



States of Guernsey
Revenue Service

Mandatory Disclosure Rules on CRS Avoidance Arrangements and Opaque Offshore Structures

Briefing Note V2

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The purpose of this briefing note is to provide a synopsis of the subject and a status update on Guernsey's implementation of the framework for Mandatory Disclosure Rules on CRS Avoidance Arrangements and Opaque Offshore Structures ("MDR").

Guernsey made a political commitment, in response to the EU Code of Conduct Group's investigation of the tax policies of third countries to the European Union ("EU"), to introduce legislation for MDR. This follows consultation in August 2018 on both economic substance requirements and the introduction of MDR. The Policy & Resources Committee took a policy letter to the December States meeting proposing the introduction of MDR and the regulations are in the process of being drafted. A similar commitment was given by the other Crown Dependencies with whom we will cooperate in developing our approach.

In essence the framework is designed to require those persons involved in either the promotion, design, marketing, implementation or management of a relevant arrangement or structure in Guernsey, to be legally obligated to report the existence of the arrangement or structure and the users of it to the Revenue Service. The Revenue Service will then exchange the relevant information to those jurisdictions in which the users are resident, subject to the relevant international exchange relationships being in place.

Background of MDR

In 2014 the OECD published the Standard for Automatic Exchange of Financial Account Information in Tax Matters, also known as the Common Reporting Standard, ("CRS"). Guernsey committed to CRS and commenced exchange with other approved jurisdictions in 2017. Despite cultivating greater transparency and cooperation, there remains concerns (following academic studies and results from the OECD's disclosure initiative) that arrangements and schemes exist globally which seek to circumvent CRS reporting, consequently further preventative controls have been considered.

Following a call from the G7 Finance Ministers in May 2017, the OECD Committee of Fiscal Affairs approved the MDR ¹ in March 2018. Whilst not being endorsed as an international standard, these rules are considered a best practice based on the principles of the Base Erosion and Profit Shifting initiative ("BEPS") Action 12 Report.

The objective of the MDR is to bolster the integrity of the CRS by introducing measures to discourage advisors and intermediaries promoting certain avoidance schemes. The method to achieve this objective is through an obligation to disclose information on the schemes, their users and suppliers to the relevant competent authority in the jurisdiction where they reside.

¹ <http://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf>

In May 2018, the EU issued EU Directive 2018/822, known as DAC6. The Directive included amendments to Directive 2011/16/EU as regards the mandatory automatic exchange of information in the fields of taxation in relation to reportable cross-border arrangements.²

There are significant distinctions between the DAC6 reporting requirements and the MDR, fundamentally these include the circumstances where a requirement to make a disclosure would be triggered, which are summarised as follows:

DAC6	MDR (CRS & Opaque Offshore Structures)
Hallmark A – Generic hallmarks linked to the main benefit test (broadly, schemes that are marketed for tax avoidance)	Rule 1.1 – CRS Avoidance Arrangements (any arrangement where it is reasonable to conclude it is designed to circumvent the CRS)
Hallmark B – Specific hallmarks linked to the main benefit test (broadly, schemes that involve structuring in order to achieve tax avoidance)	Rule 1.2 – Opaque Offshore Structures (a legal person or arrangement that does not carry on substantive economic activity where the beneficial ownership is unclear)
Hallmark C – Specific hallmarks related to cross-border transactions (includes deductible cross-border transactions to a jurisdiction that has a 0% or almost 0% of tax)	
Hallmark D – Specific hallmarks concerning AEOI and beneficial ownership (being the equivalent of the MDR, CRS & Opaque Offshore Structures model published by the OECD)	
Hallmark E – Specific hallmarks concerning transfer pricing (including arrangements involving hard to value intangibles)	

As the main driver for introducing a disclosure regime in Guernsey was to meet part of the obligations Guernsey had made when adopting the Common Reporting Standard, it is intended to implement the OECD MDR.

