & Lackay, 2016:p 19). The SARS Tax Customs and Excise Institute has developed a preliminary study of South Africa's tax gap and it intends to refine this study in the 2019/20 year with the assistance of the Davis Tax Committee (SARS, 2019c:p 11). This is important because provisions that can help to close the tax gap such as South Africa's Reportable Arrangements legislation, have not yielded the expected disclosures because taxpayers do not report potentially tax abusive transactions due to technicalities (Oguttu, 2015:p 493).

1.2 THE PURPOSE OF THE STUDY

The purpose of this study is to provide recommendations that can be adopted by SARS to increase the effectiveness and efficiency of its revenue collection which will contribute to the restoration of public trust. This study recommends avenues of which SARS can make use to revamp the modernisation and digitalisation of its systems that were halted in 2014.

This study focusses on the importance of digitalisation to ensure the effectiveness of South Africa's Reportable Arrangements legislation. In order to do this, the study will describe the operation of the South African reportable arrangement provisions and highlight aspects of the provisions that would be enhanced by digitalisation. In 2015, the OECD issued 15 Action measures that countries could adopt to prevent base erosion and profits shifting (BEPS). One of the measures as set out in Action 12, entitled "Mandatory Disclosure Rules", calls on countries to adopt mandatory disclosure rules (similar to South Africa's reportable arrangements provisions) as a best practice to address aggressive tax planning. Action 12 also provides a design framework to ensure effective mandatory disclosure rules. This study uses the design features recommended by the OECD as a

benchmark to compare with South Africa's provisions and to determine how digitalisation can enhance the effectiveness of South Africa's provisions.

The study provides an assessment of what the current state of digitalisation is at SARS before relevant recommendations are provided. An indication of the state which SARS is in can be deduced from SARS' media statement in February 2020 which advertised job positions requiring advanced technological capabilities, such as a Chief Data Scientist and a Chief Technology Innovation Officer (SARS, 2020b).

The above assessment of SARS is important because other countries' tax administrations (for example fellow BRICS countries: Brazil, Russia, India, China and South Africa (Nayyar, 2016:p 575)) have become more digitalised, which amongst other benefits, has increased transparency into aggressive tax planning. Therefore, this study also considers the technology that has been successfully implemented in other countries to determine whether it could be implemented in South Africa to achieve similar results. The study recognises that practical considerations have to be contemplated when deciding what technology can be implemented in South Africa's circumstances as a developing country in a digitised global economy.

If SARS does not evolve simultaneously with the technological advancements available to taxpayers, there will be significant revenue losses for government. This will compound the existing negative morale of taxpayers in South Africa. It could also result in a further downward spiral on voluntary tax compliance by previously compliant taxpayers who may also try to avoid or even evade paying taxes.

1.3 THE SCOPE OF THE STUDY

This study will not include a comparison of other countries' mandatory disclosure rules. It only provides examples of countries that have used digitalisation to enhance transparency that is required for effective mandatory disclosure regimes. The study focusses on how digitalisation can address tax transparency for income taxes, not indirect taxes.

Although tax transparency can be attained through various provisions, such as voluntary disclosure programmes or provisions that deal with the regularisation of tax practitioners, this study deals specifically with mandatory disclosure regimes (referred to in South Africa as reportable arrangements provisions) and how digitalisation can enhance the effectiveness of such regimes.

1.4 METHODOLOGY

This study implemented a qualitative research methodology that is based on exploratory research that is conducted in order to obtain a better comprehension of a specific topic (Dudovskiy, 2018). This entailed a literature review of textbooks and articles on the topic, as well as South Africa's Reportable Arrangements legislation and Action 12 of the OECD BEPS Reports. The study also reviewed the United Kingdom's mandatory disclosure regime to determine how digitalisation enhanced transparency and tax compliance in the UK in light of the Action 12 BEPS measures. This study followed a pragmatic philosophical stance that followed inductive reasoning.

1.5 BREAKDOWN OF THE STUDY

Part 1 introduces the purpose of a tax system and the importance of transparency to ensure its effectiveness. Furthermore, it highlights the importance of tax administrations to incorporate technological advancements so as to enhance tax transparency, and that these options should be evaluated from a South African perspective.

Part 2 provides a discussion of the current Reportable Arrangements legislation in South Africa. It details what transactions are reportable, including specific exclusions incorporated into the legislation, who is obligated to report, when, what information should be disclosed, and the consequences of compliance and non-compliance. Considerations of whether digitalisation at SARS could enhance each of these components is also deliberated.

Part 3 outlines the key design principles and features of a mandatory disclosure rule regime as recommended by the OECD/G20. There is also a specific focus on how this

regime could function in the context of international tax schemes. The South African legislation is then assessed in terms of these recommendations, to identify whether any possible legislative reform may be required. Furthermore, a consideration is provided on how digitalisation at tax administrations could enhance each aspect of the mandatory disclosure regime.

Part 4 summarises some of the current technologies implemented at SARS and whether they are effective in providing close to real time information or act as an early warning system to combat aggressive tax planning schemes.

Part 5 considers technologies that other countries such as the United Kingdom have implemented that either enhance mandatory disclosure rules or can be adapted to enhance mandatory disclosure rules. These technologies include advanced analytics, application programming interfaces, blockchain technology, artificial intelligence and machine learning. These concepts are explained, and examples are provided where other tax administrations have incorporated these technologies to enhance transparency. Suggestions are provided of how each of these technologies could be utilised to identify reportable arrangements and participants thereof from other sources.

Part 6 provides the OECD's best practice approaches for implementing technology tools.

Part 7 highlights practical considerations that are specific to South Africa that could impede the digital transformation of SARS.

Part 8 concludes the study.

2 SOUTH AFRICA'S REPORTABLE ARRANGEMENTS PROVISIONS

As alluded to in Part 1, it is necessary to have a detailed explanation on how the Reportable Arrangement legislation operates in order to illustrate how digitalisation can enhance the provisions in Part 5. South Africa's "Reportable Arrangements" legislation is set out in sections 34 to 39 of the Tax Administration Act (28/2011) (hereafter referred to as the "Tax Administration Act"). The operation of this legislation is explained below in

order to assess how the effective operation of this legislation can be enhanced by digitalisation.

2.1 MEANING OF A REPORTABLE ARRANGEMENT

An “arrangement” has an extensive definition in section 34 of the Tax Administration Act that includes written and verbal agreements between parties and includes “any transaction, operation, scheme, agreement or understanding (whether enforceable or not)”. However, the terms within the definition have not been defined in the Act and thus the ordinary meaning of the terms or meanings used by the courts should be used in determining whether there is an arrangement.

In terms of section 35 of the Tax Administration Act, an arrangement is reportable if a tax benefit is expected to be derived and it meets any of the criteria listed in section 35(1), or if the transactions falls within the scope of transactions listed by the Commissioner in a public notice that may lead to an undue benefit in terms of section 35(2) of the Tax Administration Act. The reportable arrangements provisions distinguish between generic hallmarks that are listed in section 35(1) of the Tax Administration Act and specific hallmarks that are listed in the Public Notice listing arrangements for purposes of sections 35(2) and 36(4) of the Tax Administration Act No. 28 of 2011) (SARS, 2019b) (hereafter referred to as the “Reportable Arrangements notice”). A generic hallmark incorporates features which can be found in many aggressive tax planning transactions, whilst a specific hallmark is used to focus on a tax administration’s more distinct concerns (OECD, 2015:p 10).

As will be detailed below, the Reportable Arrangements legislation can encompass a broad spectrum of transactions which may not necessarily be concluded to engage in aggressive tax planning. Therefore, exclusions have been incorporated into section 36 of the Tax Administration Act and the Reportable Arrangements notice to only target transactions that may indicate aggressive tax planning. These exclusions are considered below with respect to generic and specific hallmarks.

2.1.1 Generic hallmarks

Generic hallmarks incorporate features that can be considered common to many aggressive tax planning transactions (OECD, 2015:p 10). In South Africa, they include: interest that is not calculated in terms of time value of money principles; transactions that lack commercial substance because funds are roundtripped, transactions that include tax accommodating or indifferent parties; or have elements that offset each other. Furthermore, generic hallmarks also include inconsistent treatments of transactions for accounting and tax purposes, or those that result in nil or negative accounting profit. These generic hallmarks of arrangements that are reportable are explained below.

(i) An arrangement is reportable if it provides for "interest" as defined in section 24J of the Income Tax Act (58/1962) (hereafter referred to as the "Income Tax Act") to be calculated based on the tax treatment of that arrangement rather than in terms of the requirements of section 24J of the Income Tax Act in terms of section 35(1)(a) of the Tax Administration Act. If interest is calculated with reference to the tax treatment of the arrangement instead of as required in terms of the Income Tax Act, it will be a reportable arrangement (Davis Tax Committee, 2016b:p 52).

