Guidelines on the Drafting of Mandatory Disclosure Rules for Developing Countries

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2 Abbreviations, acronyms, and definitions

2015 OECD Report	OECD/G20 Base Erosion and Profit Shifting Project Mandatory Disclosure Rules (2015)[1]
2018 OECD MMDR	OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures (2018)[2]
Action 12	BEPS Action 12 provides recommendations for the design of rules to require taxpayers and advisors to disclose aggressive tax planning arrangements[3]
Arrangement	Throughout this Report we have used the term "arrangement" to refer to aggressive tax planning arrangements considered for the scope of the MDR. Many countries use other terms ("plan", "scheme", "agreement", "transaction", etc.)
ATP	Aggressive Tax Planning
AML	Anti-money Laundering
ATAD	Anti-Tax Avoidance Directive - Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market[4]
ATED	Annual Tax on Enveloped Dwellings
ATAF	African Tax Administration Forum (ATAF)
BEPS	Base Erosion and Profit Shifting refers to tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax. Under the OECD/G20 BEPS project, over 60 countries delivered 15 Actions to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment (BEPS package)[5]
CAD	Canadian Dollar
CBCR	Country-by-country reporting
CFC	Controlled Foreign Company

[1] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en

[2] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf

[3] *Action 12 – OECD.* (n.d.). https://www.oecd.org/tax/beps/beps-actions/action12/

[4] *EUR-Lex – 32016L1164 – EN – EUR-Lex.* (n.d.). https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32016L1164

[5] *Base erosion and profit shifting – OECD.* (n.d.). https://www.oecd.org/tax/beps/

CIAT	Inter-American Centre of Tax Administrations
CRA	Canada Revenue Agency
CRS	The Common Reporting Standard (CRS)[6], developed in response to the G20 request and approved by the OECD Council on 15 July 2014, calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. It sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions
DAC 6	Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation[7]
DASVOIT	Disclosure of Tax Avoidance Arrangements: VAT and other indirect taxes[8]
Developing Country	For the purposes of this Report the term “developing country” is to be understood broadly as encompassing developing economies set forth in the UN publication “World Economic Situation Prospects”[9], and beyond.
DOTAS	UK Disclosure of Tax Avoidance Arrangements[10]
EBIT	Earnings before interest and taxes
FATCA	The US law - Foreign Account Tax Compliance Act (FATCA), which was passed as part of the HIRE Act, generally requires that foreign financial Institutions and certain other non-financial foreign entities report on the foreign assets held by their U.S. account holders or be subject to withholding on withholdable payments
FTA 2021 Plenary	Forum on Tax Administration[11]
GAAR	General Anti-avoidance Rule
GBP	British Pound Sterling
GDP	Gross Domestic Product
G20 Countries	Members of the G20 are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea,

[6] *Common Reporting Standard (CRS) – Organisation for Economic Co-operation and development.* (n.d.). https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/

[7] *EUR-Lex – 32018L0822 – EN – EUR-Lex. (n.d.).* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L0822

[8] *VAT guide (VAT Notice 700)*. (2022, November 25). GOV.UK. https://www.gov.uk/guidance/vat-guide-notice-700

[9] United Nations. (2020). *World Economic Situation and Prospects*. https://desapublications.un.org/file/728/download?_ga=2.256186955.1154813870.1668633700-1221587795.1651233760, p. 154.

[10] *Disclosure of tax avoidance schemes*. (2022, July 8). GOV.UK. https://www.gov.uk/guidance/disclosure-of-tax-avoidance-schemes-overview

[11] *2021 - Forum on Tax Administration*. (n.d.). https://www.oecd.org/tax/forum-on-tax-administration/events/2021/

	Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States, and the European Union
Hallmark	Hallmarks are a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse (rather than define the concept of aggressive tax planning)
HMRC	Her Majesty's Revenue and Customs, the tax authority of the UK
ICIJ	International Consortium of Investigative Journalists
IHT	Inheritance Tax
IGA	Inter-governmental agreement
IMY	Intermediary
Intermediary	Intermediary is a broad term and means a person that has an obligation to report under MDR due to being either a promoter or a service provider. For sake of simplicity, throughout this Report we have used the term "intermediary" to include any "intermediary", "promoter", "service provider", "financial advisor", and any other person who has an obligation to report (except for "taxpayer")
JITSIC Network	Joint International Tax Shelter Information and Collaboration Network
Listed transactions	Arrangements in MDR scope included in the lists published by tax authority
MBT	Main Benefit Test
MDR	Mandatory Disclosure Rules
MNEs	Multinational entities
OTSA	US IRS Office of Tax Shelter Analysis
RTAT	Reporting of Tax Avoidance Transactions, Canadian regime
SDLT	UK Stamp Duty Land Tax
SMEs	Small and Medium-sized Enterprises
STR	Suspicious transaction reports
Taxpayer	Throughout this Report we have used the term "taxpayer" to include any reportable person (and may have a reporting obligation as well) that is defined in MDR regimes as relevant taxpayer / taxpayer / potential user / user, etc., of the reportable arrangement
TIN	Tax identification number
TS	Canadian Tax Shelter regime
VADR	UK VAT disclosure regime

VAT	Value Added Tax
XML	Extensible Markup Language
ZAR	South African rand

3 Executive summary

3.1 MDR for developing countries

Aggressive tax planning consists in taxpayers' reducing or eliminating their tax liability, double non-taxation, double deductions, or other tax advantages gained through arrangements that may be legal but are in contradiction with the intent of the law. Typically, aggressive tax planning includes exploiting loopholes in a tax system and mismatches between tax systems[12].

Aggressive tax planning poses a serious challenge for jurisdictions all over the world, developing, emerging markets and developed countries alike in terms of securing tax revenues needed for public investment, education, healthcare, and welfare, to ensure fair burden-sharing and preserve tax morale of taxpayers and to avoid distortion of competition between businesses.

In fighting aggressive tax planning, tax authorities often lack of timely, comprehensive, and relevant information on aggressive tax planning strategies, which is essential to enable governments to quickly respond to tax risks through informed risk assessment, audits, or changes to legislation. These challenges are exacerbated by arrangements with cross-border elements. Countries find it increasingly difficult to protect their national tax bases from erosion as tax-planning structures have evolved to be particularly sophisticated and often take advantage of the increased mobility across border.

The key strengths of mandatory disclosure rules (MDR) are their ability to obtain early information about potentially aggressive or abusive tax avoidance arrangements in order to inform risk assessment, identify arrangements, taxpayers, and intermediaries of arrangements in a timely manner, and reduce the promotion and use of avoidance arrangements.

An effective MDR regime can prove to be particularly useful to the developing countries, as the tax revenue forms a large part of their GDPs. Establishing an effective MDR requires that developing countries carefully design a legal reporting framework and enforcement measures that balance the tax authority’s need for information with additional compliance duties imposed on the taxpayers and intermediaries. Developing countries also need to consider their unique risks and challenges which are different both in nature and scale to those faced by developed countries (such as lack of sufficient resources, information, technical capacity, and enforcement capacity).

This Report provides a modular framework that enables developing countries to design a new, or enhance an existing, MDR for cross-border arrangements. Based on an analysis of existing global, regional, and local

[12] European Commission. (2017). *EUROPEAN SEMESTER THEMATIC FACTSHEET CURBING AGGRESSIVE TAX PLANNING*. https://www.europarl.europa.eu/cmsdata/150511/5%20-%2004%20european-semester_thematic-factsheet_curbing-agressive-tax-planning_en.pdf

MDR regimes, this report includes options for various MDR provisions, their strengths and weaknesses, best practices, and recommendations for developing countries.

3.2 Design principles

Existing international MDR regimes set forth in the OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures ("The 2018 OECD MMDR") and the European Union (EU) Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation ("DAC 6"), as well as the experience of other MDR countries serve as a good starting point in designing an MDR for a developing country but need to be adjusted to deal with unique challenges faced by developing countries.

Therefore, developing countries should first define the key tax avoidance and evasion risks that the MDR will aim to address. Based on the experience of other developing countries, such risks may include, for example, base erosion caused by excessive payments to foreign affiliated companies, profit shifting to low or no tax jurisdictions, countries with preferential tax regimes, challenges to enforcing transfer pricing rules and obtaining information needed to assess and address Base Erosion and Profit Shifting (BEPS) issues, obtaining unintended treaty benefits, and tax loss caused by the techniques used to avoid tax paid when assets situated in developing countries are sold.

Once a developing country has assessed its tax avoidance and evasion risks, as well as accessible resources and capacity, it needs to decide which arrangements will be in the MDR scope to most effectively address such risks while considering the country's needs and circumstances, and which options it will use when designing each of the key elements of the MDR regime.

The arrangements in the MDR scope are defined through hallmarks. Hallmarks involve a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse (rather than define the concept of aggressive tax planning). Given resource and capacity limitations, developing countries could consider focusing on only those hallmarks that pose the greatest risk to tax revenue and omitting the hallmarks that have little or no relevance or consider hallmark thresholds or other narrowing conditions to reduce the number of reported arrangements. In addition, developing countries should consider the fact that some corporate taxpayers (especially subsidiaries or branches of foreign multinational enterprises) may not have a full view on the reportable arrangements. Lastly, developing countries should assess the resources and capacity of the tax administration to process information and enforce provisions.

In line with the key tax avoidance and evasion risks outlined above, hallmarks used by developing countries tend to be related to transfer pricing risks, payments to a recipient that is resident in a non-cooperating jurisdiction, or the recipient is taxed under a preferential tax regime, exploiting asymmetries about an entity, contract, payment or instrument, other distortions (such as, for example hybrid instrument mismatches, significant book-tax differences, etc.); and tax treaty shopping.

In designing the MDR approach, developing countries should consider local political processes and potential legal challenges of implementation upfront, such as, for example, legal professional privilege, that has proven to be a stumbling block for a few countries.

MDR should be clear and easy to understand. In the context of developing countries' resources and capacity limitations, clear and simple rules are especially important. To achieve this goal, developing countries should consider having a single, clear, and concise MDR regime, with precise definitions of terms, and limit the options to those that are the most impactful, and where possible choose options that are more mechanical in nature and allow only limited discretion to be applied. Issuing clear local guidance to taxpayers and intermediaries (in addition to the MDR law), and lists of which arrangements are in and out of scope can also be useful.

MDR should balance additional compliance costs to taxpayers and intermediaries with the benefits obtained by the tax administration. The key to striking the balance is for the tax authorities to assess which information would be the most efficient in achieving MDR goals (and will be processed and actioned upon by the tax administration) and limiting the request of information that is either not necessary or would yield only minimal benefits to the tax authorities.

MDR provisions should be kept current and reflect existing and emerging tax risks. The ability to update the list of potentially aggressive arrangements in the future may be difficult if the legislative process is cumbersome, therefore countries may decide to delegate the power to designate the arrangements in scope to tax authorities through published lists.

An effective MDR system should ensure that information collected is analyzed, used, and acted on effectively. To the extent resources permit it, developing countries should strive to adjust existing or develop new e-filing infrastructure for the MDR reports. This would allow to validate and analyze the information received, simplify procedures, reduce the compliance burden on taxpayers, optimize the selection of intermediaries and taxpayers for audit, typically resulting in reduced cost and increased revenue. By joining data sources and analyzing the combined data sets, the administration may uncover insights that can be used to achieve a whole range of objectives.

3.3 Key elements of MDR

There are several key elements that need to be considered in designing MDR rules dealing with the objective and subjective scope of the rules, as well as their application and enforcement:

- who must report;
- what are reportable cross-border arrangements;
- which taxes are in scope;
- what are the hallmarks of reportable arrangements;
- when is information reported;
- how can arrangements and taxpayers be grouped;
- what information must be reported;
- how to file information and other reporting matters; and
- consequences of compliance and non-compliance.

Table 1 Summary of the MDR key elements

MDR rules must cover the following core requirements:	MDR rules should:
Who shall disclose	➢ require singular disclosure from either only intermediaries; and, in their absence, from the taxpayers; or ➢ require dual disclosure from both - the intermediaries and taxpayers; and ➢ address the issues related to legal or professional privilege.
What are reportable cross-border arrangements	➢ define what is an arrangement; ➢ define temporal scope of arrangement;

	➢ define cross-border scope of arrangement (or apply to both – cross-border and domestic arrangements).
Which taxes are in scope	➢ cover any taxes impacted by the reportable arrangement; or ➢ cover selected taxes (such as only direct taxes, or also indirect taxes, etc.).
What are the hallmarks of reportable arrangements	➢ decide which tax risks caused by aggressive arrangements cause the greatest concern and select hallmarks (hallmarks are a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse)[13] that address these risks; ➢ define hallmarks by including: ○ general hallmarks (that target features that are common to promoted arrangements, such as the requirement for confidentiality or the payment of a premium fee[14]); and ○ specific hallmarks (target particular areas of concern such as losses[15]) ➢ decide whether to define hallmarks in law, which is more rigid to change, or allow tax administrations to define it by issuing black, grey and whitelists; and ➢ consider whether to apply hallmark thresholds (main benefit test, de minimis thresholds, require that two or more hallmarks need to be met for an arrangement to be reportable, or use a whitelist).
When is information is reported?	➢ define what triggers the reporting obligation (availability, first steps of implementation, etc.); ➢ define how soon after the trigger the information needs to be reported (to assure early warning and prompt reaction opportunity for the tax authorities); ➢ define whether reporting obligation is one-off or ongoing; ➢ define when the first reporting is taking place; and ➢ decide whether retroactive arrangements are included, if permitted by law.
How can arrangements and taxpayers be grouped?	➢ consider whether to use independent approach (no overlapping data received); or ➢ consider whether to use the compiling approach (require dual reporting by intermediary and taxpayer; and /or use of arrangement ID number; and/or use of the client lists).
What information must be reported?	➢ define what information is to be reported regarding participants to the arrangement; and ➢ define what information is to be reported about the arrangement.
How to file information and other reporting matters?	➢ provide a framework for how to file the information (by issuing a reporting guidance);

[13] DAC 6. (n.d.). In *Hallmark Definition Section 9 of Preamble*.

[14] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p. 10

[15] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p. 10

	➢ decide how the collected information is analyzed, used and actioned; and ➢ include tax authority's rights to ask for more information.
What are the consequences of compliance and non-compliance?	➢ state clearly that reporting an arrangement does not mean that the arrangement is accepted by the tax administration or that it will not be challenged; and ➢ define penalties for intermediaries and taxpayers for non-compliance with the MDR requirements (monetary penalties and non-monetary penalties); and ➢ consider other measures to strengthen compliance.

Source: Apex Consulting

4 Introduction

Aggressive tax planning poses a serious challenge for jurisdictions all over the world, developing, emerging markets and developed countries alike. Tax authorities often lack of timely, comprehensive, and relevant information on aggressive tax planning strategies, which is essential to enable governments to quickly respond to tax risks through informed risk assessment, audits, or changes to legislation or regulations.

These challenges are exacerbated by arrangements with cross-border elements. Countries find it increasingly difficult to protect their national tax bases from erosion as tax-planning structures have evolved to be particularly sophisticated and often take advantage of the increased mobility across borders. Globalization has made it easier for all taxpayers to make, hold and manage accounts, investments, and businesses straddling the borders of their country of residence and abroad. Such arrangements are commonly developed across various jurisdictions and allow to move taxable profits towards more beneficial tax regimes or have the effect of reducing the taxpayer's tax liabilities. As a result, countries suffer considerable reductions in their tax revenues.

Existing tax laws and penalties for tax evasion are not sufficient to detect and deter tax avoidance if tax authorities are not aware of aggressive arrangements deployed by taxpayers exploiting legislative loopholes. If authorities are unable to obtain information on tax evaders and aggressive tax arrangements, the tax system will fail to obtain tax revenues avoided by such arrangements.

Tax authorities already require different types of information from taxpayers and third parties to properly assess taxes through tax returns and informational returns. To prevent money laundering and corruption, some countries have also set up registries of beneficial owners for companies to declare the natural persons who ultimately own or control them. Due to Foreign Account Tax Compliance Act (FATCA)[16] and the Common Reporting Standard (CRS)[17], countries that apply these regimes exchange the financial account information of taxpayers with other countries.

Further, in order to detect cases of tax evasion and tax avoidance and differentiate them from legitimate cases of low or no reported income, tax authorities may audit taxpayers, request additional information, exchange information with other countries or rely on third parties, such as banks or credit card companies.

[16] *Foreign Account Tax Compliance Act (FATCA) | Internal Revenue Service*. (n.d.). https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca

[17] *Common Reporting Standard (CRS) - Organisation for Economic Co-operation and Development*. (n.d.). https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/

More advanced tax authorities may be using artificial intelligence to detect any anomalies in the information received, and cross-checking information with other publicly available sources, including social media.

While certainly helpful, information obtained through these channels may not be sufficient to detect tax avoidance or evasion elements for several reasons. On one hand side, such information may appear to be correct and complete, but may in fact reflect aggressive tax planning positions taken by taxpayers that the tax authorities may not be able to detect just by analysing the information, especially where the cross-border elements are involved. On the other hand, information that may appear to signal potential aggressive tax practices (for example, lack of income, large income swings, etc.) may have perfectly legitimate business explanation (e.g., the tourism sector during the Covid-19 pandemic). Nor can this information provide a view of how widespread the use of the particular arrangements is.

It is therefore critical that countries can obtain comprehensive and relevant information about potentially aggressive tax arrangements. MDR have proven to be an effective solution in reducing tax leakage[18]. MDR allow to have direct information from taxpayers regarding arrangements that may have strong indicators of aggressive tax avoidance or evasion, and all relevant elements related to such arrangements – description of the transactions, persons involved, size of the transaction, etc. Based on the received information, tax authorities can easily and quickly detect aggressive tax practices, conducting adequate risks assessments, and promptly react by closing the legislative loopholes and undertaking tax audits.

An effective MDR regime can prove to be particularly useful to the developing countries, as the tax revenue forms a large part of their GDPs, and protecting this revenue is essential for economic growth. Establishing an effective MDR requires that developing countries carefully design legal framework and enforcement measures that balance the tax authority's need for information with additional compliance duties imposed on the taxpayers. Developing countries also need to consider their unique risks and challenges which are different both in nature and scale to those faced by developed countries (such as lack of sufficient resources, information, technical capacity, and enforcement capacity). This means that MDR for developing countries need specific emphases or nuances compared to those suitable for advanced economies.

This report offers insights into global standards and MDR country experiences as well as sets forth guidelines for MDR for developing countries related to cross-border arrangements.

4.1 Work to date

4.1.1 Historic background

There are several phases in MDR development:

1. **Pre-BEPS, unique regimes** that were implemented as of 1980-ties in Canada, the UK, Portugal, Israel, and few other countries;
2. **OECD Action 12 inspired, unique regimes** influencing regimes in the US, Canada, the UK, Ireland, and South Africa, among other as of 2015;

[18] Casi, E. (2022, October 5). *So close and yet so far: the ability of mandatory disclosure rules to crack down on offshore tax evasion*. UNU-WIDER. https://www.wider.unu.edu/publication/so-close-and-yet-so-far-ability-mandatory-disclosure-rules-crack-down-offshore-tax, p. 3 AND

OECD (2021), Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes, OECD, Paris. http://www.oecd.org/tax/crime/ending-the-shell-game-cracking-down-on-the-professionals-who-enable-tax-and-white-collarcrimes.htm, p. 14

3. **OECD 2018 MMDR, global regime** that has currently 15 multilateral commitments, covers hallmarks related to CRS and beneficial ownership and was launched in 2018; and
4. **DAC 6 – EU wide regime** that is implemented 27 EU Member States as of 2018, inspires other countries, and covers wide range of hallmarks**.**

From a historical perspective, there are several phases of MDR development[19]:

4.1.1.1 Pre-BEPS, unique regimes

Starting with the US in the 1980s, some developed countries such as Canada, the UK, Portugal, Israel, and South Korea implemented the first types of MDR.