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L0822>

Headline Content of the Model Rules

The Model Rules include the following:

- The Hallmarks that trigger a requirement to make a disclosure
- A definition of an intermediary segregated into i) Promoters and ii) Service Providers
- When and what information is to be disclosed
- Details of a requirement to ensure there is a framework for enforcement mechanisms to deal with cases of non-compliance

Definitions Scope

The definitions of a CRS Avoidance Arrangement and an Opaque Offshore Structure are set out in the MDR. These are intentionally broad so as to capture any type of arrangement that has the potential to circumvent CRS Legislation or prevent identification of the beneficial owners under an opaque structure.

Intermediary

- *Promoter*: Any person responsible for the design or marketing of a CRS Avoidance Arrangement or Opaque Offshore Structure.
- *Service Provider*: Any person that provides Relevant Services³ in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure in circumstances where the person providing such services could reasonably be expected to know that the Arrangement or Structure is a CRS Avoidance Arrangement or an Opaque Offshore Structure. The standard of “reasonably be expected to know” must be determined by reference to the Service Provider’s actual knowledge based on readily available information and the degree of expertise and understanding required to provide the Relevant Services.

Triggering a disclosure requirement

An intermediary is expected to make a disclosure in respect of:

- CRS Avoidance Arrangements, (“Arrangements”); and
- Passive Offshore Vehicles in Opaque Structures, (“Structures”).

Intermediaries will be expected to be alert, during the course of their activities, to the possibility of involvement with either an Arrangement or Structure and therefore having an obligation to determine whether a disclosure is required.

³ Relevant Services are providing assistance or advice on the design, marketing, implementation or management of a Structure or Arrangement.

The generic definition of a CRS Avoidance Arrangement is:

“A CRS Avoidance Arrangement is any Arrangement for which it is reasonable to conclude that it has, is designed to have or marketed as having the effect of circumventing CRS Legislation.”

Under this generic rule sits 7 specific rules as to what constitutes a CRS Avoidance Arrangement. The existence of one of these will require the Arrangement to be disclosed but only if it is reasonable to conclude that the intention of the Arrangement is to circumvent the CRS (referred to as “the reasonable to conclude test”).

The MDR defines a Passive Offshore Vehicle and then set out 5 specific rules as triggers for a disclosable Opaque Structure. Again, an opaque structure must be reported, but only if it is reasonable to conclude that the intention of the structure is to obscure beneficial ownership.

Whilst the model rules also contain commentary which seeks to elaborate further on the defined terms, it is acknowledged that the Revenue Service will need to provide some Guidance Notes. It is intended that such guidance will, where possible, be aligned across the Crown Dependencies on a principles basis.

One area in particular is the potential to provide further clarity for a Service Provider concerning the principles behind the “Reasonable to Conclude” test within the MDR framework (to assist in the decision making process as to whether an arrangement or structure is disclosable). This would not be relevant for promoters (they would have actual knowledge that the arrangement or structure had been designed and marketed for these purposes). It is, therefore, intended to work with the other Crown Dependencies to determine whether joint guidance can be issued for Service Providers which may include the following examples:

Scenario 1 – Exchange of CRS data between Guernsey and other jurisdictions

- Where assets are being moved to or from Guernsey to a jurisdiction with which Guernsey has a relationship to exchange CRS data, then it is reasonable to conclude that this transfer of assets is not being made to circumvent CRS reporting.

Scenario 2 - the cumulative value of funds in the arrangement is less than £10,000.

- The legal and administrative costs suggest it would be highly unlikely that this isolated arrangement was being undertaken to circumvent CRS reporting

requirements. If, however, a client entered into multiple instances (of creating arrangements with a value of less than £10,000 then the Service Provider would need to treat that as one arrangement and disclose such an arrangement).

Scenario 3 - Certain asset types which are excluded from CRS reporting (for example, the holding of real estate)

- Certain asset types are not reported under the CRS (such as the holding of real estate). As such a client simply investing funds in these assets does not circumvent the policy intentions behind the CRS and therefore the “reasonable to conclude” test would not be met. It is intended that the list of the type of assets not included in CRS reporting would be provided in further Guidance.

