

Conference organized by the
Institute for Austrian and International Tax Law, Vienna

Mandatory Disclosure Rules

RUST CONFERENCE 2021 Questionnaire

GUIDELINES

Mandatory Disclosure Rules

Background and Introduction

The report to BEPS Action 12 on Mandatory Disclosure Rules (MDR), published in 2015, provides recommendations for the design of rules to require taxpayers and advisors to disclose aggressive tax planning arrangements to the tax authorities. This BEPS report sets out recommendations for a modular framework for use by countries wishing to implement or amend mandatory disclosure rules in order to obtain early information on aggressive or abusive tax planning schemes and their users. These recommendations seek a balance between the need for early information on aggressive tax planning schemes with a requirement that disclosure is appropriately targeted, enforceable, and avoids placing undue compliance burden on taxpayers.

Within the EU, Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (known as DAC 6) obligates EU Member States to implement mandatory reporting of cross-border arrangements affecting at least one EU Member State that fall within one of a number of "hallmarks" (broad categories setting out particular characteristics identified as potentially indicative of aggressive tax planning). These reports of cross-border arrangements are subsequently automatically exchanged between EU Member States.

The aim of this research project is a systematic legal comparison of domestic mandatory disclosure rules (MDR) or systematically comparable disclosure rules – implemented based on BEPS Action 12/DAC 6 or prior to these instruments – with regard to the scope, consequences, procedural aspects, and criticism raised by various stakeholders (e.g. potential violations of fundamental rights, excessive compliance). Please also include references/explanations to other alternative disclosure regimes existing in your country that might not strictly fall within the defined MDR framework (but show similar features).

If you are a national reporter from an EU Member State, we would kindly ask you to focus on the national implementation in your country and to place special attention and emphasis on any deviation from the legal framework provided in DAC 6 (e.g. over-implementation in national law) and any relevant criticism/discussions on certain rules in your country. **It is not necessary nor required to explain and summarize the content of DAC 6 and any domestic measure which merely implements DAC 6 itself (as this would lead to repetition).**

1. Objective of MDR rules

Does your country have the MDR or systematically comparable rules in place? When were these rules adopted by the legislature?

In the event that the domestic MDR predates BEPS Action 12 and/or DAC 6: Have the rules been subject to a major reform after the publication of BEPS Action 12 and/or DAC 6?

What is the objective of the rules based on legislative materials: e.g. the use of the reported data (by the tax authorities) to identify potential abusive scenarios, the use of the reported data (by the legislature) to identify potentials for reforms (closing loopholes in the law), and/or implementation of a deterrent effect for multinationals and intermediaries? Are the MDR also linked to anti-money laundering objectives? Other objectives?

Are there any discussions of whether the disclosure obligations are disproportional in light of their attributed aim? Is there any evidence/study available on whether the MDR fulfil their objective in reality?

If your country has had the MDR (or systematically comparable rules) already in place for a couple of years, are there any statistics available on the effects of the MDR and the data collected? How many reports/disclosures have been filed (per year)? Have there been any significant changes in these numbers over the years (increase/decrease of number of reports)? What are the reasons for such changes?

Which hallmarks have led to the most reports? Have the reports been primarily filed by promoters/intermediaries or by taxpayers (users)? How many persons have been fined due to non-compliance with the MDR?

Has the disclosure of arrangements led to any changes in material (tax) law? Has the disclosure of arrangements led to any changes in administrative practice/administrative guidelines (e.g. special audits)? If yes, please briefly describe.

Have the tax authorities used the reported data in order to published "listed transactions" or "tax alerts" with the aim of providing an early warning and deterring taxpayers undertaking certain transactions (communication strategy)? Has there been a visible decline in the marketing of tax planning schemes?

Please also include any available statistics on alternative disclosure regimes used in your country that might not strictly fall within the defined MDR framework (example: supplementary filing that all Australian taxpayers had to file for decades after currency controls ended detailing all cross-border transactions).

2. What has to be reported? (reportable arrangements)

2.1. Temporal scope

Since when do the MDR apply, and which transactions are covered from a temporal point of view? Does the MDR also have “retroactive” effect, i.e. require the reporting of arrangements that have been implemented by a person prior to the publication/enactment/entry into force of the MDR? If yes, has any criticism been raised on such a “retroactive” effect (in light of the principle of legal certainty and/or the principle of legitimate expectations)?

