HM Revenue & Customs

Mandatory Disclosure Rules

Consultation

Publication date: 30 November 2021

Closing date for comments: 8 February 2022

Summary

Subject of this consultation

This consultation seeks views on the design of draft regulations requiring disclosure of certain arrangements to HMRC.

Scope of this consultation

At Budget 2021, the government announced that it would implement the OECD's "Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures". The model rules require taxpayers and intermediaries to disclose information on these types of arrangements and structures to HMRC. These regulations will replace similar EU rules introduced previously.

Who should read this

People who are involved in the promotion, design or implementation of reportable arrangements and structures. This could include, lawyers, accountants and financial institutions, as well as taxpayers who implement these arrangements.

Duration

The consultation will run from 30 November 2021 to 8 February 2022

Lead official

John Sandeman, HM Revenue and Customs.

How to respond or enquire about this consultation

Please send responses by email to mandatorydisclosure.rules@hmrc.gov.uk

Additional ways to be involved

HMRC will engage directly with existing stakeholders. Please contact the lead official if you are interested in meeting to discuss this document.

If you require this document in Welsh, or alternate formats such as large print, audio or Braille, please email mandatorydisclosure.rules@hrmc.gov.uk for advice.

After the consultation

The government will review the draft regulations in light of the responses received, and amend them as necessary. The final regulations will then be laid before Parliament.

Getting to this stage

The OECD published the model rules in March 2018. The EU developed similar rules, known as 'DAC 6' in parallel. As an EU member state at the time, the UK implemented DAC 6 in January 2020. Now that the UK has left the EU and the transition period has ended, the government will implement the OECD model rules to replace the EU version of the rules.

Previous engagement

Over the summer of 2019, the government consulted extensively on draft legislation to implement DAC 6. The outcome of that consultation can be found here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856842/International_Tax_Enforcement_disclosable_arrangements_summary_of_responses.pdf

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1. Introduction

The UK has long been at the forefront of global efforts to combat tax evasion and is a leader in international tax transparency and exchange of information. The UK was one of the first jurisdictions to implement the Common Reporting Standard (CRS) for automatic exchange of financial account information and has exchange relationships with over 100 jurisdictions worldwide.

Despite the efforts of the international community to tackle offshore tax evasion, tax authorities have continued to find evidence of arrangements and structures being designed to facilitate non-compliance, including through the use of opaque offshore structures, and through arrangements designed to circumvent other transparency initiatives such as the CRS.

In response to this, the OECD developed Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures (MDR), published in 2018. These rules require taxpayers and advisers to report information to the tax authorities on certain prescribed arrangements and structures which could facilitate tax evasion. Tax authorities in implementing jurisdictions will then share this information with the tax authorities of the jurisdiction where the taxpayer is resident.

At Spring Budget 2021, the government announced that it would implement these model rules in the UK. The rules are intended to replace similar EU rules, known as DAC 6, which were implemented in the UK prior to EU Exit through the International Tax Enforcement (Disclosable Arrangements) Regulations 2020 (SI 2020/25). At the end of the transition period following EU Exit, the government amended those regulations to ensure the rules remained operative from 1 January 2021, and to align them more closely with the OECD's model rules. Those amendments were made in the International Tax Enforcement (Disclosable Arrangements) (Amendment) (No. 2) (EU Exit) Regulations 2020 (SI 2020/1649). The government is now consulting on draft regulations to implement MDR, which will mean the rules apply at a global rather than European level following EU Exit.

The regulations require promoters, service providers and taxpayers to send information to HMRC about reportable arrangements and structures. The regulations are designed to provide HMRC with early information about these arrangements and structures. This will help to deter non-compliance, assist HMRC in identifying and challenging evasion, and support HMRC and other tax authorities in developing policies and tools to address loopholes.

The draft regulations draw closely on the model rules themselves, to provide consistency in the application of the rules between jurisdictions.

Given the similarities between MDR and DAC 6, HMRC proposes to take a similar approach to interpretation of MDR as it took for DAC 6. Guidance for DAC 6 can be found in the International Exchange of Information Manual (IEIM60000) on GOV.UK. This approach is intended to reduce the burden on businesses in moving to MDR. Where the model rules differ from DAC 6, or where HMRC is giving further consideration to the approach currently set out in the DAC 6 guidance in implementing MDR, this will be discussed in this consultation document. We welcome comments on those areas, and on any other areas where you consider HMRC could further refine its interpretation. The government welcomes views from a wide range of stakeholders.

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2. General Principles

2.1 The draft regulations closely follow the OECD model rules, which are available here. The primary reason for this is to maintain consistency in the application of the rules between implementing jurisdictions. This is intended to reduce the reporting burden faced by businesses operating across multiple jurisdictions and has been a key theme of discussions with businesses since the model rules were first published.

2.2 Alongside the model rules, the OECD has published a 'Commentary' which provides guidance on interpretation of the rules, and how the OECD envisages they will apply in practice. The commentary gives examples of the type of arrangements and structures that might be expected to be caught by the rules, as well as clarifying situations where no report would be due.