4.1.1.2 OECD Action 12 inspired, unique regimes

In 2013 the OECD and the G20 developed the Base Erosion and Profit Shifting (BEPS) action points[20] to propose measures to address and reduce aggressive tax planning, including Action 12[21]. BEPS Action 12 provided recommendations for the design of rules to require taxpayers and advisors to disclose aggressive tax planning arrangements. These recommendations seek a balance between the need for early information on aggressive tax planning arrangements with a requirement that disclosure is appropriately targeted, enforceable and avoids placing undue compliance burden on taxpayers[22].

After a consultation process, the OECD published OECD/G20 Base Erosion and Profit Shifting Project Mandatory Disclosure Rules (2015) ("2015 OECD Report")[23], which incorporated many of the elements and lessons from the unilateral measures and experiences established by countries, especially the US, Canada, the UK, Ireland, and South Africa. However, Action 12 was not included among the mandatory "minimum standards" for countries members to the "Inclusive Framework", meaning that MDR is optional regime, and therefore many countries are yet to establish MDR. A few developing countries designed their own, 2015 OECD report inspired - MDR, including Brazil, Colombia, and Ecuador, but their experience has not been very successful because their regimes were either not approved or are no longer in force.

4.1.1.3 OECD 2018 Report (CRS and beneficial ownership), global regime

The OECD also established a standard for the automatic exchange of financial account information - the "Common Reporting Standard" (CRS)[24]. The CRS was largely based on the US domestic law called the Foreign Account Tax Compliance Act (FATCA)[25] and the inter-governmental agreements (IGAs) signed by many countries to exchange information automatically with the US. In essence, the automatic exchange standards (both the CRS and FATCA) rely on financial institutions (e.g., banks, insurance companies, asset managers,

[19] Noked, N., Marcone, Z., & Tsang, A. (2022). THE EXPANSION AND INTERNATIONALIZATION OF MANDATORY DISCLOSURE RULES. *Columbia Journal of Tax Law*, *13*(2), p. 125. https://doi.org/10.52214/cjtl.v13i2.9798

[20] BEPS Actions – OECD (n.d.). https://www.oecd.org/tax/beps/beps-actions/

[21] *Action 12 – OECD*. (n.d.). https://www.oecd.org/tax/beps/beps-actions/action12/

[22] *Action 12 - OECD*. (n.d.). https://www.oecd.org/tax/beps/beps-actions/action12/

[23] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en

[24] *Common Reporting Standard (CRS) - Organisation for Economic Co-operation and Development*. (n.d.). https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/

[25] *Foreign Account Tax Compliance Act (FATCA) | Internal Revenue Service*. (n.d.). https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca

etc.) reporting information on their account holders to their local competent authority, which in turn shares the financial account information with the country of residence of the account holder. By finding out about the foreign financial accounts of their residents, countries are better equipped to detect unreported income.

Per OECD, in 2022, countries automatically exchanged information on 111 million financial accounts worldwide, covering total assets of EUR 11 trillion. Over EUR 114 billion in additional tax revenues have been identified through voluntary disclosure programmes, offshore tax investigations and related measures since 2009[26], with over EUR 30 billion identified by developing countries[27]. Given the sizeable tax revenues identified by developing countries, ensuring compliance with the CRS is very important.

In 2017, close to 50 jurisdictions started exchanging financial account information based on the CRS and by 2022 the number has reached 110[28]. However, there were also reports on loopholes that could be exploited to circumvent the CRS or to hide beneficial owners, such as the acquisition of "golden visas", dividing financial accounts to be below reporting thresholds, or transferring accounts to jurisdictions not participating in the CRS framework. To address these concerns, in 2018 the OECD published Model Mandatory Disclosure Rules for CRS Avoidance and Opaque Offshore Structures ("2018 OECD MMDR")[29]. A number of countries have adopted the 2018 OECD MMDR since unilaterally (such as, for example, South Africa and Guernsey), and in November 2022, 15 countries signed the multilateral MMDR[30], including some developing countries (such as Colombia, Costa Rica, South Africa).

The 2018 OECD MMDR was designed based on the principles of 2015 OECD Report but covers just a small number of hallmarks (CRS and beneficial ownership) that were envisaged by the 2015 OECD Report. The 2015 Report sets forth many more hallmarks, such as, for example, generic hallmarks related to confidentiality and premium fees, and specific hallmarks related to loss arrangements, converting income arrangements, hybrid instruments, listed transactions, etc.

4.1.1.4 DAC 6 and beyond

A much broader spectrum of hallmarks is captured in the EU directive - Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation ("DAC 6")[31]. Recognizing how a transparent framework could contribute to clamping down on tax avoidance and evasion in the European Union, the EU Commission designed the MDR regime along the lines of Action 12 of the OECD Base Erosion and Profit Shifting (BEPS) Project, incorporating the features of both –

[26] *Global Forum reports significant progress on global transparency and exchange of tax information, while noting further work is needed - OECD*. (n.d.). https://www.oecd.org/tax/global-forum-reports-significant-progress-on-global-transparency-and-exchange-of-tax-information-while-noting-further-work-is-needed.htm

[27] OECD. (2022). p. 3. Raising the Bar on Tax Transparency. In *Global Forum on Transparency and Exchange of Information for Tax Purposes*. https://www.oecd.org/tax/transparency/documents/global-forum-annual-report-2022.pdf

[28] Idem, p.7

[29] *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures - OECD*. (n.d.). https://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.htm

[30] OECD. (2022). *Signatories Of The Multilateral Competent Authority Agreement On The Automatic Exchange Regarding Crs Avoidance Arrangements And Opaque Offshore Structures MDR-MCAA*. https://www.oecd.org/tax/exchange-of-tax-information/mdr-mcaa-signatories.pdf

[31] *EUR-Lex - 32018L0822 - EN - EUR-Lex*. (n.d.). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018L0822

2015 OECD Report and 2018 Report. DAC 6 has been adopted by all Member States of the EU, and the first reporting has taken place in 2021.

DAC 6 approach has had an impact on non-EU countries designing their own (not strictly OECD or DAC 6 based) regimes. For example, Norway started discussions on the MDR, while Argentina and Mexico have recently approved their own rules, and Canada has proposed revising its MDR framework to align it with the new MDR rules based on BEPS Action 12.

At the moment, MDR have been implemented in the USA, Canada, Argentina, Mexico, all the EU Member States, the UK, Gibraltar, Guernsey, Israel, Korea, and South Africa, among others[32].

The following table offers the chronological order of MDR established by countries[33].

Table 2 Chronological order of MDR established by countries

Year	Country/Regime	Details
1984	USA	The United States was first to introduce MDR in 1984, which was subsequently revised significantly in 2004.
1989	Canada	Canada followed the US with a Tax Shelter (TS) regime for a specific tax planning arrangement involving gifting arrangements and the acquisition of property. In addition, new mandatory Reporting of Tax Avoidance Transactions (RTAT) legislation with much broader reporting requirements was enacted in June 2013. In 2022, Canada opened a consultation to reform its MDR.
2003	South Africa	Introduced disclosure rules in 2003, revised them in 2008, and in 2016. CRS and beneficial ownership MDR rules were added in 2020.
2004	The UK	The United Kingdom enacted disclosure rules and revised them substantially in 2006 and in 2011. Further, the UK implemented DAC 6 in January 2020, at which time there were a number of concurrent MDR regimes - VAT disclosure regime (VADR), Disclosure of Tax Avoidance Arrangements: VAT and other indirect taxes (DASVOIT), Disclosures for Direct taxes (including Apprenticeship Levy), Stamp Duty Land Tax (SDLT), Inheritance Tax (IHT) and National Insurance contributions (DOTAS), and Automatic exchange of information and beneficial ownership (DAC 6). However, following Brexit, the HMRC confirmed at the end of 2020 that the UK will no longer be applying DAC 6 in its entirety, but rather only with regard to Hallmark D relating to automatic exchange of information and beneficial ownership. In 2022, the UK intends to implement the OECD's 2018 MMDR to replace DAC 6 reporting. Gibraltar, which unlike all other British Overseas Territories was part of the European Union (EU), has now also left the EU and has followed suit on

[32] CIAT. (n.d.). *CIAT BEPS monitoring database, Article 12* [Dataset].

[33] Please note that due to the scope of the Report, the table does not purport to be a complete and comprehensive overview of all countries that have adopted the MDR or are in the process of designing such.

Year	Country/Regime	Details
		DAC6, replaced the previous DAC 6 rules with 2018 OECD MDR approach by duplicating the UK legislation[34].
2008	Portugal, Ireland	Portugal and Ireland introduced their MDR in 2008. Both have implemented DAC 6 subsequently and revoked their earlier regimes.
2011	Korea, Israel	Korea and Israel introduced MDR[35].
2015	OECD	In 2015 the OECD published OECD/G20 Base Erosion and Profit Shifting Project Mandatory Disclosure Rules ("the 2015 OECD Report").
2015	Brazil	In July 2015 Brazil introduced a Provisory Measure which, among others, established an MDR. However, when the Provisory Measure was converted into Law by December, the MDR provisions were removed.
2016	Ecuador	Ecuador introduced article 102 to the Tax Procedure Act requiring intermediaries to disclose arrangements. However, in 2022 the Constitutional Court of Ecuador declared it unconstitutional.
2016	Colombia	Colombia introduced a bill in Congress to approve an MDR. The bill was not passed.
2018	OECD	In the OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures ("2018 OECD MMDR").
2018	EU	In 2018 the EU adopted similar rules to the 2015 OECD Report and 2018 OECD MMDR, known as DAC 6 (the EU Council Directive 2011/16 in relation to cross-border tax arrangements) which has now been implemented by all EU Member States.
2019	OECD	To enable the exchanges under the 2018 OECD MMDR, in 2019 OECD released the legal and technical information exchange infrastructure that is needed for the exchange of the information collected by tax administrations under the MDR[36].
2019	Norway	In 2019 Norway set up a committee to study the issue of MDR. A bill establishing the MDR based on DAC 6 was drafted but it hasn't been passed yet.
2020	Guernsey	In 2020 Guernsey adopted regulations introducing MDR on CRS Avoidance Arrangements and Opaque Offshore Structures based on 2018 OECD MMDR.
2020	Argentina	In 2020 Argentina approved a Resolution by the tax administration establishing an MDR. After several lawsuits, the Resolution was suspended for two months in 2022.

[34] *Income Tax Act 2010 (Amendment) (EU Exit) Regulations 2021*. (n.d.). Gibraltar Laws. https://www.gibraltarlaws.gov.gi/legislations/income-tax-act-2010-amendmenteu-exit-regulations-2021-5866 Gibraltar followed the UK suit by adopting the Income Tax Act 2010 (Amendment) (EU Exit) Regulations, 21/01/2021, https://www.gibraltarlaws.gov.gi/legislations/income-tax-act-2010-amendmenteu-exit-regulations-2021-5866

[35] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 36

[36] OECD (2019), International Exchange Framework for Mandatory Disclosure Rules on CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/international-exchange-framework-for-mandatory-disclosure-rules-on-crsavoidance-arrangements-and-opaque-offshore-structure.pdf

Year	Country/Regime	Details
2020	Mexico	In 2020, Mexico reformed its Fiscal Code to establish an MDR.
2021	EU Member States	In 2021 all EU Member States did their first reporting under DAC 6.
2022	15 countries	In November 2022, 15 countries (Belgium, Bermuda, Cayman Islands, Colombia, Costa Rica, Cyprus, Finland, Guernsey, Iceland, Isle of Man, Jersey, Portugal, Slovenia, South Africa, Spain, and the UK) signed the 2018 OECD MMDR.

Source: Apex Consulting

4.1.2 Types of MDR regimes

- **MDR regimes vary by**:
    - **geography** – there are global, regional, and unique MDR regimes;
    - **reciprocity** – some MDR regimes provide for exchange of information (DAC 6, 2018 OECD MMDR) and some do not (the rest of MDR regimes); and
    - **range of hallmarks** – some MDR provide only a few hallmarks, as in case of the 2018 OECD MMDR that has only 2, and some have many hallmarks, like in case of DAC 6 that has 19 hallmarks.
- In targeting cross-border arrangements, developing countries are strongly encouraged to **pursue a multi-lateral, regional MDR solutions**. In the absence of multi-lateral solutions, however, unilateral MDR measures still prove to be an effective solution to increase domestic revenues and enhance taxpayer compliance.

MDR regimes could be divided by geography they can be designed as:

- **Global MDR regime** – 2018 OECD MMDR - a number of countries have adopted the 2018 OECD MMDR verbatim in their legislation (for example, South Africa and Guernsey); it covers limited hallmarks related to the CRS and beneficial ownership only.
- **Regional MDR regime** – DAC 6 - adopted across the EU with some local modification; it provides for cross-border exchange of information and has a wide range of hallmarks.
- **Unique** – country specific, unilateral MDR regimes.

While unilateral MDR measures have helped countries that implemented them, with respect to cross-border arrangements much more can be achieved through a global or regional approach, leveraging on the common ruleset, interpretation, and shared resources, and limiting taxpayer country-hopping to other jurisdictions, among other.

Several countries with MDR indicate that, in practice, they receive fewer disclosures of cross-border arrangements in comparison with domestic arrangements, which is likely due to differences in how countries define a reportable arrangement, and how it is disclosed. Cross-border arrangements generate multiple tax benefits for different parties in different jurisdictions and the domestic tax benefits that arise under a cross-border arrangement may seem unremarkable when viewed in isolation from the rest of the arrangement as a whole. The ambiguous nature of the tax benefits that arise in respect of cross-border tax planning means that disclosure regimes that focus exclusively on domestic tax outcomes for domestic taxpayers, without understanding the global picture, may not capture many types of cross-border tax planning[37].

Globally, the OECD is steering the efforts to improve international tax cooperation between governments to counter international tax avoidance and evasion. In furtherance of these goals, the OECD set up the Aggressive Tax Planning (ATP) Group in 2004 to act as a centre of knowledge and expertise on international tax planning. The Steering Group began with a membership of 7 countries and has now grown to a full working party of 46 OECD and G20 countries and is carrying out work related to Action 12 on Requiring Taxpayers to Disclose their Aggressive Tax Planning Arrangements. The OECD's work focuses on identifying trends in international tax planning and helping governments to respond more quickly and effectively to emerging risks. Such work has resulted in a library of over 400 aggressive tax planning arrangements stored on the OECD ATP Directory, a confidential database of arrangements[38].

Countries have a shared interest in maintaining the integrity of their tax systems. Therefore, developing countries are strongly encouraged to pursue multi-lateral MDR solutions designed to eradicate tax evasion and avoidance, and protect the integrity of tax systems. In the absence of multi-lateral solutions, however, unilateral MDR measures still prove to be a powerful tool to reduce tax evasion and avoidance, increase domestic revenues and enhance taxpayer compliance.

4.1.3 Challenges faced by developing countries

- **Developing countries:**
  - **are highly dependent on corporate income tax revenue and**
  - **have tax administration capacity constraints, as well as**
  - **lack of proper access to information.**
- The **corporate tax revenues form a larger share of total tax revenues** on average in Africa (18.8% in the 30 jurisdictions), Asia and Pacific (18.2% in the 24 jurisdictions) and LAC (15.8% in the 26 jurisdictions) than in the OECD (9.6%). Aggressive tax planning may have dire consequences on tax revenue collection of developing countries and therefore economic growth as such.
- There are **numerous MDR design and implementation restraints** of developing countries that relate to tax authorities (such as lack of resources, knowledge, capacity), intermediaries and taxpayers (costly compliance, incorrect, incomplete, or inconsistent filings).
- There is a need to design **balanced MDR regimes** that consider the above challenges and use the MDR to effectively stop the **greatest areas of domestic revenue leakage** by designing **hallmarks** which focus on those arrangements, sources of income, and industries that are determined to be the main cause of the revenue loss.
- In addition, MDR regimes need to be adjusted to take into consideration that reporting taxpayers in developing countries are likely to be subsidiaries/branches of a foreign parent; and that such subsidiaries/branches may **not have full visibility and information** on reportable arrangements.

All countries suffer from tax avoidance and tax evasion risks, especially aggressive tax planning by multinational entities (MNEs). However, this problem is exacerbated in the case of developing countries. There are two main reasons affecting specifically developing countries: their high dependence on tax

[37] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, paras 227, 228

[38] *Aggressive tax planning - OECD*. (n.d.). https://www.oecd.org/tax/aggressive/

revenue from corporations (especially MNEs) and tax administration capacity constraints and lack of proper access to information. Such constraints need to be addressed when designing the MDR regime.

4.1.3.1 High dependence on corporate income tax revenue

As described in the 2020 November OECD Corporate Tax Statistics Report[39], in 2019, corporate tax revenues were a larger share of total tax revenues on average in Africa (18.8% in the 30 jurisdictions), Asia and Pacific (18.2% in the 24 jurisdictions) and LAC (15.8% in the 26 jurisdictions) than the OECD (9.6%). In 14 countries[40] corporate tax revenues made up more than one-quarter of total tax revenues in 2019, and in Bhutan, Equatorial Guinea, Malaysia, and Nigeria, it accounted for more than 40%[41]. These statistics illustrate that developing countries depend more on revenues from corporate income tax when compared to developed countries.

Another vulnerability in some developing countries relates to the taxation of natural resources, a key fiscal concern. MNEs in the extractive industries commonly export minerals to foreign related parties, making transfer pricing a critical issue in the industry[42].

In such a case, aggressive tax planning may have dire consequences on tax revenue collection of developing countries and therefore economic growth as such.

4.1.3.2 Capacity constraints

Developing countries face numerous challenges to detect aggressive tax planning, prevent it or address it when detected.

For tax authorities:

1. Lack of legislative measures to address base erosion and profit shifting (e.g., not having a general anti-avoidance rule or GAAR). Lack of effective legislation and gaps in capacity may leave the door open to simpler, but potentially more aggressive, tax avoidance than is typically encountered in developed economies[43];
2. Lack of capacity to implement and enforce highly complex transfer pricing rules, monitor cross-border arrangements and challenge well-advised and experienced MNEs[44];
3. Lack of sufficient staffing levels dedicated solely to international tax matters, and challenges related to retention of such staff. Due to low salaries and a “revolving door” rotation tax authorities often lose staff to big accountancy firms, creating a knowledge and information asymmetry against tax authorities;

[39] OECD. (2022). *OECD Corporate Tax Statistics FOURTH EDITION (2022)*. https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-fourth-edition.pdf, p. 5

[40] OECD. (2022). *OECD Corporate Tax Statistics FOURTH EDITION (2022)*. https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-fourth-edition.pdf, p. 5. *The 14 countries are: Bhutan, Chad, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Ghana, Indonesia, Kazakhstan, Malaysia, Nigeria, Papua New Guinea, Singapore, Thailand and Trinidad and Tobago.*

[41] OECD. (2022). *OECD Corporate Tax Statistics FOURTH EDITION (2022)*. https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-fourth-edition.pdf, p. 8

[42] OECD. (2014). TWO-PART REPORT TO G20 DEVELOPING WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES. In *G 20*. https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf, p.15

[43] OECD. (2014). TWO-PART REPORT TO G20 DEVELOPING WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES. In *G 20*. https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf, p.15

[44] OECD: Report to the G20 on the impact of BEPS in low-income countries (2014), pp.7-8

4. Lack of IT systems to manage, analyze and detect potentially aggressive arrangements. The low prioritization of IT investments (costs) required to implement MDR leads to substantial difficulties analyzing information received ensuring information is effectively used and acted upon. If the scope and volume of the received information are large, that also leads to challenges with team's capacity to process information adequately;
5. Limited capacity to enforce MDR obligations, where the arrangement has a foreign intermediary or is with a taxpayer who is not subject to tax in the reporting country; and
6. Pressure from taxpayers (threat to take the business elsewhere due to an increased tax compliance burden) and related potential loss of tax revenue.

For intermediaries and taxpayers:

7. Lack of resources in terms of technological capacities and sufficient staffing. Implementing new compliance regimes often requires engagement of various departments – legal, procurement, financial, tax teams, as well as the IT teams- which is costly, requires training of all teams, requires internal manuals and processes, internal reporting solution, or – alternatively – engaging third party providers for some or all aspects of compliance.
8. Lack of prioritization of the investment (costs) required considering all other tax reporting requirements and compliance measures (e.g., ongoing regular filing, country-by-country reporting (CBCR), transfer pricing reporting, etc.).
9. Complex and expensive compliance, as taxpayers and intermediaries need to take appropriate measures to put in place policies, procedures, and processes to identify and capture details of reportable transactions.