Has the date of entry into force been deferred/suspended due to the Covid situation?

2.2. Substantive scope

2.2.1. Taxes covered

To which kind of taxes does the MDR apply? Are only corporate income taxes covered or are personal income taxes (including wage taxes, capital gains tax, etc.), inheritance/gift taxes and wealth taxes (including real estate tax) also covered? Does the MDR also apply to indirect taxes: VAT/GST, excise duties, and customs? Does the MDR also cover transfer taxes (e.g. real estate transfer tax, financial transaction taxes), stamp duties, and comparable charges/fees? Does the MDR also cover arrangements linked to social security contributions?

If you are an EU Member State: Does your national law deviate in respect of taxes covered from the provisions in DAC 6?

2.2.2. Persons covered

Does the MDR apply to tax arrangements implemented by legal entities (corporations, etc.) and natural persons? Do they also apply to arrangements implemented by partnerships, trusts, collective investment vehicles, and other comparable transparent/hybrid entities?

Is there any threshold with respect to the covered entities (e.g. exclusion or simplification rules for an SME, focus on big multinational enterprises)?

Does the MDR also apply to arrangements implemented by public bodies?

2.2.3. Arrangements covered

Does the MDR cover only cross-border arrangements or also purely domestic arrangements? If the MDR is limited to cross-border arrangements, how is “cross-border” defined?

Is there any material threshold (*de-minimis* filter), i.e. does the MDR only apply to transactions exceeding a certain value (e.g. amount of tax benefit)? How is such a threshold and/or value defined and calculated?

2.2.4. Main benefit test (*threshold requirement*)

Is the reporting obligation of an arrangement – in addition to the fulfilment of certain hallmarks – subject to the risk of tax avoidance or the intention of tax avoidance (so-called “threshold requirement” based on BEPS Action 12)? How is such a threshold requirement (risk or intention of tax avoidance) defined?

For example, DAC 6 requires – as an additional condition regarding generic and some specific hallmarks – that the main benefit or one of the main benefits regarding all relevant facts and circumstances that a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage (*main benefit test*). Moreover, e.g. the Austrian Implementation Act to DAC 6 provides as an additional condition that the arrangement involves a risk of tax avoidance or a risk of circumventing the obligation to report under the Common Reporting Standard (CSR) or the risk of circumventing the identification of the beneficial owner. These additional requirements have the aim of preventing the (over-)reporting of harmless arrangements (including arrangements that are intended by the legislature) and reducing compliance costs.

Does the MDR in your country include similar rules? If yes:

What is the objective behind those rules? Is there any guidance on how the “main benefit” of a transaction is to be determined (objective/subjective, proof)? How will an intermediary/taxpayer be able to verify that the tax advantage is consistent with the law (e.g. with the tax law in all 27 EU Member States)? Is this additional requirement (e.g. main benefit test) similar to the domestic General-Anti-Abuse Rule (GAAR)? What are the differences?

Does a reporting obligation also exist if the arrangement may result in a tax benefit in only another country (different from the reporting country)?

2.2.5. Hallmarks

How are reportable arrangements defined? Does your country have a general definition of “aggressive tax planning structures”, or does it list specific hallmarks?

How many hallmarks do you have in your national law? Is the list of hallmarks exhaustive, or is there a subsidiary general definition? What was the role model for the hallmarks (e.g. BEPS Action 12, DAC 6, MDR in other jurisdictions)?

Has your country implemented generic or specific hallmarks or both? Generic hallmarks target features that are common to promoted schemes such as the requirement for confidentiality or the payment of a premium/contingent fee. Specific hallmarks target particular areas of concern (such as losses, leasing arrangements, etc).

Please provide a concise and structured list of all *generic* and *specific* hallmarks (no detailed explanation on each hallmark!). If you are an EU Member State, has your country implemented more hallmarks than what is included in DAC 6? There is no need to provide a list of those hallmarks that are identical to those included in DAC 6; please limit your list and description to any hallmark that deviates from DAC 6.

If your country has had an MDR already in place for a longer period, how many changes to the hallmarks have already taken place since the first adoption of the rules (deletion of hallmarks, adaption of hallmarks, addition of new hallmarks)? What were the drivers behind these changes?