2.3 HMRC considers that the Commentary to the model rules is a helpful source of interpretation, and in general it is anticipated that there will be broad alignment between the commentary and the interpretation set out in HMRC's guidance.

2.4 HMRC intends to publish guidance on MDR once the regulations are finalised and before the rules comes into effect. HMRC envisages that generally the guidance will be consistent with existing guidance currently in the International Exchange of Information Manual (IEIM) section 600000 onwards, except where changes are necessary to ensure alignment with the model rules and commentary, or to address any gaps in the existing guidance.

Q1. Are there any areas where you consider there to be potential incompatibility between the draft UK regulations and existing guidance, and the model rules and their commentary which you think would be problematic for businesses seeking to apply the rules?

3. Commencement and Transition

3.1 The government envisages that the MDR regulations will come into force in Summer 2022. When the regulations come into effect, the regulations in SI 2020/25 as amended, which implemented DAC 6 in the UK, will be revoked. This means that arrangements or structures which would otherwise be reportable under both SI 2020/25 and the MDR regulations will only be reportable under one set of regulations.

3.2 While SI 2020/25 will be repealed, those regulations will still have effect in relation to arrangements entered into before the MDR regulations come into force. Therefore, an arrangement entered into immediately prior to these regulations coming into force will not fall between the two regimes; it will still be reportable under the rules in SI 2020/25.

Q2. Do you identify any practical difficulties with the transitional provisions?

3.3 The model rules include provisions requiring reporting of CRS avoidance arrangements that were entered into between the publication of the CRS and the date MDR comes into force. A similar approach was taken in the DAC 6 rules, implemented via SI 2020/25, which also included provisions for reporting of pre-existing arrangements, although this requirement only applied to arrangements entered into between June 2018, when the directive itself came into force and January 2021 when reporting commenced.

3.4 The requirement to report certain pre-existing arrangements was included in the model rules because it would have been possible for people to have entered into CRS avoidance arrangements between the publication of the CRS (on 29 October 2014) and when MDR reporting comes into force. Indeed, the incentive to enter into such an arrangement was arguably greatest in this period, when details of the CRS were public but the rules were not yet in force.

3.5 Therefore, the government considers it necessary to include provisions requiring reporting of arrangements entered into since 29 October 2014 in the regulations, as without these provisions the policy aims would not be fully achieved. This will ensure that those who designed and promoted CRS avoidance arrangements following the publication of the CRS will not avoid the reporting obligation. HMRC will use the information on pre-existing arrangements as part of its risk assessment process to identify and challenge cases of non-compliance.

3.6 This approach is aligned with the legislation published in other jurisdictions such as the Crown Dependencies, which gives certainty over the application of the rules in different jurisdictions. The benefits of a consistent approach are likely to increase as and when more countries adopt MDR.

3.7 The government acknowledges that including this provision is likely to create additional burdens on businesses which will have to identify and report arrangements entered into since 29 October 2014. To reduce this impact, the government proposes to implement a number of limitations and mitigations, to reduce the burdens on businesses while still ensuring the regime is effective.

3.8 Some of these mitigations are included in the model rules, but the government proposes to include an additional mitigation (at iv below) to reflect the UK's specific circumstances. The proposed mitigations are:

i. For the period between 29 October 2014 and the date the regulations come into effect, the regulations will only require reporting of 'CRS avoidance arrangements', and not 'opaque offshore structures' (see 4.3 and 4.4 below).

ii. The reporting requirement will only apply to 'promoters' and not to 'service providers' or taxpayers (see 4.1 and 4.2 below).

iii. The reporting requirement will only be engaged where the value of the financial account that is subject to the CRS avoidance arrangement immediately prior to the implementation of the arrangement was more than $1,000,000 (or sterling equivalent).

iv. An arrangement which has been disclosed to HMRC under SI 2020/25 does not have to be disclosed again under these regulations.

3.9 The government considers that these mitigations will reduce the burden faced by businesses in meeting the requirements of the regulations whilst meeting the policy objective of effectively identifying arrangements being used to evade tax.

Q3. Do you agree with the government's rationale for including the reporting of pre-existing arrangements? Please provide a supporting explanation for your answer, where helpful.

Q4. Do the proposed safeguards and mitigations strike the right balance between minimising burdens on business and ensuring the regime operates effectively? Are there any other safeguards or mitigations that you think the government should consider?

4. Key concepts

4.1 Intermediaries

4.1.1 The draft regulations set out reporting requirements for intermediaries. Intermediaries are defined by reference to the model rules, which identify two types of intermediaries: 'promoters' and 'service providers'.

4.1.2 Promoters are those who design or market a 'CRS avoidance arrangement' or an 'opaque offshore structure'. A service provider is defined as any person providing 'relevant services' in respect of such an arrangement or structure, provided that they could reasonably be expected to know that the arrangement or structure was indeed a CRS avoidance arrangement or an opaque offshore structure.

4.1.3 For the purposes of the definition of a service provider, providing a relevant service means providing assistance or advice with respect to the design, marketing, implementation or organisation of the arrangement or service.