(ii) An arrangement is also reportable if it includes financing that has been round tripped in terms of section 35(1)(b) of the Tax Administration Act. Section 80D of the Income Tax Act defines round trip financing to involve arrangements where parties transfer funds between or amongst each other that gives rise to a tax benefit and significantly reduces or offsets business risk incurred by any of the parties. This is determined without regard to the traceability of fund transfers, timing thereof nor the manner in which funds are transferred or received by the parties. An arrangement will also be reportable if it encompasses substantially similar characteristics to that outlined above. Section 80D(3) of the Act defines "funds" to include any cash, or any right to receive or pay cash. Sale and leaseback transactions could be an example of round-trip financing because it results in a transfer of funds without a corresponding business risk (Olivier & Honiball, 2011:p 532).

(iii) An arrangement is also reportable if it includes "accommodating or tax indifferent parties" as defined in section 80E(1) of the Income Tax Act, or arrangements with substantially similar characteristics in terms of section 35(1)(b) of the Tax

Administration Act. The term “accommodation party” has an extensive definition as it potentially covers any transaction with a non-resident because it refers to any party that is not subjected to South African tax (Honiball & Olivier, 2009:p 261). Therefore, this hallmark targets cross border transactions (Davis Tax Committee, 2016b:p 54). The involvement of an accommodating or tax indifferent party changes the nature of income and expenses from a tax perspective from what it would have been had that party been excluded.

(iv) An arrangement is reportable if it has steps that have the resultant effect of offsetting each other in terms of section 35(1)(b) of the Tax Administration Act. These steps could include the set off of rights and obligations in addition to the set off of amounts (Benn, 2013:p 37).

(v) An arrangement is also reportable if the main purpose thereof was to obtain a tax benefit which results in an inconsistency between the treatment of a transaction for tax return purposes and for financial reporting standards. Specific examples are included in section 35(1)(c) of the Tax Administration Act. For instance, an amount could be deducted for income tax purposes but not recorded as an expense, based on financial reporting standards. The same is true from an income perspective, where the amount is included as income for financial reporting standards but is not considered to be gross income for tax purposes.

(vi) An arrangement is reportable if it is expected to result in a nil or negative accounting profit before tax determined after deducting expenses and foreign taxes paid linked to the arrangement from income in terms of section 35(1)(d) of the Tax Administration Act. Alternatively, in terms of section 35(1)(e) of the Tax Administration Act, an arrangement will still be considered reportable if that arrangement is expected to result in an accounting profit before tax that is lower than what it would have been if they were both discounted to the present value at the end of the first year of assessment when the tax benefit arose initially.

2.1.1.1 Exclusions from generic arrangements

Exclusions to reportable arrangements need to be considered before concluding that an arrangement is a reportable arrangement. If an arrangement meets any of the three

exclusions below in terms of section 36 of the Tax Administration Act, it will be an excluded arrangement. These exclusions are further limited in terms of section 36(2) of the Tax Administration Act to transactions that are entered on a stand-alone basis and are not connected to any other arrangements other than a connected agreement that was solely entered to provide security.

(i) An arrangement will be an excluded arrangement if the transaction includes a debt arrangement where the borrower either receives an amount of cash or an exchangeable asset and agrees to repay at least the same amount of cash or return an asset of same equivalent value to the lender at a specified future point in time.
(ii) An arrangement will be considered an excluded arrangement if it involves a lease agreement.
(iii) Any transaction undertaken through an exchange that is regulated by the Financial Markets Act or any transaction in "participatory interests" in a scheme that is regulated by the Collective Investment Scheme Control Act, 2002 (45/2002) will be considered an excluded arrangement. These transactions are strictly regulated so it reduces the risk that they are entered into for aggressive tax planning purposes. Therefore, preference shares that are traded on the JSE Securities Exchange will be an excluded arrangement (SARS, 2005:p 6).

In addition to the above, there are two further exclusions that apply to generic hallmarks that are not limited in terms of section 36(2) of the Tax Administration Act and are provided for in the Reportable Arrangements notice:

(i) An arrangement that involves inconsistencies in the treatment of a transaction for tax return purposes and financial reporting standards is an excluded arrangement if the tax benefit derived is not the main benefit or one of the main benefits of that arrangement (SARS, 2019b:para 3.2).
(ii) An arrangement identified under the generic hallmarks is an excluded arrangement if the aggregate avoidance, postponement reduction or evasion of tax derived by all participants under generic hallmarks is less than R 5 million (SARS, 2019b:para 3.1).

Regardless of whether an arrangement exhibits the features above, it can still become a reportable arrangement if its main purpose or one of the main purposes of the

arrangement was to obtain or enhance a tax benefit in terms of section 36(3)(a) of the Tax Administration Act. Furthermore, an excluded arrangement can also become a reportable arrangement if the arrangement was conducted in a manner that would enhance a tax benefit in terms of section 36(3)(b) of the Tax Administration Act. The burden of proof lies on the Commissioner to demonstrate that the main purpose or one of the main purposes of the arrangement is to either obtain a tax benefit or enhance one (Davis Tax Committee, 2016b:p 64).

SARS would be able to better assess the risks of reportable arrangements if it had more visibility of information from various sources using digitalisation techniques. This could be further analysed to identify common traits of aggressive tax planning in order to enhance the legislation pertaining to generic hallmarks. This could be used to add to the exclusions to reportable arrangements to enhance precision of reportable arrangements to only target aggressive tax planning schemes.

2.1.2 Specific hallmarks

Specific hallmarks are used to target specific concerns of tax administrations (OECD, 2015:p 10). Seven specific hallmarks have been included in the Reportable Arrangements notice (SARS, 2019b) which include certain redeemable preference shares, share buybacks, payments to foreign trusts, acquisitions of companies with a large assessed loss, payments to foreign insurers, payments to non-resident employees and certain activities undertaken by rehabilitation companies and trusts prior to closure. Each of these is discussed in more detail below:

(i) An arrangement is reportable where the issuer of a share is obliged to redeem the share or distribute cash to the value of the issue price of that share within 10 years of the issue date (SARS, 2019b:para 2.1). The share would meet the definition of a "hybrid equity instrument" in terms of section 8E of the Income Tax Act if the timeframe of that section was amended from 3 years to 10 years. An example of this may include redeemable preference shares (SARS, 2005:p 8). Furthermore, this also includes transactions where the shareholder may exercise an option to require the holder to do the same within 10 years of the issue date. Finally, it also includes shares where the existence of the company is likely to be terminated within 10 years

from issue date. However, this does not apply to any instruments listed on an exchange regulated by the Financial Markets Act (19/2012) (hereafter referred to as "Financial Markets Act").

(ii) An arrangement is reportable where a company enters into an arrangement whereby it undertakes a share buy-back that exceeds R 10 million from one or more shareholders and then subsequently issues any shares within 12 months of either entering into the agreement or the date of the share buyback (SARS, 2019b:para 2.2).

(iii) An arrangement is reportable where a South African tax resident makes contributions that exceed or are reasonably expected to exceed R 10 million to a non-resident trust and either has an existing beneficial interest or obtains a beneficial interest in the trust. This hallmark specifically excludes any contributions made to the foreign equivalent of a collective investment scheme in participation bonds or collective investment scheme in securities as per Paragraph (e)(ii) of the definition of "company" in section 1 of the Income Tax Act. It also specifically excludes contributions made to a foreign investment entity as defined in section 1 of the Income Tax Act (SARS, 2019b:para 2.3).

(iv) An arrangement is reportable where a person obtains a controlling interest in a company where the acquired company either potentially carries forward a balance of assessed loss exceeding R50 million from the immediately preceding year before the acquisition, or potentially has an assessed loss exceeding this value in respect of the year of assessment during which the controlling interest is acquired. This reportable arrangement could also include the ultimate controlling shareholder of the party that acquired the company with the assessed loss as a participant to the transaction (SARS, 2019b:para 2.4). However, this may be open for interpretation based on the wording in paragraph 2.4(b) in the Reportable Arrangements notice.

(v) An arrangement is reportable where a South African tax resident pays an amount that either exceeds or is reasonably expected to exceed R 5 million to a foreign insurer and the amount paid or payable to a beneficiary in terms of this agreement is determined with reference to assets that are either held by the foreign insurer or on behalf of them or alternatively held by another person (SARS, 2019b:para 2.5).

(vi) An arrangement is reportable where a non-resident person renders services whilst physically present in South Africa to a South African tax resident or a non-resident

with a permanent establishment in South Africa. These services include but are not limited to consultancy, managerial and technical services. The amount paid to the non-resident service provider for these services exceeds or is anticipated to exceed R10 million in total and does not qualify as remuneration in terms of the Fourth Schedule to the Income Tax Act (SARS, 2019b:para 2.6). This hallmark acts as a detection mechanism to identify non-resident service providers that render services in South Africa by obligating the resident service recipient to declare payments made (Davis Tax Committee, 2016b:p 61). SARS can use this information to determine the value of services rendered from a South African source (Davis Tax Committee, 2016b:p 61).