Does your country have a “white list” that shows common arrangements/tax planning structures that do not need to be reported? Is your country planning to publish such a white list? Who is issuing this white list? Is the white list part of the law and thus has a binding character? If your country has had an MDR already in place for a longer period, how many changes to the white list have already taken place since the first adoption of the rules? What were the drivers behind these changes?

3. Who has to report (reportable persons)?

3.1. Persons addressed

Who is the primary person subject to disclosure obligations? Are they intermediaries/promoters involved in the transaction (e.g. consultants) or the taxpayer (user of the arrangement), or both in parallel (dual reporting requirement)?

If both are subject to reporting obligations (dual reporting requirement), are there any rules to avoid multiple reporting of the same arrangement by the intermediary and the taxpayer?

3.2. Intermediary/promoter

If your country puts reporting obligations on the intermediary/promoter, how is the concept of an “intermediary” and/or “promoter” defined in the law? Does the law distinguish between different concepts (e.g. intermediary and promoter), and are these different concepts linked to different obligations?

Does the definition of an “intermediary”/“promoter” (or similar) also cover persons that are only loosely linked to the reportable arrangement, i.e. who are incidental to the scheme or when their aid is immaterial to the arrangement? Is there a threshold for service providers beyond “mere involvement in a transaction”? Is the partial knowledge of relevant facts seen as sufficient to justify a reporting obligation? Does an intermediary have the right to provide evidence that he did not know and could not reasonably be expected to know that he was involved in a reportable arrangement? Is there any obligation for the intermediary to make separate investigations in order to find out whether the arrangement is reportable (e.g. whether a hallmark is met) if he does not have all of the necessary information available?

Please provide examples of which professions could be covered as reportable intermediary/promoter and which professions should usually not be covered: tax consultants, attorneys, business consultants, financial institutions, auditors, etc.

May an in-house legal/tax department (e.g. at the level of the group parent company) or a single employee (e.g. head of tax department) of a multinational/group of companies also qualify as a reportable “intermediary”?

Is the reporting obligation of an intermediary/promoter subject to the condition of a territorial link of the intermediary/promoter to the jurisdiction, or can intermediaries/promoters without any territorial link also be subject to reporting obligations? If the territorial link is defined with reference to residence or a domestic permanent establishment, how are these concepts defined? With reference to a definition under domestic income tax law, the OECD MC, is it a specific double tax treaty or totally different?

Are there any rules to avoid multiple reporting of the same arrangement by more than one intermediary/promoter? Is there a priority rule of which intermediary/promoter should file the report (e.g. “lead intermediary”)? If so, how do you define such a “lead intermediary”? How can the other intermediaries/promoters who are involved free themselves from the reporting obligation (automatic exemption, condition of proof)?

3.3. Legal professional privilege and other similar sorts of privileges

Does your country have legal profession privileges (e.g. client-attorney privilege) or other similar sorts of privileges for certain professions in place (i.e. rules that protect communication between a legal adviser/accountant/etc. and his clients from being disclosed without the permission of the client)?

If yes, does your country grant a waiver from filing information on a reportable arrangement to intermediaries protected by such privilege when the reporting obligation would breach the privilege under national law? Which intermediaries can, as a general rule, benefit from such a waiver: Tax consultants? Attorneys? Accountants?

Could financial institutions (in the case that they qualify as reportable intermediary/promoter) also benefit from a similar waiver based on domestic bank secrecy rules?

Are such intermediaries/promoters automatically exempt from reporting obligations or do they have to apply for exemption/fulfil certain additional criteria?

Are intermediaries/promoters, who can rely on such privilege for purpose of the MDR, obligated to inform the taxpayer and/or other intermediaries involved from their exemption? Are there any time limits for such information obligations? What are the legal consequences if the intermediary does not fulfil such information obligations?

Can the taxpayer release the intermediary/promoter from the (legal professional) privilege? What would be the consequences under the MDR?

If your country has (legal) professional privileges in place but does not grant a waiver to intermediaries covered by these privileges for purposes of the MDR, or if your country does not have a (legal) professional privilege for consultants in place at all, how is this breach of the privilege and/or the disclosure of confidential information to the authorities justified?

Do you expect the MDR to have an impact on the (legal) professional privilege (legally/in practice) in the long run?