4.1.4 As mentioned in the introduction, the MDR rules are intended to replace similar EU rules, known as DAC 6, which were implemented in the UK prior to EU Exit through SI 2020/25. The government intends to take a similar approach in relation to MDR.

4.1.5. Although the rules in SI 2020/25 did not explicitly refer to promoters and service providers, in practice the rules did identify two types of intermediaries: any person who "designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross border arrangement" and any person who "knows or could reasonably be expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice, with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement". Indeed, these two types of intermediaries are referred to in HMRC guidance as 'promoters' and service providers' (see IEIM621010).

4.1.6 While SI 2020/25 and these draft regulations use slightly different terms in the definition of an intermediary, in practice, HMRC considers that the definitions are largely equivalent, and it will be unlikely that a person would have a reporting obligation under one set of rules but would not have had one under the other.

Service Providers

4.1.7 For example, in relation to service providers, SI 2020/25 refers to 'aid, assistance or advice', whereas the draft regulations implementing MDR only include providing 'assistance or advice' in relation to the arrangement or structure. However, it is difficult to conceive that there will be many situations where a person could be said to be providing 'aid' but not be providing 'assistance' or 'advice'. Indeed, aid and assistance are synonyms.

4.1.8 Similarly, SI 2020/25 refers to any person who 'knows or could reasonably be expected to know…', whereas the draft regulations implementing MDR only refer to where the person 'could reasonably be expected to know…'. While this could be seen as implying some difference in legislative intent, HMRC considers the only difference to be the different sources for the two sets of regulations: DAC 6 for SI 2020/25 and the OECD model rules for the new regulations. HMRC considers the scope of the terms to therefore be the same.

Promoters

4.1.9 For MDR purposes, the definition of 'promoter' refers to the design or marketing of the arrangement, whereas SI 2020/25 covers design, marketing, organising, making available for implementation or managing the implementation of the arrangement. This could imply that organising, making available for implementation, or managing the implementation of the arrangement, would mean a person was not in scope of the definition under MDR.

4.1.10 Whether a person does meet the definition of being an intermediary will depend on the particular facts of the case, but it is worth noting that the MDR Commentary on the definition of promoters states that "A person is "responsible" for the design of a CRS Avoidance Arrangement when that person introduces features into the Arrangement which have or are likely to have the effect of circumventing the CRS." The same principle applies to opaque offshore structures. Similarly, the Commentary explains that 'marketing' refers to "encouraging others to enter into that Arrangement based on its CRS treatment or the possibility that the Structure will not allow the identification of the Beneficial Owner."

4.1.11 Consider an example where a person was involved in 'making an arrangement available for implementation' and so was a promoter for the purposes of SI 2020/25. At first sight, it may appear that that person would not meet the criteria to be a promoter under MDR because that particular wording is not a feature of MDR. However, if the person, as part of making the arrangement available, encouraged others to enter into it, for example, through advertising, or discussions with clients, they would still meet the definition in MDR as they would be marketing the arrangement.

4.1.12 If a person doesn't meet the criteria to be a promoter under MDR, they may still meet the condition to be a service provider, as the definition of 'relevant services' refers to providing assistance or advice with respect to the design, marketing, implementation or organisation of the arrangement or service.

Q5. Do you have any comments on the proposed approach to identifying 'intermediaries' in the draft regulations?

4.1.13 The definition of intermediary applies to "any person…". Person is not defined in the model rules or in the draft regulations and so takes its ordinary meaning, which includes natural people, as well as any legal person including a company or a limited liability partnership. Under UK law, general partnerships do not have their own legal personality (except for partnerships in Scotland) and do not therefore fall within the definition of an intermediary. However, the partners in the partnership would be intermediaries if they undertook the relevant activities to bring them within scope of the definition.

4.1.14 This is the same approach as was taken in relation to SI 2020/25 which implemented DAC 6, the rules in force in the UK prior to EU Exit. There was some concern amongst businesses about how partners would manage their reporting obligations, and as a result HMRC confirmed in guidance (IEIM621090) that it would accept reports by the partnership or another partner, made on behalf of any partner who was an intermediary. Attempting to impose the obligation directly on partnerships would add additional complexity to the rules for example in relation to applying penalties, and to HMRC's knowledge, this has not caused significant difficulties in practice in applying SI 2020/25, and so HMRC is minded to continue with this approach for these regulations.

Q6. Do you have any suggestions for how HMRC could improve its approach to dealing with reporting by partners and partnerships?

4.2 Reportable Taxpayers

4.2.1 Alongside the reporting obligations for intermediaries, MDR sets out reporting obligations for 'Reportable Taxpayers'. A reportable taxpayer is defined as any 'actual or potential user' of a CRS avoidance arrangement or 'a natural person whose identity as a beneficial owner cannot be accurately determined due to the opaque offshore structure'. The MDR commentary does not provide specific guidance on the meaning of a Reportable Taxpayer.

4.2.2 We have taken a similar approach in the draft regulations for MDR to the approach we took when implementing DAC 6 prior to EU Exit. SI 2020/25 refers to relevant taxpayers rather than reportable taxpayers. Relevant taxpayer is defined as "any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement."