For taxpayers (in addition to what is listed above):

10. Costly and complex compliance because even where the primary obligation to report is with the intermediary, taxpayers still need to take appropriate measures to put in place policies, procedures, and processes to identify and capture details of transactions that they may need to disclose themselves if the intermediary does not report.
11. Incorrect or incomplete filings where intermediaries are out of scope from reporting (due to legal privilege or otherwise) and where the reporting taxpayer lacks information (from the intermediaries or other parties to the arrangements).
12. Inconsistent filings where both the taxpayer and the intermediary have to report, but reports differ (for example, if the taxpayer did not have full knowledge of the arrangement) which may lead to tax audits.

There is a need to design balanced MDR rules that consider the above challenges and use the MDR rules to effectively stop the greatest areas of domestic revenue leakage by designing hallmarks which focus on those arrangements, sources of income, and industries that are determined to be the main cause of the revenue loss.

4.1.3.3 Information constraints

Tax authorities often lack sufficient information, such as data on transfer pricing comparables, foreign operations of an MNE, access to exchange of information from other countries including the country-by-country reports or offshore financial accounts.

MDR regimes of the 2015 OECD Report and DAC 6 are designed considering countries where the parent entity of an MNE is located and makes the decision to contract with an intermediary (or do it in-house) to engage in aggressive tax planning. This would usually be a developed country. In contrast, MNEs activities in developing countries usually involve subsidiaries and branches with production capabilities, but typically are not the countries where global corporate decisions are taken. In this case, even if a subsidiary or branch that is located in a developing country is part of a global tax planning arrangement, the subsidiary or branch may not itself have full details of the intermediary or the workings of the arrangement, especially if directions from the parent simply refer to "now invoice services to Company A or sell goods to Company Y located in country X". The tax authority of the country where subsidiary or branch is based may not be able to secure such information by reaching out directly to the parent or head office or tax authority of the country where the parent has tax residence.

This is precisely what the "BEPS Monitoring Group" responded[45] to the OECD Consultation on BEPS Action 12: "[forms for disclosure by intermediaries and taxpayers] may be appropriate and feasible in countries in which the taxpayer that has paid for the arrangement and the advisor relating to the arrangement are located. In countries where affiliates or related parties are located that have not participated in the design of the arrangement, such disclosure forms could be equally relevant, but the tax authorities could encounter some problems in ensuring that foreign advisors comply with form B; and even that taxpayers comply with the 'arrangement details' and 'all parties to the transaction' heads in form A."[46] The response thus called for more cooperation and the exchange of information.

4.2 What this report covers

4.2.1 Methodology

- **This Report provides an overview of MDR regimes, based on the experiences of countries that have such regimes, and sets out recommendations for a modular design of an MDR regime for cross-border arrangements, providing flexibility to allow tax administrations to control the scope and type of disclosures.**
- This Report is based on the **2015 OECD Report**. It includes **comparative analysis of 11 regimes** - global MDR (the 2018 OECD MMDR), regional MDR (DAC 6) and an analysis of the MDR rules of 9 countries (Argentina, Guernsey, Mexico, Canada, USA, UK, South Africa, Germany, and Portugal); and where available, provides analysis of other country experiences with MDR. Further, this Report is prepared with a **focus on developing countries**, and it covers **cross-border arrangements**.
- Based on the comparative analysis, the Report includes an overview of the MDR regimes, objectives, basic elements, and design principles, comparison and coordination with other disclosure regimes, and effectiveness of MDR.
- This Report further includes an analysis of **9 key MDR questions**, for each setting out **options, pros, cons, best practices, and recommendations** for developing countries:
  - who must report;
  - what is defined as reportable cross-border arrangements;
  - which taxes are in scope;
  - what are the hallmarks of reportable arrangements;
  - when information is reported;
  - how can arrangements and taxpayers be grouped;
  - what information must be reported;
  - how to file information and other reporting matters; and

[45] BEPS MONITORING GROUP. (n.d.). *Comments on BEPS Action 12: Mandatory Disclosure Rules*. https://static1.squarespace.com/static/5a64c4f39f8dceb7a9159745/t/5af4a7ea70a6ade56d2557bf/1525983211714/ap12-mandatory-disclosure-rules.pdf

[46] BEPS MONITORING GROUP. (n.d.). *Comments on BEPS Action 12: Mandatory Disclosure Rules*. https://static1.squarespace.com/static/5a64c4f39f8dceb7a9159745/t/5af4a7ea70a6ade56d2557bf/1525983211714/ap12-mandatory-disclosure-rules.pdf, p.6

- consequences of compliance and non-compliance.
- Last, but not least, the Report also includes **a summary of the MDR regime comparison** in Annex 1 and **an expanded comparison** in Annex 2 (excel sheet).

This Report is:

- Based on the 2015 OECD MDR Report as a starting point;
- Includes comparative analysis of global MDR (the 2018 OECD MMDR), regional MDR (DAC 6) and analysis of the MDR rules of 9 countries (Argentina, Guernsey, Mexico, Canada, USA, UK, South Africa, Germany, and Portugal); and where available, providing analysis of other country experiences with MDR; and
- Is prepared with a focus on developing countries.

In preparing the Report we have:

- Conducted literature reviews of existing guidelines on the design of MDR with focus on emerging and developing countries;
- Conducted desk review of 11 MDR regimes (the 2018 OECD MMDR, DAC 6, Argentina, Guernsey, Mexico, Canada, USA, UK, South Africa, Germany, and Portugal) by analyzing the underlying legal frameworks, and, where available, other sources. The review was structured to analyze each regime against 100 questions to enable easy comparison of the same elements across all regimes. Each answer includes reference to the sections of law. This analysis is included as Annex 2 to this Report;
- Used this comparative analysis to:
  - prepare an overview of the MDR regimes, objectives, basic elements, and design principles, comparison and coordination with other disclosure regimes, and effectiveness of MDR;
  - detect similarities, differences, patterns, and tendencies for various options;
- Further used this comparative analysis to elaborate on the following questions, which are set out in detail in Chapter 6:
  - who must report;
  - what is defined as reportable cross-border arrangements;
  - which taxes are in scope;
  - what are the hallmarks of reportable arrangements;
  - when is information reported;
  - how can arrangements and taxpayers be grouped;
  - what information must be reported;
  - how to file information and other reporting matters; and
  - consequences of compliance and non-compliance.
- For each of these topics, we have identified various design options developing countries can use, and compared these options by setting out pros, cons, best practices, and recommendations for developing countries;
- For each chapter we have included a summary upfront; and

- Prepared a summary of the comparison in Annex 1 and included detailed comparison in Annex 2.

MDR guidelines for developing countries ("Report")

This Report provides an overview of MDR regimes, based on the experiences of countries that have such regimes, and sets out recommendations for a modular design of an MDR regime for cross-border arrangements, providing flexibility to allow tax administrations of developing countries to control the scope and type of disclosures.

4.2.2 Scope and assumptions

This Report:

- is designed with the focus on developing countries;
- sets forth recommendations for a modular design of a MDR for cross-border arrangements;
- covers only cross-border arrangements;
- is focused on unilateral MDR rules;
- does not go in depth of other existing disclosure regimes;
- does not cover legal basis for implementing the MDR;
- only briefly covers the recommendations for reporting and technology solutions needed to enable the MDR disclosures; and
- is based on desk research of publicly available information in English and Spanish.

The MDR Guidelines:

- are designed with the focus on the developing countries and therefore, some of the aspects may not be suitable for use for developed countries;
- set forth recommendations for a modular design of a MDR for cross-border arrangements, and do not provide the sample language for the rules, given the wide variety of approaches that countries may take in designing their bespoke approach;
- cover only cross-border arrangements and do not include arrangements that are domestic;
- are focused on unilateral MDR rules (with multilateral approach being highly recommended, and outside of the scope of this Report);
- do not go in depth of other existing disclosure regimes (FATCA, CRS, tax ruling exchanges, information exchange upon request, country-by-country reporting, self-disclosure, tax amnesties, etc.), or interdependencies with such regimes, which need to be addressed upon implementation of the MDR while considering country's existing tax system and rules;
- do not cover legal basis for implementing the MDR;
- only briefly cover the recommendations for reporting and technology solutions needed to enable the MDR disclosures, but does not cover related issues (formats, processes, filing mechanisms, XML

schemas, data safety, data privacy, etc.); a detailed assessment of these matters is outside the scope of this Report. It is recommended that such matters are addressed in next phase in order to provide for a complete set of MDR guidelines for developing countries;

- is based on desk research of publicly available information in English and Spanish as of the end of October 2022[47], with focus on the 11 MDR regimes, and may not reflect other relevant sources (such as, for example, local implementation practices, assessments, etc.) and other not analyzed MDR regimes, which may alter some of the conclusions of this Report.

5 Overview of MDR

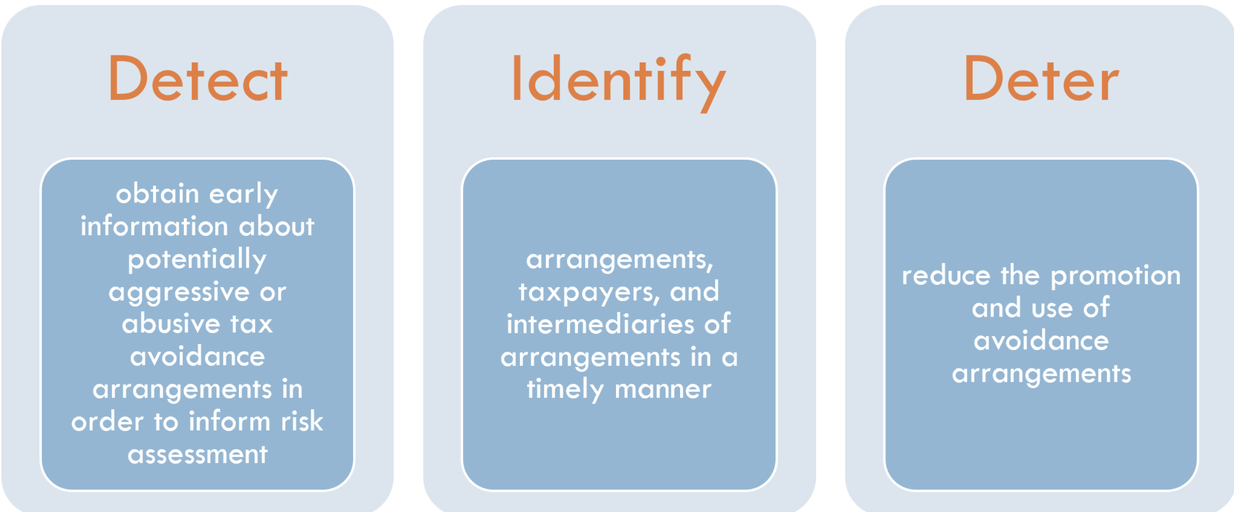
5.1 Objectives

MDR has **three main objectives**:

1. **Detect** - obtain early information about potentially aggressive or abusive tax avoidance arrangements in order to inform risk assessment;
2. **Identify** - arrangements, taxpayers, and intermediaries of arrangements in a timely manner; and
3. **Deter** - reduce the promotion and use of avoidance arrangements.

The impact of MDR in developing countries may extend well beyond tax revenue, as it may enhance the **credibility of the overall tax system** in the eyes of all taxpayers.

The design (and consequently the effect) of MDR regimes vary from one country to the next. The three main objectives of MDR can be summarized as follows[48]:



Firstly, MDR rules allow tax authorities to **detect** potentially aggressive or abusive tax planning arrangements by obtaining early information about such practices which enhances tax authorities' effectiveness in their

[47] A few updates were made to implement in November of 2022 developments by the OECD; however, the other regimes are analyzed up the end of October 2022.

[48] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en

compliance activities and ultimately protects tax revenues. As a result of such early detection, tax authorities may be in a better position to quickly respond to changes in taxpayer behavior through operational policy or trigger legislative or regulatory changes. Further, tax authorities may save resources that may have otherwise been deployed on tax audits, which may not yield necessarily a complete picture of the arrangements in scope.

Secondly, the MDR secures **identification** of defined arrangements as well as the intermediaries and taxpayers of those arrangements. This allows tax authorities to assess and quantify the tax risks, the breadth by which certain arrangements are used and their impacts, as well as participants of such arrangements. This early identification can lead to prompt closure of the opportunities for tax avoidance and evasion through legislative change, as well as through audits of the participants of the arrangements.

Last, but not least, MDR rules act as a **deterrent** for the promotion and use of avoidance arrangements. Participants in the arrangements (intermediaries, advisers, taxpayers, etc.) are put on the notice that a selected arrangement is viewed as potentially aggressive tax planning, and therefore it may shortly be closed down. Further, such reporting may trigger tax authority inquiries or audits, which could result in tax assessments, penalties, and non-recognition of the desired tax benefits, among others.

The impact of MDR in developing countries may extend well beyond tax revenue, as it may enhance the **credibility of the overall tax system** in the eyes of all taxpayers. Confidence and effectiveness of the tax system is undermined if the largest and most high-profile taxpayers are seen to be avoiding their tax liabilities[49], and if - in a cross-border setting - companies operating only in domestic markets are at a competitive disadvantage compared to MNEs which shift their profits across borders to avoid or reduce tax[50].

The effectiveness of MDR regimes in achieving these three key objectives is set out below in Section 5.6.

5.2 Design principles

There are 5 key design principles that developing countries should follow:

1. Start by defining key tax avoidance and evasion risks
2. Define the scope of MDR through hallmarks and other provisions
3. Consider legal framework, political context, and shortcuts
4. Have clear and understandable rules
5. Balance cost of taxpayers and intermediaries versus benefits for the tax administration

[49] OECD. (2014). TWO-PART REPORT TO G20 DEVELOPING WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES. In *G 20*. https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf, p.7

[50] OECD. (2014). TWO-PART REPORT TO G20 DEVELOPING WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES. In *G 20*. https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf, p.16

5.2.1 Starting point - tax avoidance and evasion risks faced by developing countries

- Developing countries should **first define the key tax avoidance and evasion risks** that the MDR will aim to address.
- Such risks could include, but are not limited to:
  - **Base erosion** caused by excessive payments to foreign affiliated companies in respect of interest, service charges, management and technical fees and royalties;
  - **Profit shifting** through supply chain restructuring that contractually reallocates risks, and associated profit, to affiliated companies in low tax jurisdictions;
  - Significant **difficulties in obtaining the information** needed to assess and address BEPS issues, and to apply their transfer pricing rules;
  - The use of techniques to obtain **treaty benefits** in situations where such benefits were not intended; and
  - **Tax loss** caused by the techniques used to avoid tax paid when assets situated in developing countries are sold.

A good starting point for designing the MDR is to determine the key tax avoidance and evasion risks that the MDR will aim to address.

The 2014 OECD "Report to G20 Development Working Group on the impact of BEPS in Low Income Countries" states that the key tax avoidance and evasion risks in developing countries are as follows[51]:

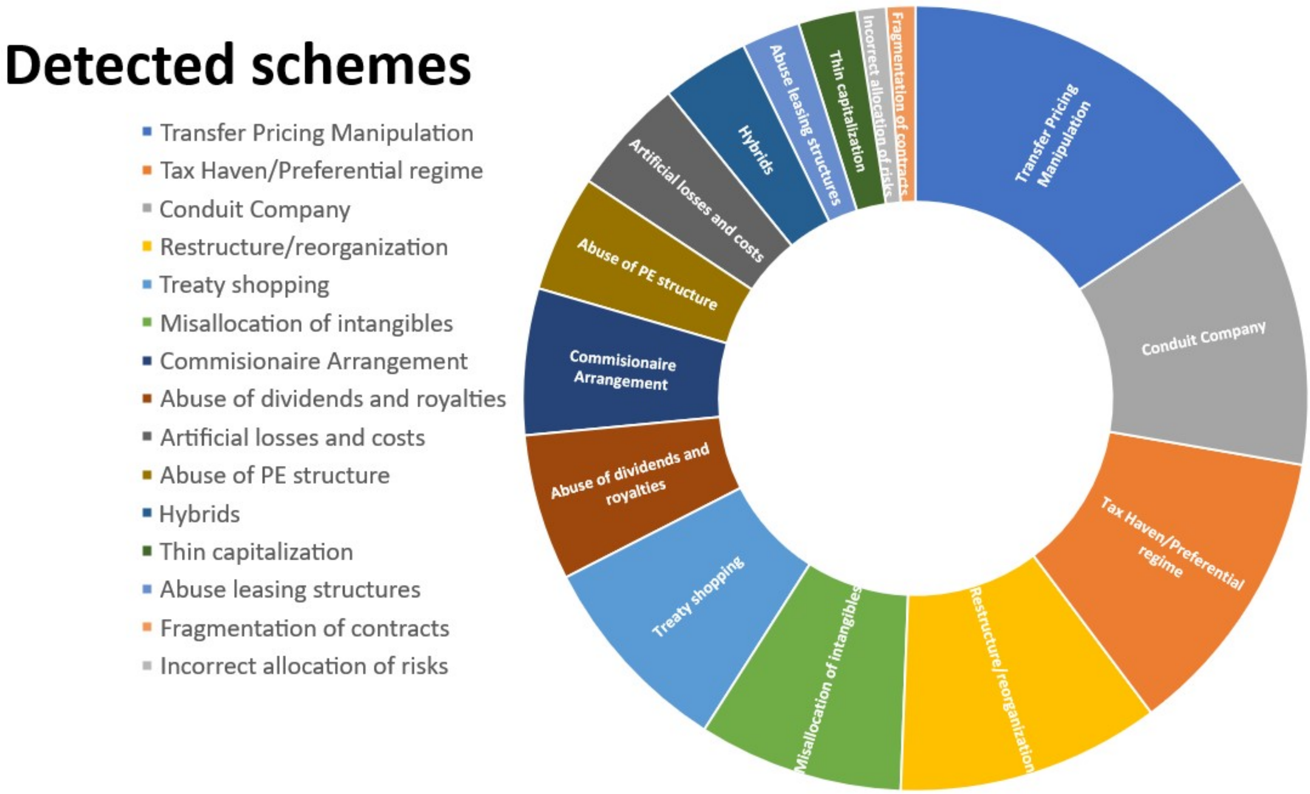
- Base erosion caused by excessive payments to foreign affiliated companies in respect of interest, service charges, management and technical fees and royalties;
- Profit shifting through supply chain restructuring that contractually reallocates risks, and associated profit, to affiliated companies in low tax jurisdictions;
- Significant difficulties in obtaining the information needed to assess and address BEPS issues, and to apply their transfer pricing rules;
- The use of techniques to obtain treaty benefits in situations where such benefits were not intended; and
- Tax loss caused by the techniques used to avoid tax paid when assets situated in developing countries are sold.

Consistent with this view, in 2022 the Inter-American Centre of Tax Administrations (CIAT) presented at the 5th Meeting of the Network of International Taxation the findings of their database on cases regarding base erosion and profit shifting identified by Latin American tax administrations. As the next figure shows, approximately two thirds of all cases relate to (sorted by largest share):

- transfer pricing manipulation;
- special purpose vehicles;
- use of tax havens or preferential tax regimes;
- restructuring/reorganization;
- misuse of intangibles;
- treaty shopping; and

[51] OECD. (2014). TWO-PART REPORT TO G20 DEVELOPING WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES. In *G 20*. https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf, p.8

- abuse of dividends and royalties.



Source: Inter-American Centre of Tax Administrations (CIAT)[52]

MDR country needs to determine which of the challenges the MDR will aim to address, based on its own unique tax risks and circumstances.