3.4. Taxpayer (user of the arrangement)

In which situations is the taxpayer (user of arrangement) subject to reporting obligations: in general, when the intermediary/promoter is offshore, when there is no intermediary/promoter, when the intermediary/promoter asserts legal professional privilege, and/or in other situations? How is the "user" of the arrangement or the "taxpayer" defined for this purpose?

Are there any rules to avoid multiple reporting of the same arrangement by more than one taxpayer/user? How can the other taxpayers/users who are involved free themselves from the reporting obligation (automatic exemption, condition of proof)?

4. When to report, which information to report, and use of reported data

4.1. Reporting event and time limits

Which event triggers the reporting obligation: e.g. at the point in time when the arrangement is ready for implementation, the point in time when the arrangement is made available (to the taxpayer and/or other intermediaries) for implementation, the point in time when the first step in the implementation of the arrangement is made, or other events?

What is the time limit to file a disclosure to the authorities (e.g. 30 days after the event triggering the reporting obligation)? Can the period be extended upon request? Have the time limits led to any criticism by scholars or stakeholders? Have the time limits been deferred/suspended due to the Covid situation?

Is there (additionally/alternatively) an obligation to file a periodical report (e.g. together with the submission of the tax return)?

4.2. Content and form of reporting

Which data needs to be included in the report? Please provide a concise list of the reportable types of information (No detailed explanation is necessary!). If you are an EU Member State, does the list of information deviate from DAC 6?

Is there an obligation to include other intermediaries involved in the arrangement in the report? Is there an obligation to include other entities involved in the arrangement in the report? Is there an obligation to include the value of the transaction or the amount of the expected tax benefit in the report? How is such value defined/calculated?

Could an intermediary or taxpayer reject the submission of certain data in the disclosure report with reference to data protection/business secrecy rules?

Is there an obligation to submit the reporting by electronic means, or can it also be submitted on paper/hard copy? Is there a special form to be used?

4.3. Use of and access to the reported data

Are there any rules for which purposes the reported data can/cannot be used by the authorities? Do you expect that the data will be used to initiate further investigations into the reported arrangements (audits)?

Is the data automatically shared with other law enforcement agencies in your country? Who has access to the reported data? Is it only available to the responsible tax authority, or can the data also be used by other domestic authorities upon request (e.g. social security authorities, criminal law authorities, courts, etc.)?

Is the reported data automatically exchanged with other jurisdictions? Could the reported data be exchanged upon the request of another jurisdiction (e.g. based on Article 26 OECD MC)?

How long is the reported data stored by the authorities?

5. Consequences of (non-)reporting

5.1. Response/reaction by tax authorities

Is the tax authority presumed/obligated to respond/confirm the receipt of the disclosure? Does such confirmation/response have any legal consequences (e.g. arrangement is accepted by tax authorities, or it cannot be challenged by tax authorities)?

How are the individual disclosures and schemes traced? Do the authorities issue a reference number (per scheme, per arrangement)?

5.2. Penalties and fines

Is the *non-reporting* of a reportable arrangement subject to criminal or administrative sanctions? Is the *incomplete or incorrect* reporting of a reportable arrangement subject to criminal or administrative sanctions? Is the *late reporting* of a reportable arrangement subject to criminal or administrative sanctions?

Please describe the requirement in terms of the seriousness of an offence (negligence/intent) and the amount/level of possible penalties. What is the basis for calculating monetary penalties: length of delay (daily penalties), amount of tax savings, promoter's/intermediary's fee, seriousness of offence?

Could the violation of reporting obligations also result in non-monetary penalties (e.g. denial of a tax benefit from the scheme, exclusion from the professional qualification)?

Could the violation of the reporting obligation be subject to multiple sanctions: criminal and administrative sanctions; non-monetary sanctions; at the level of the entity, intermediary, managing directors, employees?

6. Interaction with other domestic procedural rules

What is the relationship of the MDR or comparable disclosure rules with advance ruling procedures under domestic law and/or advance pricing agreements (APA)? Could the disclosure under the MDR be linked with an advance ruling procedure/APA?

What is the relationship of the MDR with cooperative compliance and/or horizontal monitoring programmes? Could the disclosure or non-disclosure of an arrangement have an impact on the applicability of a cooperative compliance and/or horizontal monitoring programmes?