4.2.3 For CRS avoidance arrangements, HMRC considers there to be no material difference in the definition of relevant taxpayer and reportable taxpayer as, in practice, anyone who is an 'actual or potential user' of an arrangement would likely also be within scope as someone to whom the arrangement was made available for implementation or who had implemented the first step of the arrangement.

4.2.4 In theory, the term 'potential user' could be interpreted very broadly. For example, it could be argued that any person who was currently in scope of the CRS was a potential user of a CRS avoidance arrangement. In practice, HMRC does not consider the definition to be that broad. In order for a person to be a reportable taxpayer, there will need to be a clear link between the person and the arrangement, and HMRC would expect that the person would have expressed some level of interest in or engagement with the arrangement in order to be considered a reportable taxpayer. For example, if an adviser mentions the arrangement to a client in passing, but the client has no interest in implementing it, and no work is undertaken to consider whether the arrangement is appropriate to the client's circumstances, it is unlikely that the client would be considered a potential user of the arrangement.

4.2.5 For opaque offshore structures, the definition of a reportable taxpayer is limited to natural persons. This excludes companies and other similar bodies corporate. This is because beneficial owners must by definition be natural persons, as per the definition in the model rules. This limitation is not present in SI 2020/25, but, because the reporting obligation for opaque offshore structures relates to structures where the beneficial ownership interests of a natural person are obscured, in practice, HMRC would expect relevant taxpayers to be natural persons under SI 2020/25 too.

4.2.6 Occasionally, there could be circumstances where the definition of a relevant taxpayer in SI 2020/25 could be applied to other persons involved in the arrangement or structure, for example if an entity under the control of the natural person in question implemented the first step of the arrangement.

4.2.7 For the purposes of MDR, however, the reportable taxpayer will always be the natural person whose beneficial ownership is obscured as a result of the structure.

Q7. Do you have any comments on the proposed approach to identifying 'reportable taxpayers' in the draft regulations?

4.3 CRS avoidance arrangements

4.3.1 CRS avoidance arrangements are defined in rule 1.1. of the model rules. This definition captures any arrangement "for which it is reasonable to conclude that it is designed to circumvent or is marketed as, or has the effect of, circumventing CRS Legislation or exploiting an absence thereof". The model rules go on to list a series of examples of how an arrangement could seek to circumvent the CRS, including the use of non-reportable accounts or arrangements involving jurisdictions that do not exchange CRS data. The list is not exhaustive, to ensure that newly developed arrangements are still caught.

4.3.2 The model rules go on to make clear that an arrangement will not be a CRS avoidance arrangement solely because it results in non-reporting under the CRS, if it is reasonable to conclude that such non-reporting does not undermine the policy intent of CRS legislation. This is confirmed in guidance at IEIM645010, and HMRC envisages that this principle will continue to apply following the implementation of the draft regulations.

4.3.3 Unlike SI 2020/25, which implemented DAC 6 and which these regulations will replace, there is no explicit requirement under MDR for an arrangement to be 'cross-border' in order to be reportable. However, the definition of cross-border arrangement that applied to SI 2020/25 included any arrangement that "has a possible impact on the automatic exchange of information", and any CRS avoidance arrangement under these rules would be expected to have such an effect.

4.3.4 Similarly, while there is no explicit requirement for an arrangement to 'concern' multiple jurisdictions, in practice HMRC does not consider the absence of such a provision to materially widen the scope of the rules. This is because the CRS applies to financial accounts held by residents of another jurisdiction, and so is inherently dealing with cross-border issues. Accordingly, it seems unavoidable that a CRS avoidance arrangement would itself be cross border.

4.3.5 The commentary to the model rules provides detailed examples of certain specific 'hallmarks' that indicate an arrangement is a CRS avoidance arrangement. HMRC anticipates taking a consistent approach to this interpretation in relation to the draft regulations.

Q8. Do you have any comments on the proposed definition and interpretation of CRS avoidance arrangements?

4.4 Opaque Offshore Structures

4.4.1 An opaque offshore structure is defined in rule 1.2 of the model rules as being a passive offshore vehicle held through an opaque structure. A passive offshore vehicle is defined as being "a legal person or legal arrangement that does not carry on a substantive economic activity supported by adequate staff, equipment assets and premises, in the jurisdiction where it is established or is tax resident", subject to certain exceptions.

4.4.2 An opaque structure is a structure that it is reasonable to conclude "is designed to have, marketed as having, or has the effect of allowing, a natural person to be a beneficial owner of a passive offshore vehicle, while not allowing the accurate determination of such person's beneficial ownership, or creating the appearance that such person is not a beneficial owner". A non-exhaustive list of examples of how this could be met, including through use of nominees or indirect control, is included at rule 1.2.

4.4.3 The commentary to the model rules also sets out examples of structures that could fall within the scope of being an opaque offshore structure, and HMRC anticipates that the UK's approach to interpretation will be consistent with this.

4.4.4 The definitions in the model rules cover much of the same ground as hallmark D2 does in relation SI 2020/25. Although hallmark D2 does not include the list of examples that the model rules do, as the examples are not exhaustive, HMRC does not consider that this necessarily expands the scope of reporting.