(vii) An arrangement is reportable where a closure rehabilitation company or trust undertakes specific activities prior to a final closure plan. This includes where it directly or indirectly distributes or transfers or securitises R10 million in any year of assessment. It also includes instances where it makes non-compliant amendments to its financial instruments or investments or makes a non-compliant distribution of property. Furthermore, if it adjusts bank or other guarantees or provides any guarantees of any form, it will also result in a reportable arrangement. Finally, a reportable arrangement will also arise if it uses any assets as security for any debt (SARS, 2019b:para 2.7).

2.1.2.1 Exclusions from specific arrangements

As is the case with generic hallmarks, exclusions to reportable arrangements need to be deliberated before concluding that an arrangement is a reportable arrangement. If an arrangement meets any of the three exclusions below in terms of section 36 of the Tax Administration Act, it will be an excluded arrangement. These exclusions are further limited in terms of section 36(2) of the Tax Administration Act to transactions that are entered on a stand-alone basis and are not connected to any other arrangements, other than a connected agreement that was solely entered to provide security:

(i) An arrangement will be an excluded arrangement if the transaction includes a debt arrangement where the borrower either receives an amount of cash or an exchangeable asset and agrees to repay at least the same amount of cash or return an asset of same equivalent value to the lender at a specified future point in time.

(ii) An arrangement will be considered an excluded arrangement if it involves a lease agreement.

(iii) Any transaction undertaken through an exchange that is regulated by the Financial Markets Act or any transaction in "participatory interests" in a scheme that is regulated by the Collective Investment Scheme Control Act, 2002 (45/2002) will be considered an excluded arrangement. These transactions are strictly regulated so it reduces the risk that they are entered for aggressive tax planning purposes. Therefore, preference shares that are traded on the JSE Securities Exchange will be an excluded arrangement (SARS, 2005:p 6).

2.2 REPORTING OBLIGATIONS

Section 37(1) of the Tax Administration Act indicates that a person who is a "participant" to the "arrangement" is required to report a "reportable arrangement" to SARS.

The definition of a participant includes three possible parties. Firstly, a "promoter" who is defined in section 34 of the Tax Administration Act as the party that is responsible for organising, designing, selling, financing or managing the arrangement. Secondly, a party that directly or indirectly derives either a reduction in cost of finance (i.e. a financial benefit) or a tax benefit as a result of the arrangement. Thirdly, any other person who is a party to the arrangement that has been included in the Reportable Arrangements notice published by the Commissioner.

Financial benefit is defined in section 34 of the Tax Administration Act as a reduction in the cost of finance which includes interest, finance charges, costs fees and discounts on a redemption amount.

Tax benefit is defined in section 34 of the Tax Administration Act to mean the "avoidance, postponement, reduction or evasion" of a tax liability. The wording used does not only refer to an actual benefit derived, but also includes any possible future benefit, regardless of whether it is obtained or not. Therefore, one is required to consider whether the intention behind the transaction is to avoid, escape or prevent a tax liability (Louw & Simpson, 2010:p 3).

Disclosure relief is provided in section 37(3) of the Tax Administration Act to a participant if another participant provides them with a written statement that they have already disclosed the reportable arrangement to SARS.

Based on the above, the reporting obligation is firstly on the promoter of a scheme because they are the most knowledgeable about the whole transaction. The provision also covers reporting in cross border transactions because if the promoter is a non-resident and does not report the transaction, then the disclosure obligation falls on the participant (Davis Tax Committee, 2016b:p 65).
Currently, the only source of information pertaining to reportable arrangement transactions is from disclosures made by the participants themselves. Therefore, SARS is not able to verify that all reportable arrangement transactions that should have been reported have been reported. This legislation would be more effective if SARS could identify participants to reportable arrangement transactions from alternative sources by means of digitalisation to validate the completeness of disclosures made by participants.

2.3 REPORTING TIME FRAME

A participant to a reportable arrangement is required to report the arrangement within 45 business days in terms of section 37(1)(a) of the Tax Administration Act. If a person becomes a participant subsequent to the arrangement becoming a reportable arrangement, section 37(1)(b) of the Tax Administration Act requires this participant to report this reportable arrangement within 45 business days after becoming a “participant”. Therefore, the timing of the reporting obligation is 45 days after an amount has first been received or accrued or alternatively paid or actually incurred (OECD, 2015:p 52).

For revenue authorities to determine and implement the appropriate response proactively to a reportable transaction, they need to receive this information in close to real time of the transaction in order to make an assessment of whether law reform is required. Digitalisation offers possibilities to provide data to SARS closer to the time of the transaction and therefore would enhance the effectiveness of the reportable arrangement provisions.

2.4 INFORMATION THAT HAS TO BE DISCLOSED IF A TRANSACTION IS A REPORTABLE ARRANGEMENT

Section 38 of the Tax Administration Act requires a description of detailed steps and vital characteristics of the arrangement, as well as any connected arrangement if applicable. Furthermore, it requires the names, registered address, registration number of all as well as the tax benefits expected to be obtained by all participants. Participants are also required to provide a list of all agreements related to the reportable arrangement and any financial model that depicts the projected tax treatment. This information is captured on the RA-01 Form and submitted to SARS. After this form is submitted, SARS issues a reference number.

If the digitalisation of SARS is enhanced so that SARS can collate information pertaining to aggressive tax planning from various sources, some of the required disclosure listed above might already be at SARS' disposal. Reportable arrangement forms could be pre-populated with this information. These forms could also be further customised based on the existing information available and the type of reportable arrangement being reported. Furthermore, a more digitalised SARS could result in automatic collation of all taxpayers with reportable arrangements that can be further analysed and cross checked with tax return submissions.

2.5 CONSEQUENCES OF NON-COMPLIANCE

There is a penalty regime in place for participants that do not comply with the reportable arrangement provisions. The penalties are set out in section 212 of the Tax Administration Act. A penalty is based on whether the person is a promoter, a user (i.e. the person that is expected to obtain a tax benefit), or if they are a party to a transaction that falls within the scope of the generic and specific hallmarks. The penalty is calculated as R 100 000 per month for up to 12 months in the case of a promoter and R 50 000 per month for up to 12 months in the case of a user or intermediary. The penalty amount may be doubled or tripled depending on the value of the anticipated tax benefit.

The penalties associated are quite significant and seem to apply simultaneously to all parties involved (Davis Tax Committee, 2016b:p 5-6). Section 217 of the Tax Administration Act does allow SARS to remit a penalty up to an amount of R 100 000, in the case of reportable arrangements, if it is the taxpayer's first incidence of non-compliance. This remittance could provide relief to innocent participants to an undisclosed reportable arrangement.

3 OECD BEPS ACTION 12 CONSIDERATIONS

International trading and globalisation have resulted in opportunities for taxpayers to shift profits to countries that have more beneficial tax regimes. This has a vastly negative impact on the tax base of the country that provided the infrastructure and resources to earn that profit that was subsequently shifted. Therefore, the OECD and G20 countries developed policies and recommendations with the objective of taxing profits in the jurisdiction where value is created through economic activities undertaken in that jurisdiction (OECD, 2016b:p 4). In 2015 the OECD came up with 15 Action measures that can be set out in four categories: minimum standards, best practices for domestic law, reinforcement of international standards or analytical reports (Davis Tax Committee, 2016a:p 4-5). Minimum standards relate to actions considered necessary to ensure that the location of taxable profits aligns with economic activities carried out (OECD, 2016b:p 6). Best practices for domestic law focus on more specific concerns of the BEPS Project to facilitate future alignment of national practices relating to these concerns. Reinforcement of international standards refers to action points that reflect the shared understanding of international tax standards (Davis Tax Committee, 2016a:p 4). Analytical reports are used to evaluate the impact of BEPS and the effectiveness of any BEPS action plans to counter the effects thereof (Davis Tax Committee, 2016a:p 79).

The 2015 OECD Final Report on Action 12 (hereafter referred to as Action 12) focusses on obligating taxpayers to disclose their aggressive tax planning arrangements and is categorised under the best practices for domestic law (Davis Tax Committee, 2016a:p4). As this is not a minimum standard, countries are not obligated to incorporate mandatory disclosure regimes into their legislation (OECD, 2015:p11).