5.2.2 Defining the scope of MDR through hallmarks and other provisions

Once developing country has assessed its tax avoidance and evasion risks, as well as accessible resources and capacity, it needs to **decide which arrangements will be in the MDR scope** in order to most effectively address such risks while considering the country's needs and circumstances. In determining the scope, developing countries need to **define the scope of regime through choosing options for each of the 9 key questions** outlined earlier, which are analyzed in detail in Chapter 6.

Given resource and capacity limitations, regarding **hallmarks** developing countries could consider:

- Focusing only on those hallmarks that pose the **greatest risk** to tax revenue and omitting the hallmarks that have little or no relevance.
- Implementing hallmark thresholds or other **narrowing conditions**.
- Addressing the issues related to **information restraints** - to the fact that the reporting persons may not have a full view on the reportable arrangements, as well as the resources and capacity of the tax administration.
- **Future trends**, as well as regional and global rules.

[52] CIAT. (2022). *V meeting of the Network of International Tax*. Presentation by CIAT.

> Hallmarks used by developing countries tend to be related to transfer pricing risks, payments to a recipient that is resident in a non-cooperating jurisdiction, or the recipient is taxed under a preferential tax regime, exploiting asymmetries re: entity, contract, payment or instrument, other distortions (such as, for example hybrid instrument mismatches, significant book-tax differences, etc.); and tax treaty shopping.
>
> A number of hallmarks may be less relevant for developing countries, like hallmarks for the CRS and beneficial ownership (if the country has not adopted the CRS or does not have a beneficial ownership register).

Once the developing country has assessed its tax avoidance and evasion risks, as well as accessible resources and capacity, it needs to decide which arrangements will be in the MDR scope in order to most effectively address such risks while considering the country's needs and circumstances.

In determining the scope, developing countries need to define the scope of regime through choosing options for each of the key questions outlined earlier:

- who must report;
- what is defined as reportable cross-border arrangements;
- which taxes are in scope;
- what are the hallmarks of reportable arrangements;
- when information is reported;
- how can arrangements and taxpayers be grouped;
- what information must be reported;
- how to file information and other reporting matters; and
- consequences of compliance and non-compliance.

Various design options for developing countries are considered in detail in Chapter 6. However, given the importance of hallmarks, it warrants to have a section on hallmark selection and design upfront (which is further elaborated in Sec. 6.4, below).

5.2.2.1 Hallmark selection for developing countries

There are two international MDR frameworks - the 2018 OECD MMDR (for CRS and beneficial ownership) and the DAC6 that serve as a solid starting point for designing MDR frameworks globally. However, since they have been developed by mostly high-income, developed countries, these frameworks do not necessarily contemplate the needs and circumstances of developing countries, which have different tax revenue loss risks, realities, and capabilities, as discussed earlier (See Chapter 4.1.3 Challenges Faced by Developing Countries).

Considering resource and capacity limitations, developing countries may want to consider the below options.

Table 3 Hallmark design choices for developing countries.

Developing countries my consider:	Because:
Focusing only on those hallmarks that pose the greatest risk to tax revenue and omitting the	It is essential that the hallmarks reflect specific country's needs and risks for tax revenue leakage. Such risks differ from one country to country; developing countries often have different risks and

hallmarks that have little or no relevance.	circumstances than developed countries, and limited resources to address such risks. See Chapters 5.2.2.2 and 5.2.2.3 below.
Consider hallmark thresholds or other narrowing conditions.	Another way to make the MDR regime more targeted and impactful is to add limitations, de minimis thresholds and other exceptions. This may be applied in determining who is an intermediary (e.g., in the US, based on their gross income), or to identify relevant hallmarks (for example, by applying a main benefit test, thresholds or defined transactions which are out of scope). Using thresholds and other narrowing conditions allows to narrow down reportable information and saves resources for all parties. However, any threshold or exception may also pose an inherent risk of avoidance. For instance, Mexico added a threshold for a type of hallmark classified as "personalized" as opposed to "general" hallmarks. The result of this was that intermediaries were naming or classifying "general" hallmarks as if they were "personalized" in order to exploit the exception.
Consider the fact that the reporting persons may not have a full view on the reportable arrangements, as well as the resources and capacity of the tax administration.	Local businesses in developing countries are often subsidiaries or branches of a foreign parent, MNE. Such subsidiaries may have a limited view on the global operations, decisions, business and tax strategies of the parent, and their impact locally. In this case, even if a subsidiary located in a developing country is part of a global tax planning arrangement, the subsidiary itself may not know the details of the intermediary or the workings of the arrangement. In such cases, hallmarks based on the relationship with the intermediary (e.g., confidentiality, premium fees, or contractual protection) may be harder to implement and enforce if the intermediary was contracted abroad. For this reason, developing countries may need to add in the MDR provisions an obligation for subsidiaries to inquire information from their parent entity, as well as to define special rules for subsidiaries unable to obtain information.
Consider also future trends, as well as regional and global rules.	There are different lists that are used in MDR regimes, such as those mentioned in the OECD 2015 Final report, the 2018 OECD MMDR, and DAC 6. These hallmarks reflect the current global experience related to tax evasion and avoidance as well as future trends; therefore, they serve as a good starting point in designing the relevant hallmarks. Some of the global hallmarks may have no obvious, immediate application in the specific country. For example, Norway's Committee described that certain disclosure rules were originally rejected in 2009 because they were not aware that standardized tax-reducing solutions were offered in Norway[53]. However, although there was no indication that such standardized solutions became popular in Norway by 2019 either, the Committee underscored that the MDR related to BEPS Action 12 also include other tailored tax planning arrangements and hence recommended their adoption[54]. In addition, Norway considered the importance of international cooperation, exchange of information and consistency of rules, deciding that it is

[53] *NOU 2019: 15*. (2019). Regjeringen.no. https://www.regjeringen.no/no/dokumenter/nou-2019-15/id2661964/?ch=5, chapter 10.3

[54] *NOU 2019: 15*. (2019). Regjeringen.no. https://www.regjeringen.no/no/dokumenter/nou-2019-15/id2661964/?ch=5, chapter 10.3

	more appropriate to implement DAC 6 rules which taxpayers would have to apply in other European countries as well[55].
Consider the experience of and collaborate with the other developing countries	To date, only a few developing countries (Argentina, Mexico, South Africa, Colombia and Costa Rica[56]) have implemented the MDR regime, and few others have attempted to establish one (Brazil, Ecuador, and Colombia). Tax administrations of various developing countries may consider it beneficial to establish regional work groups on MDR matters and collaborate in order to shape MDR regimes that best address current and future needs of the tax administrations.

Source: Apex Consulting

5.2.2.2 Key hallmarks for developing countries

Although countries are free to choose any or all standards, having a MDR with many rules and exceptions and an extended and complex list of hallmarks may create higher compliance costs for intermediaries, taxpayers, and tax authorities, making the MDR regime hard to implement and administer.

In designing an MDR, developing countries may consider focusing only a limited amount of hallmarks that pose the greatest risk to the tax revenues (as outlined above).

Until November 2022, only a few developing countries (Argentina, Mexico, South Africa) have implemented the MDR regime, and few others have attempted to establish one (Brazil, Ecuador, and Colombia)[57]. An analysis of the hallmarks chosen by all six developing countries (including those that are no longer in force) reveal that the chosen hallmarks lack common features with each other and may not be representative of the needs of other developing countries.

Having said that, the most common hallmarks in developing countries that have implemented MDR are addressing some of the risks outlined above:

- payments to a recipient that is resident in a non-cooperating jurisdiction, or the recipient is taxed under a preferential tax regime;
- exploiting asymmetries about entity, contract, payment or instrument, other distortions (such as, hybrid instrument mismatches, significant book-tax differences, etc.); and
- tax treaty shopping.

[55] For example, the Committee stated:” It is also an important consideration that the obligation to provide information on tax arrangements reflects the rules in our neighboring countries to the greatest extent possible. It will therefore depend on a concrete interpretation whether an event is subject to disclosure. However, certain features will not be used by their nature. It is in the nature of the matter that cross-border tax arrangements may entail an obligation to provide information in several jurisdictions. For those obliged to provide information, the burden of the obligation to provide information will increase if the detailed conditions for which tax arrangements must be reported vary from country to country. Identical rules will also have the advantage that, when interpreting the rules, guidance can be obtained from the law of other countries. “ (Chapter 14.6.1): https://www.regjeringen.no/no/dokumenter/nou-2019-15/id2661964/?ch=5#kap14-6-1

[56] As noted earlier, in November 2022, Colombia and Costa Rica adopted the 2018 OECD MMDR.

[57] Colombian and Costa Rican MDR is not further analyzed in this Report and is assumed to closely adhere to the 2018 OECD MMDR wording. The other 6 MDR regimes target broader scope than CRS avoidance and beneficial ownership.

For in-depth analysis, see Section 6.4.3.3.13, below.

5.2.2.3 Hallmarks that may be less relevant

The 2014 OECD report described that sophisticated tax planning structures may be less prevalent in developing countries because structural challenges allow for much simpler (and often more aggressive) tax planning strategies[58]. For instance, the report considered Action 2 on hybrid mismatches and Action 3 on controlled foreign companies (CFC) as having "low" relevance for developing countries. However, several developing countries do have included hybrid mismatches in their hallmarks (South Africa, Argentina, and Mexico)[59].

As for automatic exchange of financial account information based on the OECD's CRS, as of October 2022 there were 43 developing countries that had not yet committed[60] implementing it. Likewise, some countries have been choosing "voluntary secrecy"[61] (to be listed under Annex A of the Multilateral Competent Authority Agreement or MCAA, in order to send but not to receive information) or failing to meet confidentiality agreements that would allow them to receive information from other countries.

With regard to automatic exchanges with the US based on the Foreign Account Tax Compliance Act (FATCA), some countries signed Model 2 non-reciprocal inter-governmental agreements (IGA),[62] meaning that they would send information, but not receive anything from the US. In all these cases where a country will not receive any information based on automatic exchanges, hallmarks on the avoidance of automatic exchange of information are not relevant.

With regard to beneficial ownership information, according to the report on the state of play of beneficial ownership[63] registration around the world, as of 2022 more than 90 jurisdictions have approved laws requiring beneficial ownership information to be filed with government authorities. While Latin America is the second region after Europe with more beneficial ownership registries, the same doesn't apply to other regions including Africa or Southeast Asia. For countries without beneficial ownership transparency requirements, hallmarks on mechanisms to hide the beneficial owner would also be less relevant.

5.2.3 Legal framework, political context, and shortcuts

Developing countries should consider **aligning the MDR regime with existing international regimes**, where possible and desirable. They also need to decide whether to adopt a **stand-alone MDR law and guidance or integrate** into existing frameworks. **Pre-clearing legal challenges**, such as addressing legal privilege for example, is essential for a successful launch of MDR regime.

[58] OECD. (2014). TWO-PART REPORT TO G20 DEVELOPING WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES. In *G 20*. https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf, p.16

[59] See: Section 6.4.3.2.13, below.

[60] OECD. (2020). *AUTOMATIC EXCHANGE OF INFORMATION (AEOI): STATUS OF COMMITMENTS*. Global Forum on Transparency and Exchange of Information for Tax Purposes. https://www.oecd.org/tax/transparency/AEOI-commitments.pdf

[61] Tax Justice Network. (2022). *Secrecy Indicator 18: Automatic Information Exchange*. https://fsi.taxjustice.net/fsi2022/KFSI-18.pdf

[62] *Foreign Account Tax Compliance Act*. (2022, November 4). U.S. Department of The Treasury. https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act

[63] Tax Justice Network. (2020). *Ownership registration of different types of legal structures from an international comparative perspective State of play of beneficial ownership - Update 2020*. https://taxjustice.net/wp-content/uploads/2020/06/State-of-play-of-beneficial-ownership-Update-2020-Tax-Justice-Network.pdf

Further, developing countries may consider it useful to engage in **public dialogue** and consultations with taxpayers and intermediaries when designing the MDR.

One of the issues that impacts the survival of the regime is the political process to implement it.[64] Countries can choose to adopt the global (2018 OECD MMDR) or regional (DAC 6) regime or design their own, unique regimes. Adopting global measures may be perceived as an easier approach as it leverages on global reputation, experience, design, and infrastructure, provides for implementation support and reciprocal exchanges, as well as carries perceived credibility and strength of such measures. Approving purely domestic measures could be more challenging.

An issue consistently raised by developing countries is the need to achieve political buy-in as a prerequisite to making the legislative changes and resource commitment required to counter aggressive tax planning. Lack of political awareness and commitment is cited by many developing countries as a major barrier to effectively introducing and applying rules to address BEPS issues[65].

Based on MDR countries' experience, a formal law referring to the specific issue of aggressive tax planning properly discussed in Congress (e.g., in the US or Canada) may have better chances to sustain legal challenges than incorporating articles about mandatory disclosure in a law that is related to another topic, (e.g., Ecuador incorporated MDR articles in a law related to measures for zones affected by an earthquake) or by-passing Congress altogether and implementing it by a special resolution or provisory measure (e.g., Argentina and Brazil, respectively). In all these Latin American countries there was strong opposition by the private sector against the establishment of MDR, especially in relation to professional secrecy or the constitutionality of establishing a regime in such way, which resulted in different courts revoking the regime (e.g., Ecuador) or suspending the regime at least for some intermediaries (e.g., Argentina). However, a proper discussion in Congress is no guarantee that the regime will be approved, as it happened in Colombia where the draft bill was rejected in 2016. In Belgium, where the MDR was also approved by a law based on DAC 6, the Constitutional Court annulled part of the MDR provisions[66].

One of the key elements to legally avoid a disclosure regime is the issue of **confidentiality and professional secrecy** that could affect the intermediary's obligation to report. It may be for this reason that Norway, which had a special Committee in 2017[67] to discuss and propose a draft bill still has not approved an MDR, but it first decided to approve a law regarding the regulation of professional confidentiality[68]. In Argentina, although the law allows intermediaries to refuse to disclose information based on professional confidentiality, the resolution was still stroke down by courts in different provinces of the country alleging either that it added an excessive burden on intermediaries, which was disproportionate considering the aim

[64] An analysis of the legal basis and challenges to implement an MDR in each country is beyond the scope of this paper.

[65] OECD. (2014). TWO-PART REPORT TO G20 DEVELOPING WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES. In *G 20*. https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf, p.18

[66] Springael, B. (2022, October 19). *Belgium - Constitutional Court assesses Legal Professional Privilege in light of DAC6 reporting obligations*. Lexology. https://www.lexology.com/library/detail.aspx?g=8c6f57dc-f113-454f-b0c5-90d1694d1d56

[67] *NOU 2019: 15*. (2019). Regjeringen.no. https://www.regjeringen.no/no/dokumenter/nou-2019-15/id2661964/?ch=5

[68] *Lov om advokater og andre som yter rettslig bistand (advokatloven) - Kapittel 7 Organisering av advokatvirksomhet*. (2022, May 12). Lovdata. https://lovdata.no/dokument/NL/lov/2022-05-12-28/KAPITTEL_7, sections 32 and 33

of the regulation, that it affected professional secrecy and that it should have been established by a new law, rather than a resolution by the tax administration[69].

There are a number of other arguments used in courts or debates in the analyzed developing countries to oppose MDR[70], as listed below. While legal systems differ from country to country, developing countries may find it useful to review for local relevance, and be better equipped to respond to these challenges in order to assure smoother adoption of MDR. In particular, the MDR have been challenged as **unconstitutional or/because of violation of fundamental rights to:**

- Legal certainty (e.g., if key terms are not properly defined);
- Freedom of enterprise (companies not being able to design their structure and business the way they see fit, as long as it is not strictly illegal);
- Presumption of innocence (if involvement in an arrangement presumes committing tax evasion or avoidance);
- Right to defense (based on presumption of innocence and violation of legal privilege);
- Right against self-incrimination (because the self-reported data could be used against the taxpayer);
- Due process of law (based on the points above);
- Strict legality in tax matters (based on which State power is able to establish new taxes/tax obligations, especially if the MDR was established without a proper legislative process, such as tax administration resolution, or where the MDR was approved by law, but by including MDR provisions in a law that dealt with completely unrelated issues);
- Too much discretion for the tax administration (especially if a “blank” law gives the administration full discretion to define all the details of the MDR, thus undermining the goal of a proper legislative debate, affecting “strict legality in tax matters”);
- Lack of balance (more burden for taxpayers without any benefit in return (e.g., asking for information that is not necessary for MDR purposes));
- Obligation on the wrong party (because the intermediary is a third party in the tax relationship between the taxpayer and the tax administration); and
- Disproportionate based on duplication (information is already required to be reported under other information regimes (e.g., operations with foreign entities)).

A consultation process, as it happened in Norway in 2019[71] or a public consultation in Canada in 2022[72] may

[69] *Un nuevo revés al Régimen de información de planificaciones fiscales tributarias establecido por la AFIP*. (n.d.). https://palabrasdelderecho.com.ar/articulo/3687/Un-nuevo-reves-al-Regimen-de-informacion-de-planificaciones-fiscales-tributarias-establecido-por-la-AFIP

[70] See, for instance in Argentina (https://consejo.org.ar/noticias/2020/Derogacion-RG4838-reclamo-judicial), Brazil (https://revista.ibdt.org.br/index.php/RDTIAtual/article/download/1298/268/3980), Colombia (https://revistaicdt.icdt.co/wp-content/Revista%2078/PUB_ICDT_ART_RODELO%20ARNEDO%20Ana%20Maria_La%20obligacion%20de%20revelar%20esquemas%20de%20planeacion%20fiscal%20o%20abusiva%20en%20el%20ordenamiento%20colombiano_Revista%20ICDT%2078_Bogota_18.pdf) and Ecuador (http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB1dWlkOiczNzEzNjQxZi05ZjAwLTQxMzktOGQyNy0wNWEzOWNhOWExNjMucGRmJ30=)

[71] *Norway - Corporate - Significant developments*. (n.d.). https://taxsummaries.pwc.com/norway/corporate/significant-developments

[72] Department of Finance Canada. (2022, February 4). *Mandatory Disclosure Rules*. Canada.ca. https://www.canada.ca/en/department-finance/news/2022/02/mandatory-disclosure-rules.html

bring more legitimacy to the process and clarify the scope of the MDR regime, while allowing the law to address major concerns of the taxpayers and intermediaries.

5.2.4 Clear and understandable

MDR should be **clear and understandable** because unclear and difficult-to-understand MDR regimes could lead to various interpretations, over or under-reporting, unintentional and intentional non-compliance by taxpayers and intermediaries, and receipt of poor-quality or irrelevant information by tax authorities. Therefore, developing countries should consider the **single regime** approach, with **clear and concise law and with explanatory, detailed guidelines, and defined transaction lists** of what is in and out of scope. Given the resource limitations, developing countries may, where feasible, strive to have simple, mechanical, and limited discretion rules. Lastly, in designing MDR, it is essential to balance the necessity of exceptions with the breadth of information received if no exceptions are made.

If the goal is to obtain relevant information and incentivize compliance, rules should be clear and understandable. Unclear and difficult-to-understand MDR regimes could lead to various interpretations, over and under-reporting, unintentional and intentional non-compliance by taxpayers and intermediaries, and receipt of poor-quality or irrelevant information by tax authorities. In addition, the more complex the regime, the higher the costs to implement MDR and to ensure compliance for all parties involved.

In the context of developing countries' resources and capacity limitations, clear and simple rules are especially important. One way to simplify the rules is to choose provisions, where possible, which are more mechanical in nature, and allow only limited, if any, discretion.[73]

MDR countries have approached the design of MDR rules in various ways:

Table 4 Simple and short v. complex and long MDR regimes

Simple and short	Complex and long
Single regime (e.g., Argentina, Mexico, and the US).	Overlapping of multiple regimes (e.g., Canada and the UK).
Short and self-contained regime (e.g., Argentina, Mexico, the US, Canada, South Africa, and Guernsey).	Long framework including guidelines (more than 50 pages) (e.g., Germany, the UK, and Portugal).
No or minimal exceptions, such as only one de minimis threshold (e.g., Mexico).	Several exceptions and special rules, such as application of the main benefit test (e.g., EU Member States, the UK, and Canada).