4.4.5 In interpreting hallmark D2 for the purposes of SI 2020/25, one of the key questions HMRC considered was from whom beneficial ownership had to be obscured. For example, some jurisdictions, such as the UK, have public beneficial ownership registers, whereas in other jurisdictions that information is not publicly available. We considered whether, if this information was available to the tax authorities but not to the public, that would meet the criteria or not. The position reached was that the information did not need to be publicly available, and the question should be considered from the view of the tax authorities as confirmed in the guidance at IEIM 645020. HMRC considers that this should also be the case in relation to MDR.

4.4.6 In the aforementioned guidance, HMRC states that "*Where a person is obliged to identify beneficial ownership under Anti-Money Laundering legislation in accordance with FATF, and successfully does so, this would generally mean that the test in hallmark D2 (c) was not met, as beneficial owners would not be unidentifiable*". HMRC proposes to clarify in the guidance that this would not apply where the person has reason to suspect that the arrangement or structure is designed to, or will have the effect of, obscuring beneficial ownership from the tax authorities, notwithstanding that they themselves may be able to identify the beneficial owners.

4.4.7 As with CRS Avoidance Arrangements, there is no explicit requirement in the model rules for an opaque offshore structure to be 'cross-border'. However, again, in practice HMRC does not expect there to be a difference in scope to SI 2020/25, as the commentary to the model rules makes clear that in order for a 'passive vehicle' to be considered to be 'offshore', it must be incorporated, resident, managed, controlled or established outside the jurisdiction of residence of its beneficial owners. Accordingly, opaque offshore structures would inevitably be considered 'cross-border'.

Q9. Do you have any comments on the proposed definition and interpretation of Opaque Offshore Structures?

4.5 Arrangements and Structures

4.5.1 The model rules state that 'arrangement' includes "an agreement, scheme, plan or understanding, whether or not legally enforceable, and includes all the steps and transactions that bring it into effect". 'Structure' is defined as "an Arrangement concerning the direct or indirect ownership or control of a person or asset." The commentary to the model rules confirms that 'arrangement' is intended to be interpreted broadly, so as to capture all relevant steps and transactions that form part of, or give effect to, the arrangement.

4.5.2. Section 84(3) of Finance Act 2019 states that the term 'arrangements' includes "any scheme, transaction or series of transactions". HMRC guidance at IEIM630020 confirms that this term is similarly intended to be interpreted broadly. Accordingly, HMRC does not consider

there to be a difference in the scope of the term ‘arrangement’ as it applies to SI 2020/25, and to the draft regulations.

4.5.3. In order to ensure that all relevant arrangements and structures are within scope of the draft regulations, the government does not propose to further define or limit the scope of what should be considered an ‘arrangement’.

4.5.4 The reporting rules in SI 2020/25, as amended by SI 2020/1649, only apply to arrangements which ‘concern’ the UK and any other jurisdiction, or which concern two or more EU member states, or an EU member state and any other jurisdiction. The draft regulations, in line with the approach in the model rules, do not include any such territorial limitations and so arrangements and structures will be reportable regardless of which jurisdictions they involved, as long as the intermediary or taxpayer has a reporting obligation in the UK, which would derive from the intermediary or taxpayer having a UK nexus (see chapter 5).

4.5.5 HMRC acknowledges that this may be an additional burden for some businesses. However, a territorial limitation would create a misalignment between the UK regulations and the model rules, leading to potential inconsistencies in reporting. Moreover, the information on arrangements and structures is useful to HMRC in understanding how arrangements work, identifying potential loopholes in legislation and discouraging the promotion and use of potentially aggressive tax planning arrangements. It will also avoid the need for updates to the scope of the rules as and when additional jurisdictions sign up to MDR, which can also create burdens for businesses in monitoring and implementing such updates.

Q10. Do you have any comments on the proposed approach to identifying reportable arrangements and structures?

5. Reporting obligations

5.1 Intermediaries' reporting obligation

5.1.1 Any person who is an 'intermediary' in relation to a CRS avoidance arrangement or opaque offshore structure is required to disclose to HMRC information about that arrangement or structure, if the intermediary:

- is resident in the UK,
- has its place of management in the UK,
- is incorporated in the UK, or
- has a branch in the UK through which it carries out the activities that make it an intermediary in respect of the arrangement or structure.

5.1.2 Under SI 2020/25, which these regulations will replace, the provisions requiring a person to have a link with the UK in order to have to report are linked to the definition of 'intermediary' rather than to the reporting obligation itself. However, the tests for having a link to the UK are similar and so the fact that they appear in a different place in the draft regulations is not expected to significantly affect the scope.

5.1.3 SI 2020/25 does contain an additional test for having a link to the UK, if the intermediary is registered with a professional association related to legal, taxation or consultancy services in the UK (even if they are not resident in the UK, don't have a branch in the UK, and are not incorporated under the laws of the UK). This additional test is not included in the model rules or the draft regulations. This may mean that some people who would otherwise have been intermediaries under SI 2020/25 will not have to report under the draft regulations.