3.1 OBJECTIVES OF ACTION 12

Action 12 is primarily focussed on disclosure mechanisms to highlight potential aggressive tax planning as early as possible to enable tax administrations to respond to the tax risk. This response may be in the form of audits or changes to legislation (Davis Tax Committee, 2016a:p 80). This is due to past experiences where there have been significant time delays between three occurrences; the implementation of the scheme by taxpayers, when the scheme falls within the tax administration's radar (for example, via tax return audits) and finally, the point where the administration responds in order to combat the scheme (Oguttu, 2015:p 492-493).

In addition to early detection of potentially aggressive tax planning schemes, mandatory disclosure can also discourage taxpayers from entering into transactions due to the additional reporting obligations and the possibility that tax authorities may reach a different conclusion on the tax implications of the reported transaction (OECD, 2015:p 20). The mandatory disclosure rules in South Africa are set out in the "Reportable Arrangements" legislation that was discussed above.

3.2 KEY DESIGN PRINCIPLES AND FEATURES HIGHLIGHTED IN ACTION 12

Action 12 is principle-based rather than rule-based for it to be adaptable to each country. Action 12 recommends four important principles that should be considered when implementing a mandatory disclosure regime. Firstly, a balance needs to be struck between the benefits to the tax administration of early disclosure of information and the additional compliance cost placed on taxpayers to provide such information (OECD, 2015:p19-20). Secondly, disclosure rules should be clear and easy to understand. (OECD, 2015:p19-20) The legislation should distinctly determine when a transaction meets the requirements of the legislation in order to avoid irrelevant disclosures or non-disclosure of pertinent transactions due to uncertainty. Thirdly, the rules should meet policy objectives so that disclosure obtained in respect of these transactions needs to be constructive to easily identify why the disclosure was made and the parties involved (OECD, 2015:p 20). Finally, the tax administration needs to be positioned to effectively use the information provided to identify the implication on taxes collected and attend to the issue. This requires

the establishment of a process to review these disclosures to determine the appropriate response (OECD, 2015:p 9,20).

Certain design features have been identified by the OECD to obtain the required information about tax planning schemes (OECD, 2015:p 10). Each of these features will be briefly analysed below.

3.2.1 Reporting obligation

The OECD recommends that the mandatory disclosure rules should compel someone to disclose information under the scheme. This can be imposed on both the promoter and taxpayer, or the primary obligation to disclose can be imposed on either the promoter or the taxpayer. South Africa adopted the latter approach (OECD, 2015:p 33). As discussed above, in South Africa, section 37(1) of the Tax Administration Act places the obligation on the participant, which includes both the promoter or taxpayer who obtains the tax advantage. This will also be the case if the promoter is not based in South Africa. Although best practice suggests that the reporting obligation should be on the taxpayer or the promoter, the legislation could be more effective if revenue authorities could use digitalisation techniques to identify participants to reportable arrangement transactions from another source in order to validate the completeness of disclosures made by participants.

3.2.2 Reportable schemes

OECD Action 12 provides three tests that can be used to identify reportable schemes that may be used in conjunction with each other. Firstly, a threshold requirement that indicates when a transaction will be reportable (OECD, 2015:p 36). The main benefit test is an example of a threshold requirement. This considers whether a tax advantage was a main benefit of the scheme or whether it has other features of an avoidance scheme. This allows the tax administration to specifically target tax incentivised transactions and as such would increase focus on relevant disclosures. However, this increases the complexity and uncertainty of disclosure obligations. Furthermore, it can be used to justify non-disclosure of schemes that tax administrations would have preferred sight of (OECD, 2015:p 37).

South Africa addresses these disadvantages to a certain extent because the main benefit test threshold is not used in conjunction with all hallmarks. The second test is a de-minimis filter which excludes transactions below a certain amount from the disclosure requirements (OECD, 2015:p 38). The use of de-minimis filters can further narrow the scope of the reportable transaction's regime so that the tax administration can focus on the more significant transactions. This also reduces the cost and administrative burden on the tax administration and certain taxpayers. However, the use of a de-minimis filter may suggest that tax avoidance below this amount is acceptable (OECD, 2015:p 38-39). South Africa addresses this to a certain extent because the de-minimis filter of R 5 million is limited to only generic hallmarks as per the Reportable Arrangements notice (SARS, 2019b:para 3.1).

The final test relates to hallmarks which can be split into generic and specific hallmarks. Tax administrations can use hallmarks to identify characteristics of transactions about which they would want to obtain further information (OECD, 2015:p 39). Generic hallmarks focus on characteristics that are common in promoted schemes whilst specific hallmarks target known weaknesses in the tax system (OECD, 2015:p 39).

3.2.3 Information to be disclosed to tax authority

In principle, the information that should be reported should enable the tax administration to identify all parties involved, how the scheme operates and how the expected tax advantage is obtained (OECD, 2015:p 64). The tax administration can then use this information to perform a risk assessment to determine the appropriate response. This response may be to obtain further information on the scheme, consider legislative changes or to issue publications that alert taxpayers that the tax administration is aware of these schemes and is assessing the tax implications thereof (OECD, 2015:p 63-64).

If there is a dual reporting obligation on both promoters and users, the OECD recommends that scheme reference numbers should be used to act as a completeness check and to also quantify the tax loss from a specific scheme (OECD, 2015:p 55-56). Where the primary disclosure obligation is placed on the promoter, it is recommended that they supply tax administrations with a list of clients who have made use of the scheme in addition to the use of scheme reference numbers (OECD, 2015:p 55-56). In South Africa,

the primary disclosure obligation is placed on the participant, which includes both the promoter or taxpayer who obtains the tax advantage in terms of section 37 of the Tax Administration Act. As there is a dual reporting obligation, South Africa makes use of scheme reference numbers as per section 38 of the Tax Administration Act.

Digitalisation could assist in requesting more customised information from disclosures made depending on the type of reportable arrangement being disclosed and the existing information that the revenue authority has at its disposal collated from various sources.

3.2.4 Reporting time frame

For the mandatory disclosure rules to be most effective against aggressive tax planning, disclosure should be made as early as possible, bearing in mind the tax administration's ability to act based on the disclosure (OECD, 2015:p 50, 52). Furthermore, the longer it takes for a scheme to be disclosed, the greater the risk that this scheme be used by more taxpayers and therefore the more administrative capacity will be required to address the scheme and challenge cases if they are indeed aggressive transactions. In terms of section 37 of the Tax Administration Act, participants to the reportable arrangement are required to report it within 45 days. Digitalisation offers possibilities to send data in real time to revenue authorities which can assist SARS to be more pro-active toward aggressive tax planning.

The OECD recommends that if the primary obligation is on the promoter of a scheme, then the time period should be calculated from the point that a scheme is made available, whereas if the disclosure obligation falls upon the user, then the timeframe should be determined from the point at which the scheme has been implemented (OECD, 2015:p 52).

3.2.5 Consequences of compliance and non-compliance

The OECD Action 12 Report recommends that mandatory disclosure regimes clarify that the disclosure of a scheme does not suggest acceptance by the tax administration if no response is received. A penalty regime could be implemented in the case of non-

compliance with the mandatory disclosure regulations. Penalties could be monetary or non-monetary based and could be calculated differently depending on who should have disclosed the scheme (i.e. user or promoter) (OECD, 2015:p 60). In South Africa, section 212 of the Tax Administration Act set out the penalties applicable to non-compliance with the reportable arrangement positions.

3.3 HOW MANDATORY DISCLOSURE CAN BE EFFECTIVE IN THE CONTEXT OF INTERNATIONAL SCHEMES

International tax schemes result in different tax implications for different taxpayers that are based in different jurisdictions, and the tax advantage obtained by each taxpayer in isolation may be insignificant when compared to the aggregate tax advantage obtained by all parties involved in the transaction (OECD, 2015:p 68). The main benefit test may also indicate that the domestic tax benefit derived was insignificant in relation to the commercial and foreign tax benefits of the entire transaction (OECD, 2015:p 69). The same rationale can be applied if the main benefit test is included as a hallmark. Therefore, the OECD recommends that hallmarks that focus on international schemes should not include a threshold requirement. International tax schemes are more likely to be bespoke as they form part of grander commercial transactions. Therefore, generic hallmarks may also not be the most effective in identifying international tax schemes (OECD, 2015:p 68-69).

Specific hallmarks should be used to pinpoint the tax outcomes that are of concern to a domestic tax administration (OECD, 2015:p 71). If these are precise enough, they could reduce the risk of irrelevant disclosures. However, hallmarks should also be broad enough to capture various tax planning techniques that achieve these specific outcomes and not be restricted to tax planning techniques that are structured in a specific way (OECD, 2015:p 71). The definition of arrangement should be broad enough to include transactions that involve a domestic taxpayer that has a cross-border outcome and that has a significant tax impact on the reporting jurisdiction (OECD, 2015:p 72-73).