Source: Apex Consulting

While some countries have a single regime, the UK has 4 different MDR regimes in force, making the compliance very complicated. Some countries have chosen to adopt the 2018 OECD MMDR into their legislation, either as the only MDR regime (Guernsey), or pairing it with local, unique MDR regimes (South Africa, the UK and Gibraltar).

[73] OECD. (2014). TWO-PART REPORT TO G20 DEVELOPING WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES. In *G 20*. https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf, p.18

A further challenge is to find the right balance between (i) short but overly broad and (ii) lengthy but targeted scope of the MDR regime:

- Some MDR frameworks are rather short, while others provide a lengthier ruleset.
- Short rulesets could run a risk of being too vague, or incomplete. Thus, it is essential that there are definitions for key terms such as “intermediary”, “arrangement”, “tax benefit or advantage”, "taxes in scope”, etc., or that the tax authority issues clarifying guidance. Otherwise, undefined terms can lead to cases of non-compliance or legal challenges with the interpretation of terms, or alternatively to over-reporting and an overflow of information that countries are not prepared to handle. For instance, in the anti-money laundering framework, a sort of “MDR” involves the “suspicious transaction reports” (STR) that banks and other obliged entities must report to the Financial Intelligence Unit to disclose potential cases of money laundering (e.g., a high-value bank transfer). Financial institutions all over the world are over-reporting STRs to avoid penalties[74], which makes it harder for authorities (e.g., the financial intelligence unit) to identify the actual relevant reports.
- The more limited scope of MDR (e.g., the taxes and hallmarks in scope), the easier it may be to comply for the taxpayers and intermediaries, and for tax authorities to receive, analyze and act on the relevant data. However, such a narrowed approach may run a risk that it does not detect new or modified aggressive tax arrangements.
- The MDR regime that includes many detailed requirements, exceptions, thresholds may provide cleaner, more targeted information to the tax authorities, but may be complex and difficult to understand for the taxpayer. This challenge could be addressed by offering clear local guidance to taxpayers (in addition to the MDR law), and sufficient training and feedback on the collected information by the tax authorities. Several countries have considered it useful to issue specific guidance that clarifies the MDR legislation (Portugal and the UK, for example) in simple terms which include descriptive examples of what is in and out of scope, which may clarify the MDR terms, making it easier for the taxpayers to understand the rules.
- Publishing lists of transactions is another good practice in defining what is in and what is out of scope. Several countries define some of their hallmarks by publishing such lists of transactions indicating high, medium, or no relevance; also described as “black”, “grey” or “white” lists. For instance, the US[75] publishes both “listed transactions” (blacklist) of transactions that have been identified as risky for aggressive tax avoidance as well as “transactions of interest” (grey list), where there is suspicion but not sufficient evidence that this transaction is related to aggressive tax avoidance. On the other side of the spectrum, Germany publishes a “whitelist” of transactions that should not be considered tax avoidance and hence should not be reported[76].

5.2.5 Balance cost of taxpayers and intermediaries versus benefits for the tax administration

The scope and extent of any disclosure obligation is key in terms of achieving a balance between tax administration benefits and taxpayer and intermediary costs. The more targeted information the tax authorities request, the easier it may be to make risk assessments and detect new aggressive tax planning arrangements. However, requesting more information than necessary will

[74] *Simmons & Simmons*. (n.d.). https://www.simmons-simmons.com/en/publications/ck0avf7m7noux0b36q6vpvexr/20-suspicious-activity-reports-can-the-system-be-fixed
[75] Sec. 1.6011-4(b)(2) of the US Treasury Regulations
[76] See section 6.4.4.4 Whitelists in this report

increase taxpayer and intermediary costs and may undermine a tax administration's ability to effectively use the data provided.

Therefore, the key to striking the balance is for the tax authorities to **assess which information** would be the most efficient in achieving MDR goals (and will be processed and actioned upon by the tax administration) and **limiting the request** of information that is either not necessary or would yield only minimal benefits to the tax authorities.

The scope and extent of any disclosure obligation is key in terms of achieving a balance between tax administration benefits and taxpayer and intermediary costs. Greater costs can be caused by MDR that is simple but vague as it may lead to overreporting, and thus very untargeted results for tax authorities. Such costs can also be caused by MDR that is overly complex, detailed, and difficult to understand if the taxpayers, intermediaries, and also tax authorities in developing countries lack qualified staff that can fully understand the workings of the rules, exceptions, definitions, and nuances involved (e.g. complex transfer pricing rules, etc.), as aligned with the existing tax legal framework. If rules are overly complex and unclear, taxpayers and intermediaries may require additional human and IT resources to fully understand and implement MDR, or potentially acquire external support, tools, advice, etc. In such a case, the more complex, unclear and abstract the rules, the higher the cost of compliance for the taxpayers and the intermediaries (as well as the risk of error and non-compliance).

The key to cost savings, as indicated earlier, is having clear rules. Clearly defined complex rules with various exceptions (e.g., MBT or de minimis thresholds) that are aligned with existing tax framework and are easily understandable can reduce the transactions to be disclosed significantly and therewith the costs.

The more targeted information the tax authorities request, the easier it may be to make risk assessments and detect new aggressive tax planning arrangements. Tax authorities may also argue that compliance costs by themselves may serve as deterrent and discourage engagement in aggressive tax planning arrangements (if only to avoid the costs of reporting under the MDR).

The EU has realized how heavy of a burden these rules could be and has stated that DAC6 should also aim to avoid excessive costs and administrative strains not only for intermediaries, but tax authorities as well[77]. Similarly, the 2015 OECD Report states, that unnecessary or additional requirements will increase taxpayer costs and may undermine a tax administration's ability to effectively use the data provided[78].

The key to striking the balance is for the tax authorities to assess which information would be the most efficient in achieving MDR goals (and will be processed and actioned upon by the tax administration) and limiting the request of information that is either not necessary or would yield only minimal benefits to the tax authorities. This is also in line with the legislation in several countries where authorities are held accountable for the use of collected information (e.g., the Government Accountability Office[79] in the US).

[77] See: Para 13 of the Preamble of DAC 6. See also: Bianco A., *DAC6 and the Challenges Arising from Its Disclosure Obligation*, EC Tax Review (2021), p. 9.

[78] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 21

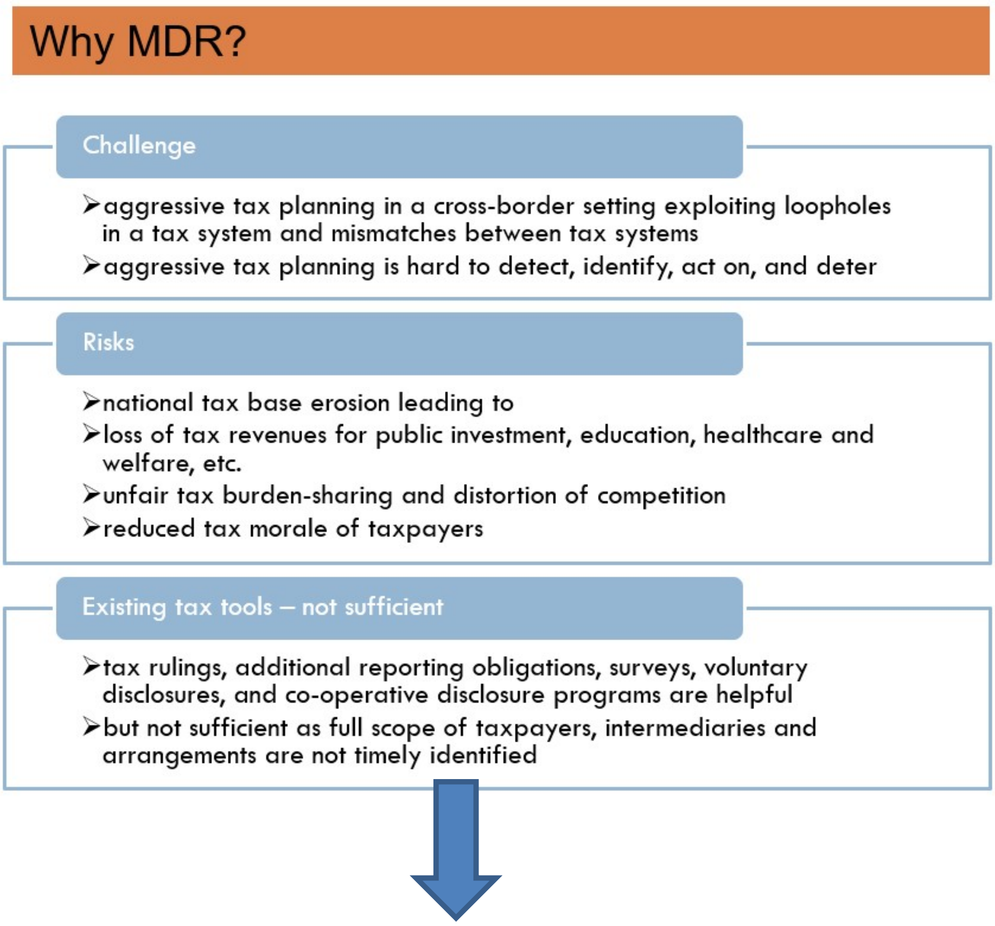
[79] *Abusive Tax Avoidance Transactions: IRS Needs Better Data to Inform Decisions about Transactions*. (n.d.). U.S. GAO. https://www.gao.gov/products/gao-11-493

Further, unnecessary, or additional requirements will increase taxpayer costs, decrease compliance morale, and may undermine the effectiveness of the MDR regime as well as the tax administration's ability to effectively use the data provided.

5.3 Why MDR is recommended despite other disclosure initiatives

Tax audits alone are not sufficient to detect aggressive tax arrangements. Further, **in comparison with other existing disclosure regimes** (tax rulings, additional reporting obligations, surveys, voluntary disclosures, and co-operative disclosure programs), **MDR is more advantageous** because it:

- Covers a broader scope: many (or any) types of taxes;
- Covers a broader range of persons: small or large taxpayers as well as intermediaries, deterring both the demand and the supply side;
- Requires an explanation of the full arrangement;
- It is mandatory and applies across the board;
- It provides an early warning;
- It allows to detect unknown aggressive tax arrangements;
- It is easy to understand;
- Does not require a response from the tax authority (although such is recommended);
- Collecting MDR data does not result in the acceptance of taxpayer's position taken;
- It acts as a deterrent; and
- Does not require commitment from other countries.



Solution – MDR

- detects - obtains early information about potentially aggressive or abusive tax avoidance arrangements in order to inform risk assessment
- identifies - arrangements, taxpayers, and intermediaries of arrangements in a timely manner
- deters - reduces the promotion and use of avoidance arrangements

In comparison with other tax tools, MDR also:

- provides broader scope of taxes and persons in scope (taxpayers and intermediaries)
- explains full arrangement
- is mandatory
- allows to detect known and unknown aggressive tax arrangements
- does not require a response from the tax authority
- data receipt does not result in the acceptance of taxpayer's position

Tax authorities need information to properly assess taxes while preventing aggressive tax planning, evasion, and avoidance in order to preserve country's tax revenues. Tax audits alone are not sufficient. As described by the 2011 OECD report "Tackling Aggressive Tax Planning through Improved Transparency and Disclosure[80]", audits carried out by the tax administration may be insufficient to detect and to prevent aggressive tax planning because the arrangement may be too complex, especially if it involves international features. In addition, by the time the audit takes place it may be too late to address or prevent the aggressive tax arrangement from taking effect. More importantly, one audit may be unable to determine whether it refers to an isolated case or to a pattern or widespread arrangement[81].

The 2015 OECD "Final Report" on Action 12 describes other information initiatives including: tax rulings, additional reporting obligations, surveys, voluntary disclosures, and co-operative disclosure programs.

Table 5 Comparison with other disclosure regimes

Initiative	Description
Advanced tax rulings	Advanced tax rulings may be binding or non-binding. They involve an inquiry from the taxpayer on the applicable framework to a specific transaction or circumstance, such as "could a payment from entity A to entity B based on X circumstance be considered a "dividend" based on Art. Y of law Z?". The issue with tax rulings as a source of information on aggressive tax planning is that it refers to the "tree", but not to the forest. A tax planning arrangement may involve several inter-related transactions, but the taxpayer may only ask about

[80] OECD (2011). Tackling Aggressive Tax Planning through Improved Transparency and Disclosure
[81] OECD (2011). Tackling Aggressive Tax Planning through Improved Transparency and Disclosure, p. 12

	the treatment of a single one, without revealing the rest of the arrangement. The tax administration may believe that there is nothing else other than that particular transaction. On the other hand, tax rulings issued by some countries were considered an element of the tax avoidance arrangement, as revealed by the LuxLeaks scandal. For this reason, BEPS Action 5 requires the exchange of tax rulings among countries and the EU requires the exchange of tax rulings under DAC 3.
Additional reporting obligations	Additional reporting obligations involve the filing of data on transactions, investments, or tax consequences as part of general return filings. Although the level of required information may vary, if it refers to specific transactions or investments, it will hardly reveal and explain complex tax planning arrangements unknown by the tax administration.
Surveys	Surveys include questions for a sub-set of taxpayers as part of risk assessment.
Voluntary disclosure programs	Voluntary disclosure programs entail amnesties where penalties are reduced, in exchange for the taxpayer disclosing its failure to comply, paying tax owed, and paying a reduced or no penalty than would otherwise apply. These programs usually take place on the eve of new sources of information that will be available to the tax administration. For instance, before the implementation of exchanges of automatic exchange of bank account information based on the OECD's Common Reporting Standard, some countries such as Argentina[82] and Indonesia[83] offered voluntary disclosure programs. Taxpayers with undeclared money knew their information would soon become known to authorities, so they had the incentive to reduce the applicable penalties. Tax authorities, while able to charge the full penalty from non-compliant taxpayers, may prefer to save time and resources of going to court. However, these programs tend not to reveal unknown tax avoidance arrangements.
Cooperative compliance programs	Cooperative compliance programs are based on scenarios where mutual trust exists between taxpayers and tax authorities. In such case, there is a joint approach to improving tax management and compliance, so taxpayers make full and true disclosure of material tax issues and transactions to allow authorities to understand the transaction and its impact.
Country-by-country report and transfer pricing information	Country-by-country report and transfer pricing information. Although the 2015 OECD Report does not mention the country-by-country report, as well as the local and master file related to transfer pricing of BEPS Action 13, one could argue that it also involves relevant information, though more related to transfer pricing and general risks rather than a proper explanation of the works of a tax avoidance arrangement.

Source: Apex Consulting

The 2015 OECD Report offers a table[84] comparing each disclosure initiative, in terms of the number of covered taxpayers and third parties (including intermediaries), whether it covers tax avoidance information,

[82] (2016, July 30). *La AFIP reglamentó la Ley de Blanqueo a través de dos resoluciones*. Infobae. https://www.infobae.com/economia/2016/07/29/la-afip-reglamento-la-ley-de-blanqueo-a-traves-de-dos-resoluciones/ AND Calvo, L. L. (2022, March 31). *Blanqueos en la Argentina: cuántos hubo de Alfonsín a Alberto y cómo le fue a cada uno*. ECC. https://www.cronista.com/economia-politica/blanqueos-en-la-argentina-cuantos-hubo-y-como-le-fue-a-cada-uno/

[83] Suryani, S. (2022, June 28). *Indonesia's Tax Amnesty program: pros and cons | International Tax Review*. ITR. https://www.internationaltaxreview.com/article/2a7cstq7ub837k268cn40/indonesias-tax-amnesty-program-pros-and-cons

[84] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p. 24

if it gives certainty to the taxpayer, whether it creates deterrence for the taxpayer or the intermediary, the timing of reporting and its nature (either voluntary or mandatory). In essence, the OECD concluded that compared to other initiatives, MDR is the best approach to tackling aggressive tax planning because of:

- **Broader scope**: many (or any) types of taxes;
- **Broader range of persons**: small or large taxpayers as well as intermediaries, deterring both the demand and the supply side;
- **Explanation of the arrangement:** not just isolated transactions or the applicable law, but how the whole arrangement works;
- **Mandatory and across the board**: taxpayers have to report information defined by tax authorities; unlike the situations where taxpayers are applying for advanced tax rulings, where the scope is defined by taxpayer, or participating in voluntary disclosure programs which are used by some, but not all taxpayers; and
- **Early warning**: timely disclosure enables tax authorities to promptly respond and take measures.

Other advantages of MDR include, among other:

- **Revealing "unknown unknowns"**: surveys and additional reporting requirements may work well when tax authorities know exactly what they are looking for (e.g., a certain type of transaction) and ask taxpayers whether they are engaging in them or not. An MDR, on the contrary, may reveal arrangements that the tax administration was not aware existed.
- **Simple to understand**: while tax rulings or information filed in tax returns may be hard to understand and process by a less sophisticated tax administration, MDR allows to receive targeted, easy to understand information by requiring reporting a description of arrangement, legal basis, tax benefits, involved parties, etc., saving time and resources for the tax administration.

In addition to the reasons for MDR listed above, the MDR is especially useful for developing countries because:

- **Easy to understand:** unlike transfer pricing documentation or advanced tax rulings, MDR should be easy to understand by the tax administration, allowing it to easily detect tax avoidance and evasion, as well as creating awareness of new and existing tax risks.
- **No timeframe to respond:** unlike advanced tax rulings which require authorities to respond to queries within a short, set time, MDR requires no such action from the tax administration (although the later the response, the larger is potential tax revenue loss).
- **Collecting MDR data is not acceptance of taxpayer's tax position:** unlike advanced tax rulings, submission of position taken by taxpayer under MDR does not result in tax authority's approval or acceptance of the reported arrangements.
- **Deterrent:** Even if the authority does nothing with the information disclosed, the burden on taxpayers and intermediaries to disclose information may act as a deterrent (although enforcement is an essential part of a successful and credible MDR regime).
- **Unilateral:** unlike other initiatives such as the automatic exchange of financial account information or access to the country-by-country reporting, MDR can be implemented unilaterally, without needing reciprocity (e.g., CRS, DAC 6) or to have special international agreements with other countries (e.g., CBCR).

5.4 Co-ordination with other disclosure and compliance tools

MDR is the best approach to detect, identify, and deter aggressive tax avoidance arrangements and their participants, but MDR cannot replace other disclosure initiatives. Rather, **MDR needs to work in tandem with other disclosure regimes**, in order to avoid duplication and contradictions, complement other tax disclosure and tools, and cross-check with other sources of information.

Developing countries should if they haven't done it already **implement anti-avoidance measures**, join the OECD Convention on multilateral administrative assistance in tax matters[85] and engage in the exchange of information and other **cooperation on tax matters with other countries**.

As the 2015 OECD Report explains[86], although MDR may be the best approach to detect, identify, and deter aggressive tax avoidance arrangements and their participants, they cannot replace other disclosure initiatives, but rather work in tandem with them.

Table 6 MDR alignment with other disclosure regimes

MDR should be aligned with other disclosure regimes in order to:	Because:
Avoid duplication	If specific information on transactions is already required as part of another information regime, it should not be included in the MDR to avoid duplication. Alternatively, the existing information disclosure regime could be expanded to cover the MDR related to aggressive tax planning arrangement.
Avoid contradictions	Information that is subject to MDR should not be part of voluntary disclosure programs which allow a reduction of penalties.
Complement other tax disclosure and tools	There are several initiatives that may complement MDR, especially to cross-check compliance, including: ➢ **General Anti-Abuse Rule (GAAR):** The information filed as part of the MDR could allow the tax administration to apply the general anti-abuse rule against specific transactions revealed in the disclosure. ➢ **Country-by-country reporting (CBCR):** The information filed as part of the MDR could explain the snapshot offered by the CBCR of BEPS Action 13[87], which discloses global corporate information such as the jurisdictions where a multinational operates, the income and taxes paid in each country, as well as the functions of the MNE's subsidiaries. Tax authorities could cross-check information available from both disclosures, for instance to make sure that all relevant entities of the arrangement have been reported. ➢ **Advanced tax rulings:** Although the tax ruling may refer to a specific transaction, if that type of transaction then becomes the object of the MDR report, tax authorities could check whether the taxpayer who

[85] OECD/Council of Europe (2011), *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol*, OECD Publishing, Paris, https://doi.org/10.1787/9789264115606-en.