5.1.4 HMRC considers this change to pose a relatively low risk of relevant arrangements not being reported. The people most likely to be caught under the additional test in SI 2020/25 tended to be practising in the UK's Crown Dependencies, but were registered with UK professional associations. The Crown Dependencies have published legislation[1] to implement the model mandatory disclosure rules, and so intermediaries in those locations would have reporting obligations in those places instead of in the UK directly once the legislation is in force. The UK would then receive that information automatically, through information exchange, where it relates to the UK once the rules are in operation.

5.2 Taxpayers' reporting obligation

5.2.1 The draft regulations also impose a reporting obligation on 'reportable taxpayers' (see chapter 4.2). The obligation applies to users of CRS avoidance arrangements, or beneficial owners of opaque offshore structures, and requires them to report to HMRC information on the arrangement which has not already been disclosed to HMRC by an intermediary. This could be the case where there is no intermediary involved in the arrangement or structure, or the intermediary was exempt from reporting (see chapter 5.3).

5.2.2 The reporting obligation for reportable taxpayers only applies where the person is resident in the UK. As with intermediaries, the test for a link with the UK is in the reporting

[1] https://www.jerseylaw.je/laws/enacted/Pages/RO-112-2020.aspx#_Toc50550880
https://www.gov.gg/CHttpHandler.ashx?id=124544&p=0
https://www.gov.im/media/1368326/sd2019-0454.pdf

requirement, rather than being part of the definition of a reportable taxpayer, which is the case for SI 2020/25.

Q11. Do you have any comments on the proposed structure of the reporting obligations for both intermediaries and reportable taxpayers?

5.3 Exemptions from reporting

5.3.1 The regulations are intended to avoid duplicate reporting where possible, while still ensuring as far as possible that the information is available to the appropriate tax authorities to enable them to take any necessary action.

5.3.2 A person who would otherwise have a reporting obligation may be exempted from reporting in certain circumstances. This will be the case where:

- the information has already been reported to HMRC,
- the person has reported the information to the tax authority in a partner jurisdiction,
- disclosing the information would require the person to breach legal professional privilege.

5.3.3 An intermediary will not have to report if the information has already been reported to HMRC. The intermediary should be able to demonstrate through appropriate documentation or other evidence that the information has indeed already been reported to HMRC. This could include evidence from another intermediary that they have already reported information on the arrangement, or the report itself. Similarly, a reportable taxpayer will not have to report where an intermediary had to report the arrangement to HMRC.

5.3.4 A person will also not have to report if they have evidence that the information has been reported to the tax authorities of a partner jurisdiction. A partner jurisdiction is defined in the model rules as being a jurisdiction that has introduced substantially similar reporting rules and has the necessary exchange of information agreements in place to ensure that information will be provided to the appropriate tax authorities in the jurisdiction(s) where the reportable taxpayer(s) using the arrangement or structure is resident. The UK envisages publishing a list of partner jurisdictions in a Schedule to the regulations to give effect to this provision.

5.3.5 Jurisdictions that have not signed up to exchange under the Multilateral Competent Authority Agreement on the Automatic Exchange regarding CRS Avoidance Arrangements and Opaque Offshore Structure are not expected to be 'partner jurisdictions' as they would not normally be able to automatically exchange this information, unless, exceptionally, other arrangements are in place.

5.3.6 There is a final exemption from reporting for intermediaries if disclosing the information in question would breach legal professional privilege. Whether information is subject to legal professional privilege will depend on the facts of the specific case, and a lawyer will have to evaluate whether or not information is privileged on a case by case basis. HMRC would not usually accept that marketing materials and similar are subject to legal professional privilege.

5.3.7 Where a lawyer is unable to report information due to legal professional privilege, they must notify their client in writing of the client's disclosure obligations (regardless of whether the client is another intermediary or a reportable taxpayer) within 30 days of the arrangement being made available or the assistance or advice being given. The client must comply with its disclosure obligations, within 30 days of the first step of the arrangement being implemented.

Q12. Do you have any comments on the application of the exemptions from reporting?

5.4 Time limits for reporting

5.4.1 The time limit for reporting for intermediaries is 30 days after the arrangement or structure is made available for implementation, or 30 days after the intermediary provides assistance or advice in relation to the design or implementation of the arrangement or structure.

5.4.2 For taxpayers who have to report, the time limit for reporting is 30 days after the first step in the arrangement or structure has been implemented.

5.4.3 HMRC has provided guidance at IEIM651000 et seq. on when an arrangement is 'made available' and when the first step has been implemented, and considers that the same interpretation will apply to the draft regulations.

5.4.4 The draft regulations, unlike SI 2020/25, do not include a reporting trigger when the arrangement is 'ready for implementation'. Normally, the point when an arrangement is made available and the point when it is ready for implementation occur fairly close together. By exception, there may be occasions where an arrangement is 'ready' but not yet 'made available', for example if the design of the arrangement is final and it could be implemented, but the intermediary decides to delay marketing it to potential clients. In these circumstances, a report may be due later under the draft regulations than it would have been under SI 2020/25.