In identifying who has the obligation to report international tax schemes, the OECD recommends that the disclosure obligation should fall on a domestic taxpayer that has a domestic tax consequence. This will ensure that the domestic tax administrations will have

the ability to enforce these rules (OECD, 2015:p 69). Domestic taxpayers that have a disclosure obligation should be encouraged to disclose offshore elements of which they are aware (OECD, 2015:p 73).

The information that a taxpayer could be expected to obtain should be considered in determining what should be disclosed (OECD, 2015:p 73). This expectation may differ depending on whether the international tax scheme is within a group of companies or not. In addition, this includes information that is held by its agents and controlled entities but does not include information that is subject to a confidentiality obligation with a third party (OECD, 2015:p 73). In a group context, if a taxpayer enters into a transaction with a group member that has a material tax impact and has not been able to confirm whether it forms part of an arrangement that incorporates a cross border outcome, the taxpayer should inform the tax administration of this fact (OECD, 2015:p 74). This would put the tax administration in a position to request specific information under existing exchange agreements with other jurisdictions. Furthermore, the OECD highlights that compliance costs would be minimised if the disclosure obligations for international schemes were standardised (OECD, 2015:p 74).

3.4 OBSERVATIONS ON WHETHER SOUTH AFRICA'S REPORTABLE ARRANGMENTS NEED TO BE REFORMED IN LINE WITH ACTION 12 BEST PRACTICE

This Part compares the recommendations set out in Action 12 to the reportable arrangement's legislation in South Africa to identify whether any law reform may be required or what changes may be necessary in order to incorporate digitalisation.

3.4.1 Timing and information requirements

The Davis Tax Committee considers that the time periods for required disclosures in South Africa are reasonable and in line with the OECD recommendations (Davis Tax Committee, 2016b:p 71). South Africa's reportable arrangement rules are mainly in line with most of the OECD's recommendations, except for client list disclosure requirements on promoters. The Davis Tax Committee does not believe that this requirement should be introduced in

South Africa, considering the dual reporting requirements in South Africa and the broad information requirements of the SARS Form RA01 that would encapsulate information that could have been obtained from client lists (Davis Tax Committee, 2016b:p 72).

3.4.2 Consequences of compliance and non-compliance

South Africa has implemented a monetary penalty regime in section 212 of the Tax Administration Act, as explained above. Furthermore, taxpayers who have disclosed reportable arrangements to SARS cannot conclude that no response from SARS implies that the scheme entered into is considered a legitimate transaction from SARS' perspective (OECD, 2015:p 56). Therefore, South Africa's rules are largely in line with the non-compliance and compliance recommendations set out by Action 12.

3.4.3 Uncertainty arising on applicability of hallmarks

The hallmark related to a resident that makes a payment or a contribution to a foreign trust makes use of undefined terms and it is not clear when the threshold of R 10 million is met. "Beneficial interest" may refer to a beneficiary of a discretionary trust or it may not because a beneficiary of a trust is not specifically excluded (Cliffe Dekker Hofmeyr, 2015). Furthermore, it is not clear whether a payment or contribution includes loans made to a foreign trust (Davis Tax Committee, 2016b:p 57). Finally, it is not clear whether the threshold relates to a single payment or a contribution or the aggregate thereof over time. These uncertainties will make it difficult to enforce penalties for non-compliance with this reportable arrangement, if it was not reported by the participants to the transaction, but it is identified by SARS due to digitalisation techniques using information from various databases.

3.4.4 Legal professional privilege

Legal professional privilege affords protection to communications between an attorney and their client from disclosure in legal proceedings, as an honest relationship between these parties is critical to ensuring that the South African legal system functions effectively (Brincker & Kotze, 2019:p 2). In South Africa a person that asserts legal professional

privilege is required to provide certain information to either SARS or the SARS representative in terms of section 42A of the Tax Administration Act. This information is used to determine whether they accept the assertion or dispute the assertion of privilege. If SARS disputes the assertion, the taxpayer is required to provide the information to a practitioner appointed by the tax board who must determine whether privilege applies based on the information provided and other information sources as the practitioner deems appropriate. If a party disagrees with the determination made by the tax practitioner, or if the practitioner does not decide, then the practitioner must keep the documentation until the assertion has been resolved through a court order.

The procedure outlined in the Tax Administration Act to determine whether legal professional privilege can be asserted can therefore cause further delays in concluding whether the reported transaction constitutes aggressive tax planning. It is also not clear on whether this privilege is restricted to an attorney and the attorney's client, or if it also encompasses all legal professionals and their clients as recommended by the Davis Tax Committee (Davis Tax Committee, 2016b:p 78). This uncertainty can reduce the effectiveness of reportable arrangement provisions to act as an early warning system. Therefore, it is important to ensure that once SARS obtains information using digitalisation techniques from other government sources, that it has the necessary information-gathering powers in terms of legislation to be able to effectively use information that may be subject to legal professional privilege to assess whether a transaction constitutes aggressive tax planning.

3.4.5 International tax schemes

Some of South Africa's hallmarks target international tax schemes. These hallmarks focus on specific techniques used by taxpayers (e.g. non-resident physically rendering services in South Africa). The OECD recommends that since international tax schemes tend to form part of grander commercial schemes, the focus should be on the outcomes that raise concerns for the tax administration, regardless of how they are achieved. The generic hallmarks in South Africa that target transactions that lack commercial substance in section 35(1)(b) of the Tax Administration Act include the phrase "substantially similar transactions" which widens the scope of these hallmarks, as the focus is on the concern of

tax administration and not the manner in which it is achieved. It is therefore recommended that this phrase also be included in hallmarks that target international tax schemes. This will also be beneficial when digitalisation is used to enable SARS to have real time access to all government databases and taxpayer information, so that it is able to target specific outcomes rather than specific techniques applied by taxpayers.

3.4.6 Existing vulnerabilities in the tax system

Action 12 recommends that identified vulnerabilities in the tax legislation should be used as a basis when determining specific hallmarks for a specific country (OECD, 2015:p 39). As discussed above in Part 3.4.3, the specific hallmark relating to a payment or contribution made by a resident to a foreign trust makes use of undefined terms and it is not clear when the threshold of R 10 million is met. This is a vulnerability because although there is legislation in place, it cannot be effectively implemented where uncertainty arises around the hallmark.

4 CURRENT TECHNOLOGY AT SARS THAT CAN ENHANCE TRANPARENCY FOR THE REPORTABLE ARRANGEMENTS PROVISIONS

SARS has digitalised various aspects of its system which have enabled compliance with the various taxes that SARS administers (such as Value Added Tax and Import Duties and Income Taxes) and systems for the general administration of the system. This study only focusses on the digital developments that can enhance transparency with respect to the reportable arrangements provisions.

The implementation and continuous updating of the SARS e-Filing system enables several services to be performed online. This includes submission of returns for various taxes and electronic payment of such taxes. In addition, e-Filing is used to pre-populate an individual's tax return using data obtained from employers and other third parties (SARS, 2020a:p 25). The SARS e-Filing system enables it to get information in a quick electronic format as tax returns are completed retrospectively and therefore the system is effective as an early warning system to alert SARS to aggressive tax planning.

The SARS MobiApp that has been launched also caters to uploading of supporting documents (SARS, 2020c:p 4). Although this tool enhances compliance because it makes it easier for SARS to access documentation regarding taxpayer's affairs, this tool does not necessarily ensure that SARS gets an early warning system to alert it to aggressive tax planning.

SARS has implemented automated risk engines that are used to determine accuracy of taxpayer declarations by comparing this information to readily available statistical data (Hattingh, Roeleveld *et al.*, 2016:p 407). The risk engines enable SARS to correlate data submitted across declarations received for various tax types including VAT, corporate income tax and Pay-As-You-Earn. SARS also makes use of cutting-edge risk management systems combined with information provided by third parties to detect non-compliance by identifying irregularities in taxpayer information (Hattingh *et al.*, 2016:p 401). The risk engine is used to carry out investigative audits (Judge R. Nugent, 2018:p 151). The rules within the automated risk engine do not necessarily target the identification of possible reportable arrangements. However, this existing automated risk engine could form the foundation of advanced analytics and blockchain technology that can be further expanded to identify reportable arrangements.

Furthermore, the Annual Performance Plan 2019/20 indicates that SARS wishes to build a dedicated organisation-wide data analytics capability and increase ability to transform data into well-packaged information products (SARS, 2019c:p 13). This is required in order to become a data driven organisation where information provides "one version of truth and insights to drive optimisation" (SARS, 2019c:p 13). Based on the information available, data analytics are not currently used to identify reportable arrangements. This will be further discussed below.

For SARS to obtain information that can act as an effective early warning system, technology that results in digital disruption is necessary because disclosure needs be closer to real time than what it currently is in South Africa.