[86] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, pp. 22-23

[87] *Action 13 - OECD*. (n.d.). https://www.oecd.org/tax/beps/beps-actions/action13

	requested the ruling had also complied with disclosing the transaction as part of the MDR, or whether the facts and circumstances set forth in the ruling request align with those filed under the MDR. ➢ **Exchange of information:** most tax administrations can exchange information spontaneously and upon request. The exchange of information on tax rulings and MDR information, as well as other types of information (e.g., client list) could reveal cases where taxpayers have failed to comply with the MDR.
Cross-check with other sources of information	➢ **Leaks**: leaks including the Panama Papers, the Paradise Papers, LuxLeaks, Pandora Papers, etc., could be used to cross-check compliance with MDR. Many of these leaks contain communications between taxpayers and corporate service providers where the goal and function of the structure is explained, for instance to hide the beneficial owner. ➢ **Foreign public registries**: information available for free and online in central beneficial ownership registries may reveal information related to arrangements used to hide the beneficial owner or specific arrangements. For instance, Argentina's MDR requires the disclosure of residents who are parties to a foreign trust or a foreign private foundation. Those beneficial ownership registries which offer searches by residence or address, e.g., Denmark, may allow authorities to cross-check whether those taxpayers have disclosed their involvement in foreign trusts. ➢ **Other publicly available information**: countries could use free online public data, such social media, home pages of the taxpayers, etc.

Source: Apex Consulting

In order to benefit from some of the tools mentioned above, developing countries should, if they haven't done it already:

- **Implement anti-avoidance measures**: these could include establishing a GAAR, a list of non-cooperative jurisdictions, terminating double tax treaties that are subject to abuse, etc.
- **Join the OECD Convention on multilateral administrative assistance in tax matters[88] and engage in exchange of information with other countries**: although MDR could be implemented unilaterally, information available in other countries and subject to exchange of information is especially relevant. For this reason, developing countries should, if they have not already, join the OECD Convention on Mutual Administrative Assistance in Tax Matters which allows for tax authority co-operation that ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims and has more than 140 jurisdictions committed to it[89].

5.5 Effectiveness of mandatory disclosure

Given that the full scope of tax evasion and avoidance is unknown, it is difficult to measure the precise tax revenue increase directly attributable to the MDR. However, the success of MDR regime can be measured by **key performance indicators that are aligned with the three main goals of the MDR regime – detection, identification, and deterrence.**

[88] OECD/Council of Europe (2011), *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol*, OECD Publishing, Paris, https://doi.org/10.1787/9789264115606-en.

[89] *Convention on Mutual Administrative Assistance in Tax Matters - OECD*. (n.d.). https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm

With regard to **detection** of arrangements, the success and effectiveness of the MDR regime can be measured by aggressive tax planning arrangements that have been prohibited or discouraged, new aggressive arrangements discovered; and speed at which the tax authorities and /or legislator have responded to the detected tax revenue leakage threat.

With regard to **identification**, the success and effectiveness of the MDR regime can be measured by, among other, the number of types of transactions listed as reportable aggressive arrangements, the number of taxpayers and intermediaries that have filed disclosures or have been disclosed, the value of the tax benefits generated by the arrangements and/or the value of the transaction disclosed, related closed audits, taxes and penalties received, or tax legislation changed; and lists of taxpayers that indicate whether the arrangement is exploited by few or many taxpayers.

With regard to **deterrence**, the success and effectiveness of the MDR regime can be measured by reduction of the filings, reportable taxpayers, reporting intermediaries, and arrangements in scope. In part, it can also be measured by market resistance to the MDR adoption (from the potential persons in scope) that signals that MDR is viewed as a threat to promote or implement aggressive arrangements.

The effectiveness of the MDR will depend on the ability to reduce tax evasion and tax avoidance. Given that the full scope of tax evasion and avoidance is unknown, it may be difficult to measure the tax revenue increase directly attributable to the MDR (apart from the tax penalties collected for failure to comply with the MDR). Even if overall tax revenues have increased, such increase may be due to a wide range of factors (economic growth, improved tax collection efforts, MDR, etc.).

There are good examples of tax revenue increases directly attributable to the MDR regime. For example, based on its “Tax Shelter” disclosure regime, Canada was able to deny close to CAD 6 billion in donation claims, it reassessed over 182,000 taxpayers who participated in these gifting tax shelters, it revoked the charitable status of 47 charitable organizations and obtained CAD 137 million in penalties from intermediaries[90]. Similarly, between 2005 and 2009 the US collected USD 42.9 million in penalties from material advisors and USD 13.6 million from taxpayers for failure to disclose material transactions[91].

Instead of measuring MDR success by referencing collected tax revenues due to a reduction of tax evasion and avoidance, countries may choose to measure other key performance indicators of success related to the following three main goals of the MDR regime, for which some results are available on the UK, Ireland, Canada, and South Africa[92]:

1. Obtain early information to respond;
2. Identify arrangements, taxpayers, and intermediaries; and
3. Act as a deterrent.

[90] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p. 27
[91] *Abusive Tax Avoidance Transactions: IRS Needs Better Data to Inform Decisions about Transactions*. (2011). U.S. GAO. https://www.gao.gov/products/gao-11-493, pp. 38-39
[92] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, pp. 25-28

5.5.1 Obtain early information to respond

One of the main goals of disclosure regimes is to provide an early warning so authorities have time to respond and prevent widespread use of aggressive tax planning arrangements. Considering this, developing countries need to define:

- What situations trigger the reporting – focusing on earlier phases (such as marketing of the arrangement, its availability, or implementation, see Sec. 6.5);
- How long after the trigger the arrangement must be reported (the sooner, the better); and
- Once the MDR is launched, what is the implementation period of the regime and when does the first reporting take place.

Tax authorities need to have a team ready to process this information as fast and efficiently as possible in order to act on it. Delays in processing can result in increased tax revenue loss, among others.

The success and effectiveness of the MDR regime can be measured by, for example:

- Aggressive tax planning arrangements that have been prohibited or discouraged;
- New aggressive arrangements discovered, and made subject to the MDR regime; and
- Speed at which the tax authorities have responded to the detected tax revenue leakage threat.

For example, the UK Disclosure of Tax Avoidance Arrangements (DOTAS) allowed the government to close by legislation 925 of the 2,366 avoidance arrangements disclosed up to 2013. In one case, over 200 stamp duty land tax arrangements were closed by just 3 legislative changes and in one case, the arrangement was closed within a week of the disclosure[93].

Further the success could also be measured by the reduction of the filings of the arrangements. The OECD 2015 Report described that after a high uptake of filings, throughout the years there was a reduction in the number of arrangements reported in Canada, South Africa, the UK, the US[94]. It is very plausible that such reduction is attributable to MDR regime, because of which the intermediaries stopped offering the reportable arrangements, and taxpayers ceased engaging in them. It is also possible that the arrangements were readjusted to become not reportable, intermediaries and taxpayers have become more sophisticated and found new loopholes in the legislation, that there is little concern for the enforcement (lack of) capabilities of tax administrations, or that they have implemented arrangements in foreign countries without MDR.

5.5.2 Identify arrangements, taxpayers, and intermediaries

The effectiveness of MDR can be measured by the number of types of transactions listed as reportable aggressive arrangements, some of which may be detected through the MDR reporting itself. It is estimated that in MDR countries one third of the identified arrangements were obtained thanks to the disclosure regime (in other cases, it was based on audits and data analysis)[95].

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[93] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p. 25

[94] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, pp. 27-29

[95] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p. 26

Listed transactions can range widely:

- Globally, the Aggressive Tax Planning (ATP) Directory is a secure database of tax planning arrangements maintained by certain OECD and G20 countries with more than 400 arrangements.
- The US number of "Listed transactions" went from 13 in the year 2000 to 36 by 2010.[96]
- In 2022, Canada published a sample list of 6 "Notifiable transactions."[97]

Further, the MDR can be measured by **how many taxpayers and intermediaries** have filed disclosures or have been disclosed through the MDR, as well as the size of operations of such taxpayers and/or intermediaries, and the **value of the tax benefits generated by the arrangements and/or the value of the transaction disclosed**. Once tax authorities have taken enforcement steps that have resulted in **closed audits, taxes and penalties received**, **or tax legislation changed**, those results could be quantified as well.

Lists of taxpayers allow both the estimation of the relevance of the arrangement (e.g., one arrangement exploited by few or many taxpayers) as well as cross-checking that all relevant taxpayers have reported the arrangement. Client lists can be mandatory and filed as part of the MDR overall reporting (e.g., Canada, the UK, Germany, and Mexico) or filed upon request from the authority (e.g., the US). In the absence of client lists received from the intermediaries, tax authorities may, of course, themselves analyze the received data to detect commonalities in the arrangements (through narrowly drafted hallmarks or use of technology).

5.5.3 Act as a deterrent

When it comes to deterrence, the empirical evidence is not always clear, but the level of penalties will clearly have some impact. The deterrence can range from criminal sanctions to monetary penalties to reputational impacts and other non-monetary penalties, to other elements outlined below. Their effectiveness will depend on the particular taxpayer or intermediary concerned and calculations as to risk and reward[98]. It may be challenging to precisely quantify the deterrence effect, other than by reduction of the filings, reportable taxpayers, reporting intermediaries, and arrangements in scope.

There are several reasons why MDR serves as a deterrent in preventing aggressive tax avoidance arrangements.

Table 7 Deterrent effect of the MDR

Deterrence effect	Explanation
Coming under the scrutiny of tax authority	Taxpayers and intermediaries may be less willing to engage in aggressive tax planning if they know their arrangements and identities will be disclosed to the tax administration, which may result in such taxpayers becoming higher-risk or persons of interest from the perspective of tax authorities. Further, there is a risk that the tax authorities may challenge the arrangement and deny expected tax benefits, among other.
Compliance and other costs	MDR involves, among other things, filing comprehensive forms, describing the structure, the affected rules, naming all involved parties, and where required, estimating the tax advantage. In cases where taxpayers must disclose information,

[96] *Abusive Tax Avoidance Transactions: IRS Needs Better Data to Inform Decisions about Transactions*. (2011). U.S. GAO. https://www.gao.gov/products/gao-11-493, Sec. 1.6011-4(b)(2), p.11

[97] Department of Finance Canada. (2022, February 4). *Mandatory Disclosure Rules*. Canada.ca. https://www.canada.ca/en/department-finance/news/2022/02/mandatory-disclosure-rules.html

[98] OECD. (2017). *Shining Light on the Shadow Economy: Opportunities and Threats*. https://www.oecd.org/tax/crime/shining-light-on-the-shadow-economy-opportunities-and-threats.pdf, p. 11

	either because the MDR regime requires reporting by both – intermediary and taxpayer, or because the intermediary is not subject to reporting, the taxpayer will incur the cost. Further, failure to report or incomplete reporting may result in substantial penalties to the taxpayer and intermediary. Finally, if the expected tax benefits are denied by the tax authorities, there could be a significant financial impact on the taxpayers involved, which may be further coupled with the costs necessary to pay taxes, penalties and interest owed.
Assumption that the tax administration will act upon the information	Disclosure regimes making information available to tax authorities create a sense of exposure and imminent risk of tax audits, even if the tax authority may not be fully equipped to deal with the incoming reportable information due to its lack of resources, staff, and capabilities to use the information appropriately. For instance, in the case of automatic exchange of financial account information, there were reports on several loopholes and circumvention arrangements (sometimes as easy as transferring the account to a non-participating jurisdiction, including the US). Nevertheless, voluntary disclosure rules were successful in having taxpayers disclose their offshore holdings.
Reputational impact	Some of the countries publish the lists of the intermediaries, transactions, and taxpayers engaged in reportable arrangements. In some other countries, the fact that the taxpayer filed an MDR report may need to be disclosed in the financial statements, if related tax provisions were created. Such public disclosure could substantially damage the reputation of the taxpayer and therefore could serve as a strong motivator not to engage in such transactions. For instance, many individuals and companies had a reputational impact for being listed on some of the famous data leaks from the International Consortium of Investigative Journalists (ICIJ) such as the Panama Papers[99], Paradise Papers[100], or Pandora Papers[101], among many others.

Source: Apex Consulting

6 Options for MDR and best practices

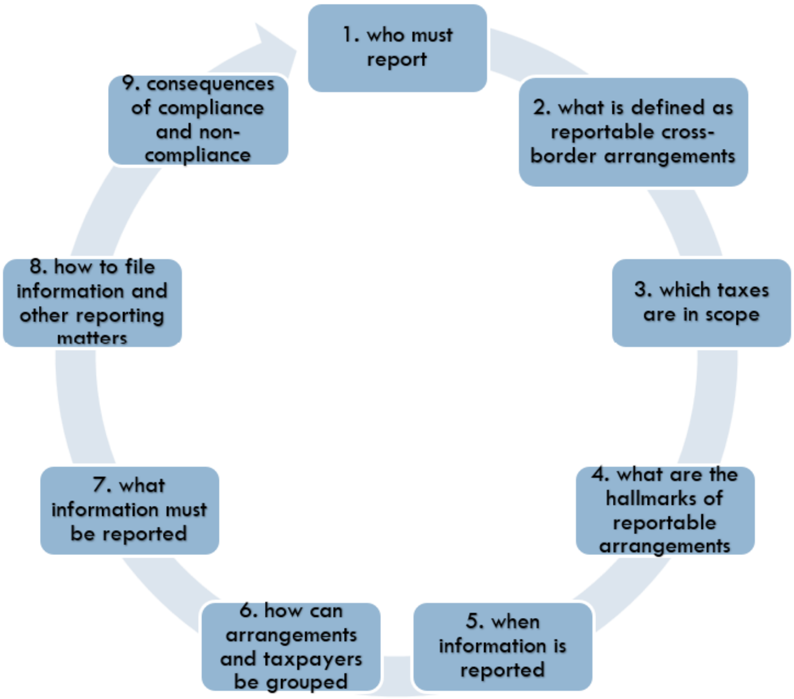
There are 9 key elements that need to be addressed by MDR. For each element, developing country should consider various design options, assessing pros, cons, and best practices so as to assure that the chosen option aligns closely with the MDR goals, and the resources and capacity of developing country.

Figure: Key questions

[99] *The Panama Papers: Exposing the Rogue Offshore Finance Industry*. (2022, March 23). ICIJ. https://www.icij.org/investigations/panama-papers/

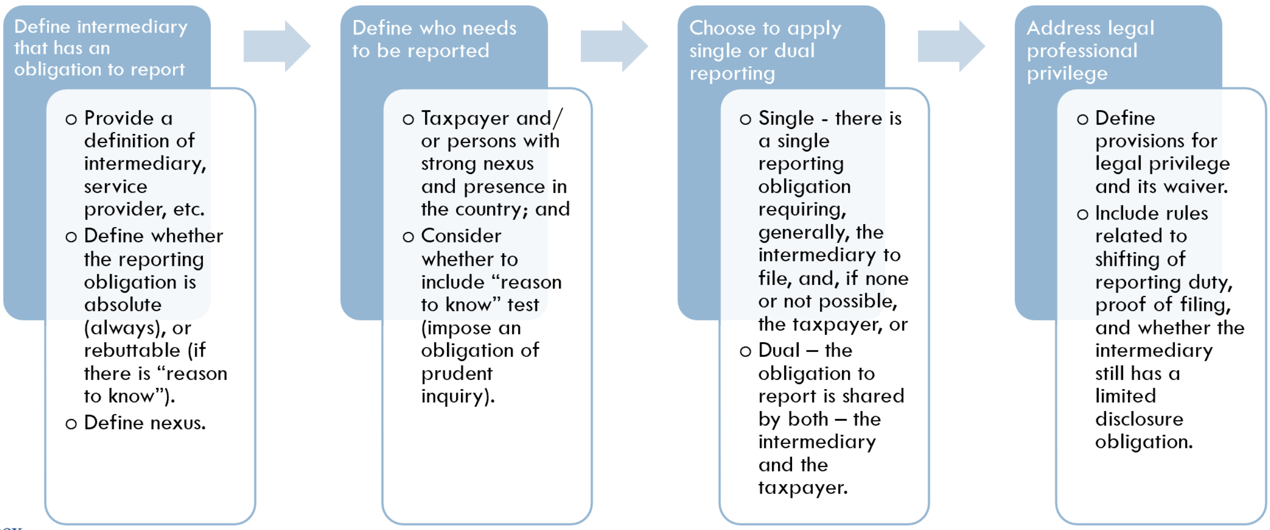
[100] Boland-Rudder, H. (2022, March 24). *Paradise Papers: Secrets of the Global Elite*. ICIJ. https://www.icij.org/investigations/paradise-papers/

[101] Monteiro, C. (2022, October 3). *Pandora Papers*. ICIJ. https://www.icij.org/investigations/pandora-papers/



Source: Apex Consulting

6.1 Who must report



Source: Apex Consulting

6.1.1 Overview and recommendations

In deciding who must report, **developing countries should**:

- Define who has an obligation to report;
- Define who needs to be reported;
- Choose to apply single or dual reporting; and
- Address legal professional privilege.

In defining who has an obligation to report (intermediary, promoter, service provider, etc.), developing country should consider the definition of intermediary/promoter/advisor, to assure that it is clear who has an obligation to report, whether such obligation is absolute (like in case of promoter), or rebuttable (in case of service that does not meet the "reason to know" standard), and define nexus with the reporting country.

In defining who needs to be reported (relevant taxpayer, user, etc.), developing country should consider whether to align the definition with the notion of taxpayer or go broader. If a broader definition is elected, the definition should only consider persons with strong nexus and presence in the country. Further, it could be considered (with caution) whether to limit the definition to the taxpayer that could reasonably have been expected to be aware of the cross-border outcome under the arrangement, provided that prudent inquiries had been made as to the cross-border nature of the arrangement.

Developing countries may choose to apply **single reporting (Option A) or dual reporting (Option B).** If Option A is chosen, there is a single reporting obligation requiring, generally, the intermediary to file, and, if none or not possible, the taxpayer to file. If Option B is chosen, the obligation to report is shared, resulting in dual filing by both – the intermediary and the taxpayer.

Option A – single filing - is adopted by the majority of the MDR countries as it is believed to provide for the most cost-efficient approach, comparatively reduced compliance efforts by intermediaries and taxpayers and reduced inflow of information for tax authorities. However, MDR provisions for this option can be relatively complex, and may have a higher risk of incomplete and incorrect filings. Given potential (or actual) non-availability of intermediary, taxpayer still needs to be prepared to file.

If Option A is selected, then developing countries should clearly define situations when the obligation to report switches to the taxpayer, i.e., when there is no intermediary; the intermediary is offshore (define nexus); or the intermediary asserts legal professional privilege. Developing countries may consider requiring only those taxpayers to report who have taken the first steps to implement the arrangement.

Option B – dual filing - is deployed by the US and Argentina. It has a stronger deterrent effect on both – intermediaries and taxpayers, and a potentially reduced risk of incomplete or incorrect disclosures. However, it requires multiple disclosures of the same transaction, it imposes multiple compliance obligations, generating large volume of reports, and therefore also causing greater administrative and compliance costs.

If Option B is selected, then developing countries should develop a system to accept multiple filings of the same arrangement, that can compare such filings for inconsistencies, allowing further steps in terms of tax audits.

It may be practical to go for a **hybrid option** (currently applied by South Africa and Canada), imposing an obligation to file on all parties, but stating that a single filing suffices to satisfy this obligation if a proof is given to other parties with reporting responsibility.

Whether Option A or B is chosen, the question of **legal professional privilege** needs to be addressed. Developing countries should define provisions for legal privilege and its waiver, and include rules related to shifting of reporting duty, proof of filing, and whether the intermediary still has a limited disclosure obligation.

6.1.2 Definition of intermediary

Existing MDR regimes have various definitions of persons that have an obligation to report or are reportable - “intermediary”, “promoter", “service provider”, “financial advisor”, “taxpayer”, “user” etc.