5.4.5 For pre-existing CRS Avoidance Arrangements, which are within the scope of reporting under regulation 8, reports must be made within 180 days of the rules coming into effect. As the rules are expected to come into force in Summer 2022, the reports would be due by Autumn/Winter 2022, with the exact date to be confirmed.

5.5 Information to be reported

5.5.1 The information that must be included in any report includes details of people involved in the arrangement including the person making the disclosure, any other intermediaries, any users of the arrangements and any clients of the person making the disclosure, to the extent that they are clients in relation to the reportable arrangement or structure.

5.5.2 The report must also include details of the arrangement or structure, including why it meets the requirements to be a CRS avoidance arrangement or opaque offshore structure. This should be provided in sufficient detail to allow HMRC and other tax authorities to understand how the arrangement or structure works and its key features.

5.5.3 It is also a requirement to disclose the jurisdictions in which the arrangement or structure has been made available for implementation.

5.5.4 Information is only required to be disclosed to the extent that it is within the knowledge, possession or control of the person making the disclosure. HMRC anticipates maintaining an approach to these concepts consistent with what is set out in IEIM657010.

5.6 Penalties

5.6.1 The draft regulations contain provisions for penalties where a person fails to meet any of their obligations. Specifically, there are penalties for intermediaries and taxpayers for failing to comply with the reporting requirement, penalties for failure to notify the client when legal professional privilege applies, and failure to provide information when required by HMRC.

5.6.2 The penalty regime in the draft regulations mirrors the regime in SI 2020/25, both in terms of the amounts of penalties and the processes surrounding the charging of penalties. In particular this includes provision for no penalty to be charged if a person has a reasonable excuse for a failure, for appeals against penalties, and for independent tribunal oversight where the penalties under consideration are higher than standard.

5.6.3 The draft regulations also confirm that in determining both the amount of any penalty, and whether or not a person has a reasonable excuse, HMRC will take into account any reasonable procedures a person has put in place to ensure reporting. Guidance on this is available at IEIM660100 as it applies to SI 2020/25, and HMRC considers that this will also apply in relation to the draft regulations.

Q13. Do you have any comments on the proposed penalty regime?

6. Practicalities of reporting

6.1 HMRC envisages that reporting under these regulations will be done online. HMRC will issue details of the reporting schema, which is anticipated to be in line with the reporting requirements and schema produced by the OECD. That schema is available from the OECD website here: https://www.oecd.org/ctp/exchange-of-tax-information/international-exchange-framework-for-mandatory-disclosure-rules-on-crs-avoidance-arrangements-and-opaque-offshore-structures.htm

6.2 For reporting under SI 2020/25, HMRC provided two different options for reporting: xml schema upload, or manual data entry online. You can find out more about these reporting options here: https://www.gov.uk/guidance/report-a-cross-border-arrangement-to-hmrc. In view of the expected volume of reports under MDR, HMRC is considering whether it is both necessary and appropriate to provide a manual data entry option in addition to the xml schema upload.

Q14. If you need to make a report under the new regulations, what methods could you use?

Q15. Would you expect to report to HMRC yourself or would you want someone else such as an agent to report on your behalf?

Q16. If your preferred method of reporting was not available, please explain whether this would cause significant difficulties for you or your organisation and why?

7. Assessment of impacts

Summary of impacts

Year	2020-21	2021-22	2022-23	2023-24	2024-25	2025-26	2026-27
Exchequer impact (£m)	-	-	Neg	+5	+5	+5	+10

These figures are set out in Table 2.1 of Budget 2021 and have been certified by the Office for Budget Responsibility. More details can be found in the policy costings document published alongside Budget 2021

Impacts	Comment
Economic impact	This measure is not expected to have any significant macroeconomic impacts.
Impact on individuals, households and families	This measure is expected to have a minimal impact on individuals, as virtually all MDR reporting is expected to be done by businesses. The reporting obligation will only apply to individuals who enter into reportable arrangements where the information is not reported by an adviser or intermediary. Where individuals do have to report, they will need to register for the HMRC reporting service, and then use the online tool to submit a report. The design of this tool is still in development, and so there is no estimate of potential costs to individuals at present. Customer experience is expected to remain broadly the same as this measure does not significantly alter how individuals interact with HMRC. This measure is not expected to impact on family formation, stability or breakdown
Equalities impacts	It is not anticipated that there will be impacts for groups sharing protected characteristics.
Impact on businesses and Civil Society Organisations	This measure is expected to have an impact on businesses who will have to identify whether they have to make reports under this regime. There will be one-off costs to businesses to familiarise themselves with the new regulations. A further one-off cost could include making any necessary changes to IT systems to collect and report information.

	There are expected to be continuing costs to businesses. This will include the costs of identifying arrangements and making reports. These costs will replace similar costs that would have been incurred under the DAC 6 regime. Customer experience is expected to remain broadly the same as this measure does not significantly alter how businesses interact with HMRC. This measure is not expected to impact civil society organisations.
Impact on HMRC or other public sector delivery organisations	Work is underway to develop the necessary IT systems to implement MDR. The measure is not expected to affect other government departments. Additional cases in the court system are expected to be negligible.
Other impacts	Other impacts have been considered and none have been identified.