5 DIGITALISATION ADVANCEMENTS THAT CAN BE ADOPTED TO ENHANCE SOUTH AFRICA'S REPORTABLE ARRANGEMENTS PROVISIONS

The onus of disclosing reportable arrangements is on the participant. As mentioned above, SARS was dissatisfied with the number of disclosures made due to taxpayers relying on technicalities (Oguttu, 2015:p 493). It is also difficult to assess the effectiveness of the reportable arrangement scheme without being able to perform a completeness check on it. This legislation can only successfully meet its objectives if the tax administration has another source of reportable transactions other than taxpayer disclosure (Oguttu, 2015:p 505).

A possible option for this alternative is how digitalisation can assist in this regard. The application of digital technologies enables tax administrations to extract new insights from available data other than tax disclosures to visualise their own picture of a taxpayer's business (PWC, 2019:p 1).

The discussion below explains different types of technologies and how they can be used to enhance the effectiveness of South Africa's reportable arrangements provisions. Advanced analytics, artificial intelligence and machine learning are tools that can be applied to newly obtained information sources and existing information that is at SARS' disposal, whereas blockchain technology and application programme interfaces are technology tools that can assist in gathering the necessary information from various sources.

Where available, examples are provided as to how some countries have utilised that technology, which has either enhanced their mandatory disclosure rules or where they have implemented technology that could be used to enhance mandatory disclosure rules.

Particular examples are given about how the UK has used technologies for the effective implementation of its mandatory disclosure rules that are referred to as Disclosure of Tax Avoidance Scheme ("DOTAS") (HM Revenue and Customs, 2018:p 27). The UK DOTAS is very detailed in an attempt to encompass every aspect of impermissible tax avoidance schemes (Marupen, 2018:p 60-61). The regime can be considered the ideal model of an

effective disclosure regime. In brief the UK DOTAS legislation has incorporated many of the hallmarks recommended by the OECD in Action 12 that South Africa has not implemented. These include hallmarks where premium fees could hypothetically be charged by the promoter (HM Revenue and Customs, 2018:p 45), where confidentiality clauses could be hypothetically used to keep information from revenue authorities or competitors (HM Revenue and Customs, 2018:p 37 - 38), and specifically around standardised tax products (HM Revenue and Customs, 2018:p 46).

However, it is not recommended that this be incorporated into South Africa's legislation, as the increase in administrative burden on taxpayers would outweigh the possible benefit for SARS. SARS should weigh up the administrative burden before incorporating more complexities into the legislation such as those relating to confidentiality and premium fee hallmarks. The UK revenue authority, Her Majesty's Revenue and Customs ("HMRC") has spotlights published on their website to further discourage aggressive tax planning (HM Revenue and Customs, 2020b). SARS could apply a similar approach and publish the current techniques of which it is aware on its website and explain why these techniques should not be used. This can further deter taxpayers from using these schemes. For example, SARS could use this approach to explain the hallmark relating to a resident that makes a payment or contribution to the trust and makes use of undefined terms and it is not clear when the threshold of R 10 million is met as set out in the Reportable Arrangements notice (SARS, 2019b:para 2.3). This approach can be used to clarify the scope of transactions that this hallmark is targeting. Once this clarity is available, SARS would be able to develop appropriate algorithms and sources of information to identify this reportable arrangement. South Africa could adapt the principles of the UK's MTD Project to target aggressive tax planning, as information is still being received at an earlier stage than when tax returns and financial statements are submitted a year after the fact.

5.1 ADVANCED ANALYTICS

Advanced analytics makes use of statistical and machine learning techniques to obtain an understanding from data analysed in order to better deploy resources (OECD, 2016a:p 17-18). Analytical projects can be categorised as either predictive or prescriptive. Predictive analytics is used to anticipate problems that are likely to occur based on patterns

recognised in historical data (OECD, 2016a:p 17-18). Prescriptive analytics provides insight into the impact that tax administrations have on taxpayer behaviour (OECD, 2016a:p 17-18). It aims to understand the nature of relationships identified to assist in determining the appropriate responses to various taxpayer segments (OECD, 2016a:p 17-18).

Advanced analytics is mainly used for audit case selections, improving debt management and determining appropriate methods to ensure on time filings and payment compliance (OECD, 2016a:p 20). Social Network Analysis can also be used as a source of information to identify links between connected individuals (OECD, 2016a:p 21). This is useful in group situations where individual level assessments may be considered otherwise to be normal (OECD, 2016a:p 21). However, some tax administrations have also been applying advanced analytics to tax gap measurement and forecasting the impact of a change in tax policy (OECD, 2016a:p 28).

HMRC “Connect” is a comprehensive analytical system used in the United Kingdom which collects and stores data from various sources and creates connections within these sources to identify wayward taxpayers and potential cases for enquiry in an attempt to close the tax gap in the UK (Munro, 2018). This system makes it possible to unearth hidden relationships between organisations and taxpayers that the previous analytic techniques would either have been unable to do or would have taken a significant amount of time to achieve (Munro, 2018). The system can identify anomalies by comparing taxpayers’ expenses and investments to the value of tax paid (Munro, 2018). These different data sources include other government databases and the private sector, such as credit card issuers (Munro, 2018). Although this system is more focussed on possible tax evasion and selecting cases for enquiries, these information sources could be used to identify transactions that lack commercial substance and contain other hallmarks of reportable arrangements.

Advanced analytics could be useful to SARS in identifying possible reportable arrangement transactions if access to various data sources could be obtained. In South Africa, these could include various sources, but specific focus would be placed on the

Companies and Intellectual Property Commission (CIPC), and authorised dealers or the South African Reserve Bank (SARB).

The CIPC has various objectives set out in section 186 of the Companies Act (71/2008) (hereafter referred to as the "Companies Act") which include proper registration of companies and ensuring its database of information remains up to date. In terms of section 35 of the Companies Act, an entity is required to disclose all authorised share capital in the Memorandum of Incorporation (MOI), and the MOI must be filed with the CIPC on incorporation in terms of section 15 of the Companies Act. Furthermore, if any amendments are made to the share capital of a company, they are required to file a Notice of Amendment of its MOI with the CIPC in terms of section 36(4) of the Companies Act. There is a strong information exchange relationship between SARS and CIPC that enables SARS to verify existence and activity of companies (SAICA Academic Symposium, 2019:p 5). If SARS could obtain information from the CIPC to identify entities with redeemable preference shares as soon as the MOI's or amendments thereto are filed, they would be able to establish points of inquiry to determine whether the company has entered into a reportable arrangement relating to the specific hallmark on redeemable preference shares.

Section 33(1) of the Companies Act obligates companies that are audited to file a copy of their annual financial statements with their annual return to the CIPC. Therefore, the CIPC could provide financial statements to SARS for all companies that have not yet filed tax returns. SARS can use these financial statements to determine further details on companies that have redeemable preference shares that were identified previously, using the MOI and amendment information. The financial statements could also be analysed to determine whether any share buybacks occurred in the year and whether there has been a change in shareholding to determine whether the company has entered into a reportable arrangement relating to the specific hallmark of share buybacks and subsequent re-issue of shares.

SARS could maintain a list of companies that have an assessed loss of over R 50 million and update it on an annual basis. Data analytics could be used to identify which of these companies have answered "yes" to the ITR14 question: "Were there any changes in shareholder's interest during the year of assessment (excluding listed companies)?". This

would assist SARS to determine whether the company has entered into a reportable arrangement relating to a change in shareholders of companies with large assessed losses.

South Africa has exchange controls regulations that provide Treasury with control over South Africa's foreign currency reserves by ensuring that only authorised dealers may deal with foreign currency unless specific permission has been provided as per Paragraph 2(1) of the Exchange Control Regulations (National Treasury, 2012). Paragraph 1 of the Exchange Control Regulations defines "Treasury" as the Minister of Finance or officer of a Department of Finance who acts on the authority of the Minister of Finance. Paragraph 1 of the Exchange Control Regulations defines "authorised dealer" as a person authorised by the Treasury to deal in foreign exchange. There are only a limited number of authorised dealers including all major banks of South Africa (South African Reserve Bank, 2020:p 20).

Therefore authorised dealers and the SARB have sight of offshore payments made from South Africa and to whom these payments are made. If authorised dealers could notify SARS of these offshore payments that are in excess of R 10 million and that the foreign bank account was held by a foreign trust, then SARS could identify taxpayers that may have entered into a reportable arrangements relating to payments to foreign trusts or payments to non-residents. Data analytics can be used to compare to the list of employers registered for Pay-As-You-Earn in order to initiate further inquiries to determine whether the foreign payment may be a reportable arrangement if all other requirements are met. If authorised dealers could notify SARS of any offshore payments in excess of R 5 million, this could also enable SARS to initiate inquiries to establish whether this payment was made to a foreign insurer to determine whether taxpayers have entered into the reportable arrangement relating to payments to foreign insurers.