MDR impose obligations on the intermediaries because they play an integral role in making it easier for taxpayers to defraud the government and evade their tax obligations, such as by offering non-transparent structures and arrangements to conceal the true identity of the individuals behind the illegal activities undertaken. This type of activity has become a subject of international and domestic political significance and has been covered extensively in the media. These scandals also reveal the broader problem of tax evasion in society: that it undermines public confidence as well as the public purse and gives rise to an increasing sense of instability caused by inequality[102].

By targeting the intermediaries who actively pursue opportunities for, and conceal the commission of, aggressive tax arrangements, tax authorities can disrupt a crucial part of the planning and pursuit of criminal activity. This allows to address all tax evasion and avoidance, as well as provides for a cost-effective solution that reduces the accessibility of sophisticated means of tax evasion and avoidance, thereby narrowing the opportunities for such arrangements to take place[103].

The definition of an intermediary / promoter / service provider is centered around the depth of involvement and the knowledge of facts (reason to know). Below is a summary of common principles and themes (but note that the application differs from one MDR regime to another, as further analyzed below).

- **An intermediary** is typically a broad term and means a person that has an obligation to report due to being either a promoter or a service provider. (Throughout this Report we have used the term “intermediary” to encompass any of these terms).
- **A promoter** under definitions of most MDR regimes is an intermediary who designs, markets, organizes, makes available for implementation, or manages the implementation of a reportable cross border arrangement. It is implied that the promoter will have a full understanding of the material aspects of the arrangement. This is because to effectively carry out the activities of a promoter, the intermediary will need to fully understand the material aspects of the arrangement[104].
- **A service provider** - a person who does not fall under the definition of a promoter but knew or should have known that the person is providing services regarding a reportable arrangement. The standard of

[102] OECD (2021), Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes, OECD, Paris. http://www.oecd.org/tax/crime/ending-the-shell-game-cracking-down-on-the-professionals-who-enable-tax-and-white-collarcrimes.htm, pp. 7 and 39

[103] OECD (2021), Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes, OECD, Paris. http://www.oecd.org/tax/crime/ending-the-shell-game-cracking-down-on-the-professionals-who-enable-tax-and-white-collarcrimes.htm, pp. 7 and 39

[104] *IEIM621030 - Promoter - HMRC internal manual - GOV.UK*. (2022). https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim621030

knowledge - "reason to know" is essential for this definition. If a person is willfully ignorant of certain aspects of the arrangement, to try to avoid being an intermediary, the tax authorities should still consider that such a person was an intermediary[105].

It is interesting to observe that countries in development (Mexico, Argentina, South Africa) have simple definitions of intermediary, there are no qualifications attached, and the definition refers to a person who in broad terms is principally responsible for the design, marketing, sale, and implementation of the reportable arrangement (see the nuances, below). Whereas other regimes tend to have more extensive definitions, with a few qualifiers attached, such as, for example:

- The intermediaries in scope are differentiated between the "promoter" and "service provider"; "service provider" must meet "reason to know" standard to have an obligation to report (DAC 6, OECD);
- Intermediary is only in scope if the actions were carried out during intermediary's relevant/ordinary business (the UK, Mexico, Canada);
- Intermediary is only in scope if the transaction is above certain thresholds (the USA);
- Further qualifiers concern the nexus with the country of reporting, see Sec. 6.1.3 below.

Below is a comparison of various approaches taken by the MDR countries in defining intermediaries.

Table 8 Definitions of intermediary

2018 OECD MMDR (and countries that have adopted it, like, e.g., Guernsey)	Promoter Service provider Reason to know	"Intermediary" means[106]: (a) any person responsible for the design or marketing of a CRS Avoidance Arrangement[107] or Opaque Offshore Structure ("Promoter"); and (b) any person that provides Relevant Services in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure in circumstances where the person providing such services could be expected to know that the Arrangement or Structure is a CRS Avoidance Arrangement or an Opaque Offshore Structure ("Service Provider"). 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.

[105] *IEIM621030 - Promoter - HMRC internal manual - GOV.UK*. (2022). https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim621030

[106] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, Sec.1 Rule 1.3.

[107] Here and later in the Report we have left the capitalized letters and other punctuation as used in various MDR regimes and legal texts.

DAC 6 (and EU Member States)	Intermediary Provider of aid, assistance, or advice Reason to know	"Intermediary" means[108] any person that designs, markets, organizes, or makes available for implementation or manages the implementation of a reportable cross-border arrangement. It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably 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, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could not be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding.
UK	Intermediary Promoter Service Provider "In the course of relevant business"	For DAC 6 purposes, the UK uses the same definition as above[109], but clarifies that these are two distinct types of intermediaries: those who design, market, organize, make available for implementation or manage the implementation of a reportable cross border arrangement (in this guidance referred to as "promoters"), and those who undertake to provide aid, assistance or advice in relation to the designing, marketing, organizing or implementing of a reportable cross border arrangement ("service providers"). Under the UK DOTAS regime[110], another element is interesting – a person would only be a promoter, if the arrangement was designed, marketed, made available or implemented "in the course of a relevant business" of such person. A relevant business is a business involving provision of services relating to tax, or National Insurance contributions, and a business carried on by a bank or a securities house. What constitutes a relevant business is widely drawn. Deciding if a relevant business is being carried out requires an assessment of the nature of the overall trade, profession, or business through which the relevant services were or are being provided.
Argentina	Financial advisor	Financial advisor is a natural or legal person, and other entities which, in the ordinary course of their business, aid, assist, advise, counsel, give opinions or perform any activity related to the implementation of tax planning, if they participate in such implementation directly or through third parties. It also includes financial advisors directly or indirectly linked, associated and/or connected to a foreign financial advisor who implements a tax planning arrangement[111].

[108] Official Journal of the European Union. (2018). *EU DAC 6 Directive - COUNCIL DIRECTIVE (EU) 2018/822 of 25 May 2018*. Art. 3.21

[109] Sec. IEIM621010 (Definition of Intermediary) of DAC 6 Guidance

[110] *Disclosure of tax avoidance schemes: guidance*. (2022, June 15). GOV.UK. https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes. Sec. 307 of the Finance Act 2004; Sec. 3.2

[111] Art. 6.b. of the Tax administration (AFIP) General Resolution 4838/2020

South Africa[112]	Participant Promoter Party to an arrangement	Participant, in relation to an arrangement, means— (a) a promoter; (b) a person who directly or indirectly will derive or assumes that the person will derive a tax benefit or financial benefit by virtue of an arrangement; or (c) any other person who is party to an arrangement listed in a public notice.[113] Promoter, in relation to an arrangement, means a person who is principally responsible for organizing, designing, selling, financing, or managing the arrangement.[114]
Mexico	Financial Advisor “Ordinary course of business”	Financial Advisor[115] is a natural or legal person (tax resident or with a permanent establishment in Mexico) who, in the ordinary course of business, performs tax advisory activities, and is responsible for or involved in the design, marketing, organization, implementation or administration of an entire reportable arrangement or who makes available an entire reportable arrangement for implementation by a third party.
Canada	Advisor Promoter “In the course of business” Accepts consideration	Under Canadian RTAT regime[116], an “advisor” means a person who provides any contractual protection in respect of a transaction or series of transactions, or any assistance or advice with respect to creating, developing, planning, organizing, or implementing the transaction or series, to another person. A “promoter” means a person who (a) promotes or sells an arrangement that includes or relates to a transaction or series of transactions;(b) makes a statement or representation that a tax benefit could result from an arrangement in furtherance of the promoting or selling of the arrangement, or (c) accepts consideration in respect of an arrangement in paragraph (a) or (b). Under Canadian TS regime[117] a "promoter" in respect of a tax shelter means a person who in the course of a business (a) sells or issues, or promotes the sale, issuance or acquisition of, the tax shelter, (b) acts as an agent or adviser in respect of the sale or issuance, or the promotion of the sale, issuance or acquisition, of the tax shelter, or (c) accepts, whether as a principal or agent, consideration in respect of the tax shelter, and more than one person may be a tax shelter intermediary in respect of the same tax shelter.
US	Material advisor	A “material advisor”[118] is defined as any person who provides any material aid, assistance, or advice with respect to organizing,

[112] This is approach for the South African MDR regime. South Africa has also adopted the 2018 OECD MDR, and thus regarding the CRS and beneficial ownership hallmarks South Africa applies the definitions of the 2018 OECD MDR (See Sec. 9. A. Rule 1.3. of the CRS regulations of October 9, 2020: https://www.sars.gov.za/wp-content/uploads/Legal/SecLegis/LSec-Reg-2020-01-Notice-R1070-GG43781-International-Tax-Standard-9-October-2020.pdf)

[113] Sec.39 of the Tax Administration Act No. 28 Of 2011 (GG 35491 of 4 July 2011): https://sars.mylexisnexis.co.za/#

[114] Sec. 34 of the Tax Administration Act No. 28 Of 2011 (GG 35491 of 4 July 2011): https://sars.mylexisnexis.co.za/#

[115] Art. 197, para. 2 & 3 of the Fiscal Code, see also p. 4 of the Web-service Guidance: http://omawww.sat.gob.mx/EsquemasReportables/Paginas/documentos/Guia_03.pdf

[116] *Canadian Income Tax Act*. (2022). https://laws-lois.justice.gc.ca/eng/acts/i-3.3/, Sec. 237.3.1 of the Canadian Income Tax Act (RTAT) [2013]

[117] Sec. 237.1.1. of the Canadian Income Tax Act (TS) [1989]

[118] Sec. 6111-3.b of the Internal Revenue Code; US Summary guidance Summary Guidance: https://www.irs.gov/businesses/corporations/abusive-tax-shelters-and-transactions

	Thresholds	managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction and who directly or indirectly derives gross income more than threshold amounts of: ➢ Listed Transactions: $10,000 for a natural person and $25,000 for all other entities; and ➢ Non-Listed Transactions: $50,000 for a natural person and $250,000 for all other entities

Source: Apex Consulting

Other exceptions and clarifications are put forward under a few MDR regimes. For example, under the UK Guidance[119], the **employee** of an intermediary or reporting taxpayer will not be treated as an intermediary. The same applies in Portugal; Portuguese guidance further clarifies that if instead of an employment agreement the services were provided under the service agreement, then such a person will be treated as an intermediary as well[120]. The UK has several other special provisions, such as, for example, a provision for group companies (only the entity that carries out activities is an intermediary; not the whole group[121]), and a rule for a permanent establishment of non -UK/non- EU business (only permanent establishment activities would trigger the "intermediary" status; not the activities of the business as such; advice provided by the non-UK, non-EU overseas firm that was not connected with the business of the UK permanent establishment would not bring the firm into scope as an intermediary)[122].

It is recommended that the developing countries carefully consider the definition of intermediary/ promoter/advisor, to assure that it is clear who has an obligation to report, whether such obligation is absolute (like in case of promoter), or rebuttable (in case of service that does not meet the "reason to know" standard), whether the intermediary needs to be doing these actions as a part of business, and be paid for it, or whether only arrangements over certain threshold would put intermediary in scope.

In developing countries, the later conditions requiring that the intermediary acts as a part of business, is paid for the services, or limiting the arrangements only to certain amounts of threshold could potentially open room for abuse (splitting the transactions below the thresholds, structuring payments for services differently, etc.), and therefore should be considered with caution.

6.1.3 Definition of relevant taxpayer / taxpayer / user

The definition of relevant taxpayer / taxpayer / user[123] also varies from country to country, differentiating at which trigger point the person becomes reportable (and may have a reporting obligation as well). The options range from being potential user (2018 OECD MMDR), to person to whom arrangement is made

[119] Queen's Printer of Acts of Parliament. (2020). *The International Tax Enforcement (Disclosable Arrangements) Regulations 2020*. https://www.legislation.gov.uk/uksi/2020/25/contents/made, Sec. 13

[120] Portuguese Tax Authority. (2021). *GENERAL GUIDELINES Concerning the reporting obligation to the Tax and Customs Authority of certain internal or cross-border arrangements with tax relevance*. https://info.portaldasfinancas.gov.pt/pt/docs/Conteudos_1pagina/Communication_Regime_of_arrangements/Statement_of_communication/Documents/General_Guidelines_cross_border_arrangements.pdf Sec. II 1; p. 7 of the Portuguese Tax Authority (the PTA) guidance (the Guidance) on the application of Law Nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law Nr. 53/2020 of 11 August 2020.

[121] *IEIM621070 - Groups of Companies - HMRC internal manual - GOV.UK*. (2016, updated 2022). https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim621070

[122] *IEIM621110 - Practical application of rules for overseas intermediaries - HMRC internal manual - GOV.UK*. (n.d.). https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim621110

[123] For the purposes of this report, these terms are used interchangeably.

available, is ready to implement or has implemented (DAC 6), to being person who will derive tax benefits (South Africa).

While in some countries the definition of the taxpayer is directly rooted and thus aligned with the tax code (Canada, the US, for example), in number of the countries the definition of the "relevant taxpayer" could go beyond the definition of "taxpayer" in the national tax law (see, e.g., Portugal that refers to person "carrying out activity in Portuguese territory"). Special definitions apply in the case of 2018 OECD MMDR and other regimes with hallmarks for CRS avoidance and obscuring of beneficial owners, which refer to users of CRS avoidance arrangements, and beneficial owners.

See the table of comparison, below:

Table 9 Definitions of taxpayer

2018 OECD MMDR	Reportable taxpayer User Beneficial Owner Client	"Reportable Taxpayer" means, in respect of a CRS Avoidance Arrangement, any actual or potential user of that Arrangement and, in respect of an Opaque Offshore Structure, a natural person whose identity as a Beneficial Owner cannot be accurately determined due to the Opaque Offshore Structure[124]. "Beneficial Ownership" or "Beneficial Owner" shall be interpreted in a manner consistent with the latest Financial Action Task Force Recommendations and shall include any natural person who exercises control over a Legal Person or Legal Arrangement[.][125] The term "Client" means any person who requests an Intermediary to, or on whose behalf, or for whose benefit, an Intermediary make(s) a CRS Avoidance Arrangement or Opaque Offshore Structure available or provide(s) Relevant Services in respect of such an Arrangement or Structure. The term Client includes users or potential users and persons acting as a representative or agent of a Reportable Taxpayer. The term Client also includes persons who obtain assistance or advice from an Intermediary on the design, marketing, implementation or organization of a CRS Avoidance Arrangement or Opaque Offshore Structure with the intention of subsequently promoting that Arrangement or Structure to third parties.[126]
DAC 6	Relevant Taxpayer	"Relevant taxpayer" means 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.[127]

[124] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, sec.1 Rule 1.4. (l)

[125] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, sec.1 Rule 1.4. (c)

[126] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, sec. 88

[127] Art. 3.22. of DAC 6

Portugal	Relevant taxpayer Nexus	A relevant taxpayer is any person or entity without a legal personality to which a reportable arrangement is made available for application or who is prepared to apply a reportable arrangement or who has applied any stage or part of a reportable arrangement[128], provided that the taxpayer meets the following conditions: a) is a resident, for tax purposes, in Portuguese territory; b) has a permanent establishment in Portuguese territory that benefits from the mechanism; c) receives or generates income in Portuguese territory; d) carries out an activity in Portuguese territory; e) is registered, for tax purposes, in Portugal.[129]
Germany	Relevant taxpayer Nexus	Any individual or legal entity, partnership, association, or trust to whom the cross-border tax arrangement is provided for implementation, who is willing to implement the cross-border tax arrangement or who has taken the first step to implement the cross-border tax arrangement.[130] The User must have a German nexus.[131]
UK	"Any person who enters into any transaction forming a part of arrangement"	Under the DOTAS regime, where there is no intermediary in respect of an arrangement with a duty to disclose it, it must be disclosed by any person in the UK who enters any transaction forming part of it[132]; for social security contributions, this would not apply to SMEs. The disclosure only applies to arrangements that have been implemented — there is no requirement to disclose mere plans and ideas.[133] Under the DAC 6 regime, the "relevant taxpayer" has the same meaning as under DAC 6.

[128] Sec 2.1.(c) of Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements

[129] Sec 2.1.(c) of Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements

[130] Bundesministerium der Finanzen. (2021). *Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*. https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steuerthemen/Abgabenordnung/2021-03-29-Anwendung-Vorschriften-Pflicht-Mitteilung-grenzueberschreitende-Steuergestaltungen.pdf?__blob=publicationFile&v=3, Art. 138d.5 of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, p. 2875 on 30 December 2019 (BGBl. I no. 52/2019, at 2875). Art. 2.4.1 of the Guidelines

[131] Bundesministerium der Finanzen. (2021). *Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*. https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steuerthemen/Abgabenordnung/2021-03-29-Anwendung-Vorschriften-Pflicht-Mitteilung-grenzueberschreitende-Steuergestaltungen.pdf?__blob=publicationFile&v=3, Art. 138g.3 of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, p. 2875 on 30 December 2019 (BGBl. I no. 52/2019, at 2875). Art. 3.2.1.3 of the Guidelines

[132] *Disclosure of tax avoidance schemes: guidance*. (2022, June 15). GOV.UK. https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes, see Sec. 310 of the Finance Act 2004, Sec. 3.12 of HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022

[133] *Disclosure of tax avoidance schemes: guidance*. (2022, June 15). GOV.UK. https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes, sec. 3.12 of HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022

Argentina	Taxpayer	Taxpayer who participates in international tax planning arrangement[134]
South Africa[135]	Participant Person deriving tax benefit	South Africa defines the term participant to include an intermediary, a person who directly or indirectly will derive or assumes that the person will derive a "tax benefit" or "financial benefit" by virtue of an "arrangement"; or any other person who is party to an "arrangement" listed in a public notice.[136]
Canada	Taxpayer	There is no mention of the user, but the MDR provisions are sections of the income tax act, so the general definition of taxpayer would apply.
US	Any person subject to tax	Any person subject to any internal revenue tax.[137]
Mexico	Taxpayer Permanent establishment	Taxpayer or non-resident with a permanent establishment, or those with operations with foreign related parties that generate tax benefits in Mexico.[138]

Source: Apex Consulting

It is important to have a clear definition of reportable persons (who themselves may have primary or secondary obligation report). Developing countries need to consider whether to align the definition with the notion of taxpayer (as the US and Canada have done) or go broader (like in Portuguese example). If a broader definition is elected, tax authorities may find it challenging to enforce the rules onto persons that may not have strong enough nexus and presence in the country, therefore nexus needs to be defined.

In order to prevent mandatory disclosure from imposing an undue burden on taxpayers, a developing country may decide that disclosure in the reporting jurisdiction should only be required where the taxpayer could reasonably have been expected to be aware of the cross-border outcome under the arrangement. A person can reasonably be expected to be aware of a cross-border outcome where the person has sufficient information about the arrangement to understand its design and to appreciate its tax effects. This will include any information obtained by a taxpayer under the obligation to make reasonable inquiries but, in the context of transactions with unrelated parties, the test should not be taken as requiring a person to gather more information than it could have been expected to obtain during ordinary commercial due diligence on a transaction of that nature[139]. However, in context of developing countries, such provision should be considered with great caution as it may lead to abuse of the MDR compliance by circumventing the definition of a reportable taxpayer.

Further, the definition of a relevant taxpayer needs to be considered in conjunction with the potential reporting obligations. Here it is recommended to follow the UK example and require only those taxpayers to report who have taken the first steps to implement the arrangement. The fact that intermediaries have approached the taxpayer with an arrangement should not by itself serve as an obligation of the taxpayer to report.