Q17. Do you have any comments on the expected impacts of this measure?

8. Summary of consultation questions

Q1. Are there any areas where you consider there to be potential incompatibility between the UK regulations and guidance and the model rules or commentary which you think would be problematic for businesses seeking to apply the rules?

Q2. Do you identify any practical difficulties with the transitional provisions?

Q3. Do you agree with the government's rationale for including the reporting of pre-existing arrangements? Please provide a supporting explanation for your answer, where helpful.

Q4. Do the proposed safeguards and mitigations strike the right balance between minimising burdens on business and ensuring the regime operates effectively? Are there any other safeguards or mitigations that you think the government should consider?

Q5. Do you have any comments on the proposed approach to identifying 'intermediaries' in the draft regulations?

Q6. Do you have any suggestions for how HMRC could improve its approach to dealing with reporting by partners and partnerships?

Q7. Do you have any comments on the proposed approach to identifying 'reportable taxpayers' in the draft regulations?

Q8. Do you have any comments on the proposed definition and interpretation of CRS avoidance arrangements?

Q9. Do you have any comments on the proposed definition and interpretation of Opaque Offshore Structures?

Q10. Do you have any comments on the proposed approach to identifying reportable arrangements and structures?

Q11. Do you have any comments on the proposed structure of the reporting obligations for both intermediaries and reportable taxpayers?

Q12. Do you have any comments on the application of the exemptions from reporting?

Q13. Do you have any comments on the proposed penalty regime?

Q14. If you need to make a report under the new regulations, what methods could you use?

Q15. Would you expect to report to HMRC yourself or would you want someone else such as an agent to report on your behalf?

Q16. If your preferred method of reporting was not available, please explain whether this would cause significant difficulties for you or your organisation and why?

Q17. Do you have any comments on the expected impacts of this measure?

9. The consultation process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

Stage 1 Setting out objectives and identifying options.

Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.

Stage 3 Drafting legislation to effect the proposed change.

Stage 4 Implementing and monitoring the change.

Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 3 of the process. The purpose of the consultation is to seek views on draft legislation in order to confirm, as far as possible, that it will achieve the intended policy effect with no unintended effects.

How to respond

A summary of the questions in this consultation is included at chapter 8

Responses should be sent by 8 February 2022, by e-mail to mandatorydisclosure.rules@hmrc.gov.uk or by post to: John Sandeman, Business Assets & International, HMRC, 8th Floor, 14 Westfield Avenue, London, NE98 1ZZ

To ensure timely receipt of your response during the covid pandemic, HMRC would be grateful for responses to be sent via email where possible.

Telephone enquiries: John Sandeman 03000 589486 (from a text phone prefix this number with 18001)

Please do not send consultation responses to the Consultation Coordinator.

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from HMRC's GOV.UK pages. All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

HMRC is committed to protecting the privacy and security of your personal information. This privacy notice describes how we collect and use personal information about you in accordance with data protection law, including the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act (DPA) 2018.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018, UK General Data Protection Regulation (UK GDPR) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs.

Consultation Privacy Notice

This notice sets out how we will use your personal data, and your rights. It is made under Articles 13 and/or 14 of the UK General Data Protection Regulation.

Your data

We will process the following personal data

Name

Email address

Postal address

Phone number

Job title

Purpose

The purpose(s) for which we are processing your personal data is: the Mandatory Disclosure Rules consultation

Legal basis of processing

The legal basis for processing your personal data is that the processing is necessary for the exercise of a function of a government department.

Recipients

Your personal data may be shared by us with HM Treasury.

Retention

Your personal data will be kept by us for six years and will then be deleted.

Your rights

You have the right to request information about how your personal data are processed, and to request a copy of that personal data.

You have the right to request that any inaccuracies in your personal data are rectified without delay.

You have the right to request that any incomplete personal data are completed, including by means of a supplementary statement.

You have the right to request that your personal data are erased if there is no longer a justification for them to be processed.

You have the right in certain circumstances (for example, where accuracy is contested) to request that the processing of your personal data is restricted.

Complaints

If you consider that your personal data has been misused or mishandled, you may make a complaint to the Information Commissioner, who is an independent regulator. The Information Commissioner can be contacted at:

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

0303 123 1113

casework@ico.org.uk

Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.

Contact details

The data controller for your personal data is HM Revenue and Customs. The contact details for the data controller are:

HMRC

100 Parliament Street

Westminster

London SW1A 2BQ

The contact details for HMRC's Data Protection Officer are:

The Data Protection Officer

HM Revenue and Customs

14 Westfield Avenue

Stratford, London E20 1HZ

advice.dpa@hmrc.gov.uk

Consultation principles

This call for evidence is being run in accordance with the government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website: Consultation Principles Guidance

If you have any comments or complaints about the consultation process, please contact the Consultation Coordinator using the following link:

Submit a comment or complaint about HMRC consultations

Please do not send responses to the consultation to this link.

Annex A: Relevant (current) Government Legislation

- SI 2020/25
- SI 2020/713
- SI 2020/1649