Data analytics could be used to identify when information provided by the CIPC or authorised dealers meets the requirements of specific hallmarks by establishing a criterion based on the reportable arrangement provisions.

5.2 ARTIFICIAL INTELLIGENCE AND MACHINE LEARNING

Artificial intelligence is a broad field that encompasses instilling of intelligence into machines so that they are able to adopt a human being's unique reasoning capability to different extents (De Jesus, 2017). This intelligence includes continuous learning and improvement in the ability to understand and use information for a specific purpose, for example, interpreting or using it to predict likely outcomes (Dimitropoulou, *et al.*, 2018:p 296). In order to achieve this, artificial intelligence applications rely on the convergence of software, algorithms, big data, cloud computing and sensory interfaces (Milner & Berg, 2017:p 4). The machine learning category within artificial intelligence specifically concentrates on using algorithms to teach pattern recognition to a machine for it to generate insights that form the basis of its future decision making (De Jesus, 2017). Therefore, without explicit instructions, it can complete tasks where the input data is changed (Milner & Berg, 2017:p 4).

Artificial intelligence allows for complex and laborious tasks to be completed more proficiently (Huang, 2018:p 1818). Once the criteria and source of data has been finalised, significant time savings will be achieved because it will be faster for a machine to sift through mountains of information than for a human. This will then free up staff members to focus on the identified transactions instead of sifting through information.

If all necessary information can be collected or obtained in a central repository or if access could be granted to all required sources, it may be possible to use artificial intelligence to identify instances where reportable transactions have occurred by creating algorithms that determine what sources of information should be considered and what criteria should be met for a taxpayer or transaction to be identified for further analysis. This could be further expanded to identify other transactions that have characteristics of aggressive tax planning by using the general hallmarks listed in section 35 of the Tax Administration Act.

The Australian Tax Office (ATO) used machine learning to analyse data in various formats that arose from the Panama and Paradise Papers (Australian Tax Office, 2020). The ATO created data sets to teach the machine learning model to discover patterns and relationships between people and entities by searching for key words and using algorithms to catalogue the results in a required manner (Australian Tax Office, 2020).

The Davis Tax Committee highlights that the SARS Tax Avoidance and Reportable Arrangements Unit was able to tailor its training of its auditors for risk profilers based on the reportable arrangement reports received, so that these auditors could be kept abreast of trends in the market. The addition of five specific hallmarks to the reportable arrangement regime was as a result of the proactive management in the unit in 2016 (Davis Tax Committee, 2016b:p 70).

The unit could use machine learning to teach machines to process a vast amount of data much faster, in order to flag transactions upon which auditors could focus which have characteristics of tax abuse. Initially machine learning will likely flag legitimate transactions. However, this is not dissimilar from what has happened without machine learning where the most reported transactions were vanilla preference share deals (Davis Tax Committee, 2016b:p 70). The legitimate transactions can then provide a basis for adding further excluded arrangements to the legislation and further customising the criteria in algorithms to exclude these transactions. Machine learning could be implemented on a trial basis in order to determine the best sources of information and what the criteria should be to provide optimal results.

5.3 BLOCKCHAIN TECHNOLOGY

The 2019 Annual Report on SARS states that blockchain as a proof of concept and cloud technologies were explored to assess their suitability for SARS (SARS, 2019a:p 60). Blockchain technology is “a shared immutable ledger” that enables the process of capturing and tracking anything of value (Gupta, 2020:p 3). In the traditional business sense, each party to a transaction updates their accounting ledgers for each transaction entered. Blockchain provides the opportunity for a shared ledger between transaction participants who can also be referred to as “nodes”. This ledger is then updated on a transactional basis through “peer to peer replication” which means that each node needs to validate a transaction before it is added to the blockchain. Therefore, each node can receive or send transactions to other nodes and in near real time the distributed ledger is synchronised across the network as each transaction is sent (Gupta, 2020:p 6-7).

These transactions are stored in blocks that are linked in a specific order to form a chain. The blockchain grows as the number of transactions increase. Each block contains three items; a “hash” which is the equivalent of its digital fingerprint, the hash of the preceding block and time stamped batches of validated transactions. Each block records the time and sequence of each transaction (Gupta, 2020:p 13-14).

There are embedded controls within blockchain technology that ensure data entered on the blockchain is secure and not subsequently tampered with. For instance, it relies on cryptography which is advanced encryption of information stored on the blockchain. Permissions can be set per participant (node) to either only transact if certain conditions are met or only have restricted visibility of the ledger (Gupta, 2020:p 22). It is also possible to set certain conditions and rules that need to be met before transactions are conducted. This is often referred to as “smart contracts”. If a transaction is processed in error, a new transaction needs to be recorded in order to reverse the error because the original transaction cannot be tampered with (Gupta, 2020:p 11).

It is possible to add a user (for example, an auditor) to the network with read only access to the transactions (Gupta, 2020:p 16). Another possible party could be a tax administration. The OECD recommends considering a whole of government approach programme by making use of a common digital platform which enables government agencies to share data amongst themselves (OECD, 2016c:p 39).

The Estonian government uses blockchain technology to enforce integrity in their systems. Amongst other systems, it uses blockchain in its property registry and business registry which enables data sharing between national systems and across borders (Marthinson, 2019:p 7). The integration of blockchain technology into tax administrations is a new phenomenon which has not yet been fully implemented by a tax administration (Demirhan, 2019:p 359). In the context of a tax administration using blockchain technology, the tax administration and taxpayers would be peers on the network (Demirhan, 2019:p 359).

Blockchain technology could provide SARS with the ability to access the necessary information from the CIPC and authorised dealers in real time as transactions occur. This access would enable SARS to follow a transaction between all parties involved. Using this

information, SARS would be able to build rules to identify possible reportable arrangement transactions and the participants involved. For example, this visibility would enable SARS to identify tax accommodating or indifferent parties or transactions that lack commercial substance.

SARS currently relies on taxpayer or promoter disclosures regarding reportable arrangements and is currently not able to confirm the completeness of disclosures made. Blockchain technology provides the opportunity to perform this completeness check due to the traceability of blockchain using the hash of each block. Blockchain could also assist in determining the total value of the various hallmarks used by associating a specific identifier with each category of reportable arrangements.

5.4 APPLICATION PROGRAMMING INTERFACES

An application programming interface (API) enables access to features of an operating system, application or other service by means of a set of functions and procedures (OECD, 2019b:p 59; Oxford English Dictionary). APIs enable real time exchange of data and other information between systems (OECD, 2019b:p 14). However, APIs facilitate connectivity between systems without providing direct access to the underlying system (OECD, 2019b:p 12). Furthermore, the content of this data exchange can be a full transactional record or only required extracts thereof (OECD, 2019b:p 14).

In the UK, APIs are the gateway that taxpayers can use to communicate with the HMRC's system using Making Tax Digital ("MTD") compatible software (House of Commons, 2017:p 16). The UK's MTD Project aims for taxpayers to use software that keeps information in digital records that can be transmitted to HMRC (HM Revenue and Customs, 2020a:p 22). A pilot of making tax digital for income tax commenced in April 2017 which involves the use of software to transmit accounting information to HMRC on a quarterly basis (HM Revenue and Customs, 2020a:p 22). This information can then be used to meet tax obligations using this software instead of filing a tax return (HM Revenue and Customs, 2020a:p 22). The objective of the MTD Project is to increase accuracy of taxpayer submissions without placing an additional compliance burden on taxpayers (HM Revenue and Customs, 2020a:p 8).

Although the MTD system is not focussed on identifying aggressive tax planning, the transmission of transactional data every three months may be useful for SARS to identify generic hallmarks, for instance where:

- interest is calculated using a method other than that prescribed by section 24J;
- transactions lack commercial substance;
- transactions result in zero or negative accounting profit.

APIs could also be used to facilitate a real time connection with the SARB or authorised dealers for all payments that meet the requirements of the specific hallmarks discussed in Part 2.1.2 above.

6 BEST PRACTICE APPROACHES TO IMPLEMENTING TECHNOLOGY TOOLS

As illustrated in the previous sections, there is a wide range of technology tools available that tax administrations have implemented at different speeds using different methods (PWC, 2019:p 8). This section aims to apply the best approaches suggested by the OECD that could be followed to implement technology tools to enhance tax transparency for the reportable arrangements rules.

The OECD recommends that it is vital for tax administrations to clearly define the problems to be resolved before technology solutions are considered (OECD, 2017:p 28). With respect to reportable arrangements provisions, there are practical considerations that need resolution at SARS before implementing digitalisation. Four of these main considerations are considered in Part 7.