What is the relationship of the MDR with voluntary disclosure rules (leading to an amnesty/exemption from criminal sanctions)? Does the report of an arrangement rule out the possibility of a voluntary disclosure of the arrangement based on national law at a later point in time? Is it possible to file a voluntary disclosure for non-compliance with the MDR in order to avoid any penalties and fines?

Does your country have other disclosure rules (for tax purposes, anti-money laundering purposes, statistical purposes, etc.) that apply alongside the MDR and could lead to the multiple reporting of the same arrangement (to different or to the same authorities)?

Is there any other interesting/disputed interaction of the MDR with other domestic procedural rules? If yes, please briefly describe.

7. Fundamental Rights

Have there been any discussions on whether the MDR places disproportional burdens on the persons involved and/or whether the MDR violates fundamental rights (as stipulated in domestic constitutional law, the European Convention on Human Rights, the EU Charter of Fundamental Rights)? Have there been any court cases on such issues? If yes, please briefly describe. In particular, please take into account the following fundamental rights:

Freedom to conduct a business of the intermediaries/promoters: Are there any discussions in your country on whether the disclosure obligation put on intermediaries/promoters violates the right to conduct a business by these professions?

Nemo tenetur/privilege against self-incrimination: Are there any discussions in your country on whether the disclosure obligation on tax arrangements put on intermediaries/promoters and taxpayers could conflict with the nemo tenetur principle? Does the law provide any exceptions from the reporting obligation in the case that the reporting of the specific arrangement could lead to a criminal proceeding (tax fraud)?

Principle of equal treatment/fundamental freedoms: Are there any discussions in your country on whether the disclosure obligation for certain (cross-border) tax arrangements could conflict with the principle of equal treatment or the free movement of persons/capital under EU law?

Principle of legal certainty: Are there any discussions in your country on whether the MDR could conflict with the principle of legal certainty (e.g. specific hallmarks, the amount or vague description of hallmarks, the main benefit test)?

8. Overall Evaluation and Future Outlook

Is the MDR perceived as a success in your country? Do you expect the MDR to be a success story in the long run? What are the opinions and criticism from a tax policy point of view raised by various stakeholders: businesses, intermediaries (tax consultants, attorneys, financial institutions, etc.), tax authorities, or other organizations?

What is your expectation on the number of reports in the future: Do you expect that many reports will be filed in order to be on the safe side (over-reporting), or do you expect a low number of disclosures? What could be the major drivers behind the decision to disclose or not to disclose?

What is your expectation on the impact of the MDR in your country on the approach to tax planning and the development of tax law rules? Will the data collected on potential aggressive tax planning schemes lead to changes in the substantive tax law in the future, or will the MDR primarily have a deterrent effect on taxpayers and intermediaries? Do you expect a decline in mass marketing planning schemes? Do you expect many penalties to be issued for non-compliance with the MDR?

Do you expect many litigation cases on questions of interpretation or on questions regarding fundamental rights in your country?

Do you see the MDR as the beginning of a process that could lead to more transparency and a different/new relationship between tax authorities, intermediaries (consultants), and taxpayers?

Paper length: 20 pages, Times New Roman 12 pt.

Format: preferably Microsoft Word

Bibliographic references (footnotes) and quotations: Follow the IBFD guidelines, for download under <https://www.ibfd.org/Authors-Correspondents/Publish-book-IBFD>

The questionnaire does not necessarily have to be followed question by question (e.g. when there is nothing to report from your jurisdiction). Rather, it should stimulate your thinking about the various topics that are outlined.

Deadline for delivery of the paper: May 15, 2021

Provide a brief biographical statement (3-5 lines) for the List of Contributors in the book by the deadline mentioned above. Ensure that graphics and charts in the final version are black-and-white or greyscale only (No colour graphics are allowed for the book!), and email them as separate files in xlsx, docx, pptx, jpg or tif format. The resolution of images must be at least 300 DPI to ensure good quality for printing.

The national reports (papers) will be made available for download on a password-protected conference website so that the conference participants can be well prepared for the discussions.

On the basis of the national reports, we will identify the most relevant topics and select speakers who will present selected issues in a three-minute input statement to stimulate public debate and discussion.

After the conference, there will be a short period of time granted for authors to include the findings of the conference in their respective papers. We will organize linguistic editing of the final reports.

If you have any questions or concerns, do not hesitate to contact us at renee.pestuka@wu.ac.at. We will be happy to assist you.