Scenarios 1 to 3 focus on the CRS Avoidance Arrangement element of MDR. In respect of the other aspect of MDR, relating to Passive Offshore Vehicles held through Opaque Offshore Structures, the following scenarios are provided to demonstrate some of the principles concerning the “reasonable to conclude test”:

Scenario 4 - a company which is within the scope of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018 and fulfilled its requirements under that legislation.

- A Passive Offshore Vehicle does not carry on substantive economic activity supported by adequate staff, equipment, assets and premises where it is tax resident. Companies that are subject to Guernsey’s economic substance legislation are already subject to this test and therefore it is reasonable to conclude that they will not fall within this description.

Scenario 5 - any entity that is registered with the Guernsey Registry or any legal arrangement (such as a trust) administered in Guernsey will be subject to stringent Anti Money Laundering and Combatting the Financing of Terrorism (“AML/CFT”) legislation, requiring the collection and retention of Know Your Client (“KYC”) information.

- If the structure being reviewed incorporates such Guernsey entities/legal arrangements, those entities/legal arrangements (such as a trust) and any subsidiaries or parents would not be regarded as Passive Offshore Vehicles held through an Opaque Offshore Structure where the relevant KYC information had been provided to the Service Provider.

- Guernsey’s robust AML/CFT legislation ensures that details of the Beneficial Ownership of entities and legal arrangements in Guernsey must be maintained on an ongoing basis. This information is available for access by the Government of Guernsey and will be provided, for example, on request to the Competent Authorities in other relevant jurisdictions. On this basis, it is reasonable to conclude that:
 - Guernsey registered entities or legal arrangements administered in Guernsey,
 - a subsidiary of that entity or legal arrangement, or
 - a parent with a controlling interest in the Guernsey entity

where all of the AML/CFT KYC information is available in Guernsey, will not be a Passive Offshore Vehicle held through an Opaque Structure designed to conceal Beneficial Ownership.

Disclosure

Broadly, disclosures will be required to be made within 30 days of the date an intermediary makes a CRS avoidance arrangement or opaque offshore structure available, or first provides Relevant Services to such an arrangement or structure.

The intention is to coordinate the approach to the timing of the first disclosures to be made in step with the other Crown Dependencies to enable an aligned implementation across each island.

There is also a provision for legacy disclosures, however, this is specifically for promoters. This applies in respect of any CRS Avoidance Arrangements created on or after 29 October 2014 and before the effective date of the MDR coming into force in Guernsey. Any promoter who made such an arrangement available would be required to disclose the details within 180 days of the MDR coming into force. There is however a de minimis threshold suggested in the MDR, which mean that if immediately prior to the arrangement being implemented the Promoter has documentary evidence to confirm the aggregate balance of value of the Financial Account was less than US\$1,000,000, the arrangement does not need to be disclosed.

Reporting

It is intended to use the existing Information Gateway Online Report (“IGOR”) software solution for receipt of information and onward transmission. An upgrade to the current system is required to enable disclosure and exchange. The OECD have provided a schema for the purpose with the basic reportable information, which broadly covers:

- Identification of intermediaries

- The relevant hallmark(s)
- Summary of the arrangement and the activities
- Identification of the taxpayer(s) (including their Tax Identification Number, tax residence and date of birth) and their jurisdiction and any other jurisdiction(s) likely to be concerned by the reportable arrangement/structure.
- The identification of any other person(s) in a jurisdiction likely to be concerned by the reportable arrangement/structure and which jurisdiction such person(s) is linked.

Future engagement

The Revenue Service appreciate that this is a further development in respect of the reporting of client information to the Revenue Service, therefore, we intend to continue to engage with industry to provide clarity and guidance with regard to the implementation.

The intention is to set up a Working Party to enable the Revenue Service staff that are tasked with implementing MDR to meet with interested industry members to discuss the practical implementation of the Model Rules and to obtain feedback concerning guidance that is intended to be published.

More information will be added to www.gov.gg/mdr, with the intention that this will be the landing place for anyone who is interested to find out the latest information about the implementation project and obtain the latest guidance.