To resolve these problems SARS can leverage off other tax administrations' experiences and what they have learnt through their implementation of technology tools (OECD, 2017:p 32). However, it is also important to understand what their objective was with the specific technology tool to determine whether it would be applicable to SARS. SARS could consider achieving the following objectives with technology tools:

- the ability to collect information from various sources to determine whether taxpayers' have entered into identified reportable arrangements.

- the ability to identify peculiarities in the data that could indicate aggressive tax planning or disguised transactions.

Thereafter, the appropriate tax technology solution should be determined along with an implementation plan. Government stakeholders and taxpayers should be involved throughout the process to ensure transparency across the board. Engagement with taxpayers during the process could help identify additional hurdles that were not considered initially, as well as identify preferences of specific taxpayer segments and most cost-effective solutions (OECD, 2017:p 28).

Early consultation with solution providers will ensure that defined problems are adequately explained and understood, in order to be able to identify the best all-encompassing solution that meets the defined objectives. Tax administrations need to also consider how future improvements or updates to the system will be incorporated into the overall cost of the project (OECD, 2017:p 28).

Where possible, pilot projects should be conducted in order to identify any unforeseen practical issues (OECD, 2017:p 28). The pilot project could be used to ensure that the technology has been set up correctly to identify instances of non-compliance with reportable arrangement disclosure. If the solution identifies legitimate transactions as reportable arrangements, it should be possible to adapt the algorithm accordingly before the project goes live.

Engagement with other tax administrations during and after the digitalisation project is important, in order to share and learn from each other's success stories and new risks identified. This is especially important due to the fast pace of technological developments (OECD, 2017:p 29). Part 5 considers what the UK has implemented to learn from their success stories.

7 PRACTICAL CONSIDERATIONS FOR SARS TO ENSURE EFFECTIVE DIGITALISATION FOR SOUTH AFRICA'S CIRCUMSTANCES

For real-time information transfers to SARS to successfully occur, there are certain factors that need to be considered and addressed. Four of these factors are addressed below relating to protection of taxpayers' privacy and data protection, electricity, internet and the cost of implementing digitalisation.

7.1 PROTECTION OF TAXPAYER'S PRIVACY AND DATA PROTECTION

One of the main concerns about digitalisation that SARS should be concerned about, is whether it is to be used to enhance the reportable arrangements provisions and ensuring that taxpayers' rights to privacy are not contravened. It is therefore important that in adopting any digital technology SARS is in line with provisions in South Africa that protect taxpayer rights.

Section 14 of the Constitution of the Republic of South Africa provides that everyone has the right to privacy which includes the right to not have their home or property searched, possessions seized or infringement of their private communication. To enforce this right, the Protection of Personal Information Act (4/2013) (hereafter referred to as the POPI Act) was signed into law in 2013 and has a commencement date of 1 July 2020 (Giles, 2020). There is a 12 month grace period for responsible parties to become compliant (Giles, 2020). The POPI Act regulates "processing" of "personal information" (Hogan Lovells Publications, 2015). Personal information has a broad definition in section 1 of the POPI Act and includes any information that can be connected to a living natural person or juristic person. Processing is defined in section 1 of the POPI Act, but briefly it includes collecting, storing, transmission and destruction of information. Section 13 of the POPI Act requires that information must only be used for the purposes explained to the data subject. Section 15 of the POPI Act prohibits processing that takes place beyond the original scope. Using blockchain to adopt a "whole of government" approach as described above, would involve further processing.

However, there are exemptions in section 37 of the POPI Act that allow further processing of personal information, one of which includes if the public interest in processing significantly outweighs any interference with privacy of data. Public interest can include economic and financial interests of a public body. It can be argued that the exchange of

information with other tax authorities and providing further information to SARS can be included in the financial interests of SARS and therefore does fall within this exception to the POPI Act, but this requires further legal analysis and confirmation. This is essential to ensure that SARS information requirements are aligned with the POPI Act before large investments occur in blockchain and cognitive technologies that could be used to ensure the transparency of the reportable arrangements provisions.

It should also be noted that section 69 of the Tax Administration Act provides that SARS officials must preserve the secrecy of taxpayer information and it prohibits disclosure to anyone who is not a SARS official. This section also provides certain exceptions to this rule where disclosure of taxpayer information may be made to the South African Police Service or the National Prosecuting Authority to prove a tax offence under a tax act or to be a witness in civil or criminal proceedings. Other exceptions to the general rule in this section include when the information is requested by order of a High Court, if another act expressly provides for disclosure of this information, or if the specific taxpayer information is public information.

7.2 COST INTENSIVE

One of the main challenges that SARS may face in installing such technology is the initial start-up cost.

For example, a permissioned or private blockchain would need to be established if the blockchain is to be used by authorised dealers or the CIPC as nodes to be able to share information with SARS in real time. The cost of blockchain technology is predominantly based on the transaction volume, transaction size, node hosting method and consensus protocol (Ernst & Young LLP, 2019:p 5).

The major spending adjustments announced by the South African government have the implication that no funding has been allocated in the short or medium term for possible key projects that could enhance the administration of SARS (SARS, 2019c:p 10). Therefore, if the blockchain platform cannot be implemented on SARS' existing technology, the project may need to be postponed to when funding is available.

7.3 INFORMATION SECURITY

A significant issue surrounding digitalisation that SARS should be concerned about, if digitalisation is to be used to enhance the reportable arrangements provisions, is the potential leak of taxpayer information.

Cyber-crime has been identified as an existing threat to SARS in the Strategic Plan (SARS, 2016:p 15) and new risks are likely to arise as new technologies are implemented at SARS (SARS, 2019c:p 10). As discussed above, blockchain technology relies on cryptography and advanced encryption to ensure the protection of information within the blockchain. Furthermore, due to the distributed ledger properties, it makes it more difficult for information to be tampered with, as each ledger would need to be altered at the exact same time. It may be necessary to communicate to taxpayers how their data will be more secure than in the current environment.

7.4 ELECTRICITY

A constant source of electricity is necessary for physical devices to access or make blockchain network technology work (Saragih & Setyowati, 2019 para 4.1). A constant source of electricity is also necessary for reporting information in real time as required by the reportable arrangements provisions. Load shedding is one of South Africa's inherent limitations. It is Eskom's responsibility to protect the electricity power system from a total blackout (Eskom). This has become necessary due to the constrained power system and this will only be rectified when a new substantial power capacity is available (Eskom). However, many taxpayers have installed private power generation facilities to maintain power supply during periods of load shedding, so it may be necessary to determine which taxpayers do not have generator power but have information to report to SARS as required by the reportable arrangements rules.

7.5 INTERNET

Technologies like blockchain technology cannot function without an internet connection. As blockchain technology works in real time, the quality of internet speed is also important

(Saragih & Setyowati, 2019:para 4.1). In 2018, Statistics South Africa indicated that 64.7% of the South African population were internet users and only 10.4% of South African households had access to the internet at home (Statistics South Africa, 2018, p 57). Therefore, it is possible that parts of the country will not be able to report in real time due to their inability to access the internet.

8 CONCLUSION AND RECOMMENDATIONS

South Africa was one of the first countries to adopt mandatory disclosure rules. The ambit of current reportable arrangement legislation also caters for international tax schemes. There are very few recommendations remaining on how South Africa could improve reportable arrangement legislation without also unnecessarily increasing the compliance burden.

The fact that the public has lost trust in SARS due to maladministration that has lowered taxpayer morale, could further encourage aggressive tax planning techniques. Schemes that involve aggressive tax planning are also likely to evolve with technological advancements.

Technological innovations have rapidly increased the pace at which companies and people transact, information is made available and the rate at which decisions must be made. Advanced analytics, artificial intelligence and machine learning, blockchain technology and API's, are all viable options that SARS could adopt to enhance the effectiveness of the reportable arrangements provisions.

Advanced analytics could be used by SARS to identify undisclosed reportable arrangements if access is granted to other government databases. For instance, SARS could run data analytics based on information within its database against that of the CIPC and authorised dealers or the SARB. Artificial intelligence and machine learning could be used by the SARS Tax Avoidance and Reportable Arrangements Unit to perform repetitive tasks of processing limitless information from various sources to highlight transactions containing certain characteristics of aggressive tax planning that the wider team could then further investigate.

Blockchain technology and API's could be implemented by SARS to gain real-time access to other government databases such as the CIPC and authorised dealers or SARB databases. Due to the traceability incorporated into blockchain technology, it offers SARS the capability of tracking a specific transaction between all parties involved which enhances transparency of taxpayers' affairs to enable SARS to identify tax accommodating or indifferent parties or transactions that lack commercial substance.

The most appropriate technology plan will be the one that boosts taxpayer confidence in the administration of SARS and enables processing of data timeously from various sources to enhance transparency closer to real time. This needs to be determined after considering the current budget limitations, possible restrictions as a result of internet access, privacy legislation and load shedding.

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