[134] Art. 6.a of the Tax administration (AFIP) General Resolution 4838/2020

[135] This is an approach of the South African MDR regime. South Africa has also adopted the 2018 OECD MDR, and thus regarding the CRS and beneficial ownership hallmarks South Africa applies the definitions of the 2018 OECD MDR. See: Sec. 9. A. Rule 1.3. of the CRS regulations of October 9, 2020

[136] Sec.39 of the Tax Administration Act No. 28 Of 2011 (GG 35491 of 4 July 2011)

[137] Sec. 7701 (Definitions) of the Internal Revenue Code

[138] Mexico. (2019). *Federal Fiscal Code*. https://bado.mx/en/Codigo-fiscal-de-la-federacion, art. 198, para. 2

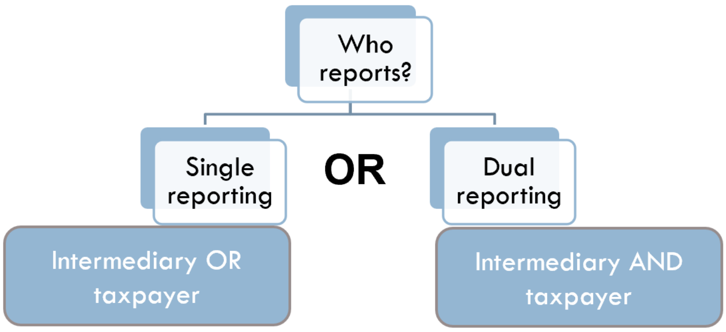
[139] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, paras 249, 250

Last, but not least, in most MDR jurisdictions the mere participation in the arrangement is sufficient to trigger the MDR. By comparison, South Africa has linked the taxpayer/user definition to a taxpayer's intention to derive tax or financial benefits from the arrangement, which would mean that tax authorities may be challenged on the grounds that taxpayers did not report because there was no such intention. Given the possibility to use this condition as an escape from reporting obligations, it is not recommended that developing countries use this option, unless the "intention" is defined objectively and can be easily enforced (see Sec. 6.4.4.2, below, regarding definition and application of the "main benefit test").

6.1.4 Options A and B

There are two different approaches based on existing MDR regimes:

- Option A: Single reporting – requiring MDR reporting by intermediary OR taxpayer (primary obligation with intermediary if none – taxpayer); and
- Option B: Double reporting – requiring MDR reporting by intermediary AND taxpayer



Under both options, the intermediary needs to report, which serves a two-fold goal. Firstly, the intermediary who designs and sells an arrangement inevitably has more information on the arrangement and its details. Secondly, imposing an obligation on the intermediary is designed to have an impact on the intermediary's behavior and to discourage the design and promotion of tax avoidance and evasion arrangements.

6.1.4.1 Option A: single reporting – intermediary OR a taxpayer (primary obligation with intermediary, if none – taxpayer)

Under this approach intermediaries have the primary obligation to disclose and, if such disclosure is made, then taxpayers are not required to provide details of the arrangement to the tax administration, unless:

- There is no intermediary;
- The intermediary has no nexus with the country of taxpayer; or
- The intermediary has invoked the legal professional privilege.

This option is deployed by both – the 2018 OECD MMDR, and by the DAC 6, and consequently all the countries that have adopted these regimes (the EU member states, the UK, Guernsey, and South Africa). Furthermore, this approach is also applied by several MDR countries in implementing their unilateral MDR regimes (the UK, South Africa, and Mexico).

The underlying rationale is that the intermediary is better placed to report as it is likely to be the intermediary who has a better understanding of the arrangement and the tax benefit arising under the arrangement, particularly in the context of a widely marketed, cross-border arrangement.

If there is a reporting intermediary, some MDR countries have provided some additional obligations on the taxpayer to strengthen the qualifications for this option:

- **Requiring a proof of reporting:** For example, in South Africa, the participant's obligation to disclose only falls away when the participant has obtained written confirmation that disclosure has been made by an intermediary or another participant[140].
- **Requiring a limited reporting:** In some other cases (the UK, Germany[141], Mexico[142], and South Africa), the taxpayer does not have a duty to directly report the reportable arrangement but has a duty to provide to the tax authorities the arrangement reference number received from the intermediary, or proof that another participant has filed, hence alerting indirectly of the taxpayer's involvement in the arrangement. In this case, the taxpayer still has limited duty to report[143]. In the UK, the taxpayer that participated in a reportable cross-border arrangement must include in his/her annual tax return (and following years, for which tax advantage continues) not just the arrangement reference number of the reportable cross-border arrangement, but also the tax advantage of the reportable cross-border arrangement in relation to the UK relevant taxpayer for that tax year or accounting period[144].

If there is no reporting intermediary, the taxpayer will only have an obligation to report if there is no intermediary, the intermediary has no nexus with the country of taxpayer, or the intermediary has invoked the legal professional privilege.

6.1.4.1.1 There is no intermediary

Where the reportable arrangement has been designed and implemented by the taxpayer (typically, by a MNE in-house corporate and tax team), then the taxpayer needs to report itself. In such a case, it could be considered to require disclosing only arrangements that have been actually implemented.

6.1.4.1.2 The intermediary has no nexus with the country of taxpayer

While the MDR applies to all intermediaries, in a cross-border setting where the intermediary does not have a nexus with the taxpayer's country, it is recognized that there are practical difficulties in ensuring compliance. Therefore, the local taxpayer is considered better placed to disclose the reportable arrangement to the tax authority.

A MDR jurisdiction should only require disclosure of a cross-border arrangement where the arrangement has a substantive connection with its jurisdiction (i.e., the arrangement results in domestic tax consequences for a domestic taxpayer). MDR should avoid imposing disclosure obligations on persons that are not subject to tax in the reporting jurisdiction or on advisers or intermediaries that do not provide any advice or assistance in respect of domestic taxpayers or transactions. This means that MDR should only apply to domestic taxpayers and their advisors and only in respect of arrangements that have a material impact on domestic tax outcomes in the reporting jurisdiction, i.e., the arrangements that pose significant risks to tax revenue collection. Limiting disclosure in this way ensures that reporting obligations are not imposed in circumstances

[140] MDR is included in Sec. 34 – 39 of the Tax Administration Act No. 28 Of 2011 (GG 35491 of 4 July 2011): https://sars.mylexisnexis.co.za/#, See Sec. 37.1, 37.2, and 39.

[141] Sections 138f and 138k of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, p. 2875 on 30 December 2019 (BGBl. I no. 52/2019, at p. 2875)

[142] Mexico. (2019). *Federal Fiscal Code*. https://bado.mx/en/Codigo-fiscal-de-la-federacion, arts. 197.8 and 202 (paragraphs 1 and 2)

[143] See, e.g., the UK DOTAS regime Sec. 14.5. https ://www.gov.uk/government/publications/disclosure-of-tax-avoidance-arrangements-guidance/disclosure-of-tax-avoidance-arrangements#introduction

[144] Queen's Printer of Acts of Parliament. (2020). *The International Tax Enforcement (Disclosable Arrangements) Regulations 2020*. https://www.legislation.gov.uk/uksi/2020/25/contents/made, sec. 5

where the tax authority would have limited practical ability to enforce them, or where there are no domestic tax revenues lost.[145]

Once the ability to require disclosure is established, further consideration needs to be given to how a taxpayer in the reporting jurisdiction would comply with additional information requirements for cross-border arrangements. Simply because a cross-border arrangement results in domestic consequences for a taxpayer does not mean that the taxpayer will be aware of the offshore elements of the arrangement or be able to properly understand its effects, or have full information required for the disclosure[146].

At the same time, disclosure obligations should not be framed in such a way as to encourage a taxpayer to deliberately ignore the offshore aspects of an arrangement simply to avoid disclosure. This could be problematic in developing countries, if subsidiaries or branches of foreign MNEs were able to claim that they have no information or details on arrangements designed and acquired abroad by their parent entities or head offices.

The way the countries have in practice approached this exception is by including a reference to nexus in the definition of the "intermediary". For example, the 2018 OECD MMDR defines[147] an intermediary as any person with respect to a CRS Avoidance Arrangement or Opaque Offshore Structure if that person:

(a) makes that CRS Avoidance Arrangement or Opaque Offshore Structure available for implementation, or provides Relevant Services in respect of that CRS Avoidance Arrangement or Opaque Offshore Structure through a branch located in [Jurisdiction Name],

(b) is resident or has its place of management in [Jurisdiction Name]; or

(c) is incorporated in, or established under the laws of, [Jurisdiction Name].

By comparison, the DAC 6[148], instead of branch refers to having a permanent establishment in EU Member State through which the services with respect to the arrangement are provided (broader scope) and adds persons that are registered with a professional association related to legal, taxation or consultancy services in a Member State.

In practice, taxpayers would have to engage in dialogue with such an intermediary early on to establish whether the intermediary has sufficient nexus for reporting. If the outcome is that the intermediary does not fall under the definition of the MDR intermediary due to nexus considerations, then the result would be as if the there was no intermediary, and hence the taxpayer becomes the primary responsible party for the reporting.

6.1.4.1.3 The intermediary has invoked the legal professional privilege

Legal professionals that design, promote, sell, or help implement reportable arrangements come directly within the definition of an intermediary and therefore should be subject to reporting obligations. However, these reporting obligations may be in contradiction with the local legislation that sets forth legal professional privilege rules. Consequently, the MDR countries have addressed this issue in several ways.

[145] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 233

[146] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p. 234

[147] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, Sec.2 Rule 2.1.

[148] DAC 6, Art. 3.21.

Most commonly, where the intermediary cannot disclose the information due to the legal professional privilege, then such intermediary must notify other intermediaries. If there is no other intermediary, then the intermediary must provide the taxpayer with written notice of the taxpayer's obligation to report, effectively shifting the burden of reporting onto the taxpayer[149]. This rule applies under 2018 OECD MDR, DAC 6, and in Argentina[150] and the UK[151].

There are a few qualifications that can be put in place, for example:

- **Qualified disclosures** by the intermediary still possible or required– under the 2018 OECD MMDR, the intermediary is not required to disclose the information pursuant to professional secrecy but only to the extent the disclosure would reveal confidential information held by an attorney, solicitor, or other admitted legal representative with respect to a client[152]. In Guernsey, notwithstanding the legal privilege, an advocate or other legal adviser may be required to give the name and address (including an electronic address) of a client.[153] The same applies in Germany,[154] Finland and Poland (for marketable tax arrangements); and Sweden requires the filing by intermediaries of anonymous or simplified information when legal privilege is claimed[155].
- **Waiver possible** - the client may have an option of waiving any right to legal privilege and, if that is invoked, the obligation to disclose remains with the intermediary[156].
- **Privilege applies only to lawyers** - in Cyprus, Finland, Ireland, Gibraltar, Latvia, the Netherlands, Slovenia, and Sweden, only law firms can be exempt from the reporting obligation due to the legal professional privilege (by comparison, in Croatia, Czech Republic, Germany, Luxembourg, Romania, Slovakia and Spain (and also likely in Belgium, where the matter is still being investigated), legal privilege can also apply to tax advisors and auditors, and in some cases, notaries. In Austria, Bulgaria, Estonia,

[149] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, e.g., Art. 8ab.5 of DAC 6 and Rules Sec. 2. Rule 2.4. (b), Rule 2.5.

[150] Art. 8, AFIP Resolution 4838/2000.

[151] Sec. 3.11 of HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

[152] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, Sec. 2. Rule 2.5.

[153] Box 23, P. S. P. P. (n.d.). *Mandatory Disclosure Rules - States of Guernsey*. https://www.gov.gg/mdr, sec.7 of the Income Tax (Approved International Agreements) (Implementation) (Mandatory Disclosure Rules) Regulations, 2020.

[154] Bundesministerium der Finanzen. (2021). *Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*. https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steuerthemen/Abgabenordnung/2021-03-29-Anwendung-Vorschriften-Pflicht-Mitteilung-grenzueberschreitende-Steuergestaltungen.pdf?__blob=publicationFile&v=3, sec. 3.1.5 of Guidance

[155] EY, *DAC 6 Newsletter: DAC 6 local country status and reporting trends* (2020), p. 3. https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/tax/ey-dac-6-newsletter-may-2020.pdf

[156] Sec. 3.11 of the UK DOTAS regime set forth in HMRC Guidance Disclosure of tax avoidance arrangements: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-arrangements-guidance/disclosure-of-tax-avoidance-arrangements#introduction

France, Poland and Portugal, legal privilege applies even more broadly to all the professionals subject to professional secrecy as per national legislation[157]).

In several countries, the privilege cannot be asserted, or the obligation reverts to the intermediary, for example:

- **No privilege**
  - No privilege can be asserted under the South African MDR regime (but can under the South African CRS / beneficial ownership MDR regime).
  - In the U.S.[158] the privilege of confidentiality applicable to communications between tax practitioners and taxpayers does not apply to written communications regarding defined tax shelters (such include, in general, a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of federal income tax[159]).
  - In Mexico, disclosure of arrangements shall not constitute a breach of a professional secrecy obligation[160].
  - Italy and Lithuania do not provide any exemption from the reporting obligation[161].
  - In the U.K., where a lawyer is "marketing" an arrangement, the lawyer cannot assert legal privilege, and the lawyer should disclose the arrangement.[162]
- **Subsidiary obligation to report** - In Portugal, if the intermediary invokes a legal or contractual duty of secrecy, there remains a subsidiary obligation to communicate to the tax authority if the relevant taxpayer has not notified the intermediary that the relevant taxpayer has reported.[163]

The next table summarizes the cases where legal or professional privilege may prevent disclosures by intermediaries:

Table 10: Legal privilege in MDR countries

Legal privilege prevents disclosures	Legal privilege partially prevents disclosure / requires limited disclosures	Legal privilege does not apply - disclosures are not prevented
DAC 6 (based on national laws), Argentina, Canada, UK	OECD 2018 MMDR, Guernsey, Germany, Finland, Poland, Sweden, Portugal (subsidiary obligation)	Mexico, South Africa, US, Italy, Lithuania; certain UK disclosures

Source: Apex Consulting

[157] EY, *DAC 6 Newsletter: DAC 6 local country status and reporting trends* (2020), p. 3. https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/tax/ey-dac-6-newsletter-may-2020.pdf
[158] Sec. 7525(b) of the Internal Revenue Code
[159] Sec. 6662(d)(2)(C)(ii) of the Internal Revenue Code
[160] Mexico. (2019). *Federal Fiscal Code*. https://bado.mx/en/Codigo-fiscal-de-la-federacion, art. 197, para. 7
[161] EY, *DAC 6 Newsletter: DAC 6 local country status and reporting trends* (2020), p. 3. https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/tax/ey-dac-6-newsletter-may-2020.pdf
[162] Sec. 3.11 of the UK DOTAS regime set forth in HMRC Guidance Disclosure of tax avoidance arrangements: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-arrangements-guidance/disclosure-of-tax-avoidance-arrangements#introduction
[163] Sec. 14 of Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements (DAC 6 or the Directive). https://dre.pt/dre/legislacao-consolidada/lei/2020-138516384, sec.1; 4.2. of the Portuguese Tax Authority (the PTA) guidance (the Guidance) on the application of Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020 of 11 August 2020

The MDR provisions on legal privilege can have crucial political and judicial consequences on the legitimacy and effectiveness of the MDR. In many countries, especially developing ones, the opposition by intermediaries based on legal or professional privilege can jeopardize the approval or the survival of the MDR framework. For instance, judicial objections based on violations of the attorney-client privilege (or other professional privilege) affected the attempts to implement the MDR in Ecuador[164]. In Argentina, where the MDR regime was approved in 2020, the tax administration decided in 2022 to temporarily suspend the regime in the whole country after courts in almost half of all provinces in the country suspended the regime based, among others, on professional privilege.[165] Judicial opposition was also successful in Belgium, where in October 2022 the Constitutional Court partially annulled reporting obligations considered contrary to the legal professional privilege and referred questions to the European Court of Justice.[166] Norway followed a different approach. In a likely attempt to prevent legal challenges to the MDR framework, Norway suspended actions to approve an MDR regime (as proposed by its 2019 Committee[167]). Instead, in 2022 Norway approved a law regulating professional confidentiality[168]. This law may help reduce legal challenges if and when Norway finally approves an MDR regime.

In summary, developing countries designing MDR rules must address the issue of legal privilege, following the national laws on this matter. If the privilege can be invoked, it needs to be ensured that the obligation to report is eventually fulfilled by the taxpayer (i.e., the intermediary needs to inform the taxpayer of the duty to report, and the taxpayer needs to confirm back that the taxpayer has in fact reported), or if not, it is advisable that the obligation reverts to the intermediary, avoiding situations where nobody has reported. Alternatively, as a minimum, the legal professional asserting legal privilege must advise clients of their obligation to disclose and must also advise the tax administration that the legal professional's obligation to disclose has not been complied with because of the assertion of legal professional privilege, and further – the name and address of the client could be disclosed. Further, the developing countries need to confirm whether the privilege can be waived.

6.1.4.1.4 Single arrangement, but multiple intermediaries, taxpayers, jurisdictions

There may be situations where there could be potential multiple obligations to report the same arrangement because there are two or more intermediaries involved (for example, tax consultant and a law firm), and two or more taxpayers involved (for example, various entities of the same MNE group), or where the filing for the same arrangement needs to be made in more than one country.

Most countries that follow the single filing option have put forth rules that state that only one filing would suffice, provided that the non-filing intermediary and taxpayers have received proof of filing from the intermediary or taxpayer who filed. For example, the UK Regulations state that the UK intermediary in relation to a reportable cross-border arrangement does not have an obligation to file, if it has filed in

[164] Government of Ecuador. (2022). *CORTE CONSTITUCIONAL DEL ECUADOR*. http://www.edicioneslegales-informacionadicional.com/webmaster/directorio/EC76_2022.pdf

[165] *La AFIP suspendió un régimen que provocó el rechazo de los contadores y de la Justicia por vulnerar el secreto profesional*. (2022, September 3). Infobae. https://www.infobae.com/economia/2022/09/03/la-afip-suspendio-un-regimen-que-provoco-el-rechazo-de-los-contadores-y-de-la-justicia-por-vulnerar-el-secreto-profesional/

[166] Springael, B. (2022, October 19). *Belgium - Constitutional Court assesses Legal Professional Privilege in light of DAC6 reporting obligations*. Lexology. https://www.lexology.com/library/detail.aspx?g=8c6f57dc-f113-454f-b0c5-90d1694d1d56

[167] Committee's 2019 Report, pp. 141-142.

[168] Secs. 32 and 33 of the Act on lawyers and others who provide legal assistance (Lawyer Act): https://lovdata.no/dokument/NL/lov/2022-05-12-28/KAPITTEL_7#%C2%A722

another Member State or another intermediary has filed and there is supporting evidence for that[169]. The UK relevant taxpayer must make a return within the specified period setting out the reportable information in relation to the reportable cross-border arrangement if (a) a UK relevant taxpayer participates in a reportable cross-border arrangement, and (b) no intermediary is required to file the reportable information in relation to the reportable cross-border arrangement or with the competent authority of member State, unless a UK relevant taxpayer has filed in another member state, or another relevant taxpayer agreed the reportable cross-border arrangement with the intermediary, or manages the implementation of the reportable cross-border arrangement, and the relevant taxpayer has evidence that the reportable information in relation to the reportable cross-border arrangement has been filed or returned[170].

In summary, if the developing country has chosen to implement Option A (single filing), then it would be advisable to also provide for rules dealing with scenarios of multiple intermediaries / taxpayers, assuring that there is a proper chain of handling over the reporting responsibility, assuring that at least one party has filed in the MDR country, and the rest have a proof of such filing.

DAC 6 further has provisions for situations where the same intermediary is liable to file information on reportable cross-border arrangements with the competent authorities of more than one country. In such cases, the DAC 6 provides for cascading priority rules (filing to be in the country that is first listed (a) the Member State where the intermediary is resident for tax purposes, or (b) the Member State where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided; (c) the Member State which the intermediary is incorporated in or governed by the laws of; or (d) the Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services).

Note that this provision can only work where there is a reciprocal regime established for reporting (like in DAC 6 and 2018 OECD MMDR). Where a developing country is designing its own bespoke MDR regime, the fact that the intermediary has filed in another country regarding the same arrangement would not secure automatically that the local tax authorities are notified, in the absence of agreed information exchange mechanisms with the other countries.

Various other alternatives exist. For example, Portuguese law requires that if there is more than one intermediary, the reporting obligation is incumbent on all intermediaries involved in the same mechanism to be communicated[171].

6.1.4.2 Option B: double reporting – intermediary AND taxpayer

Some countries have chosen to require double reporting from both – the intermediary and the taxpayer. Such is the case in Argentina, which requires the taxpayer and the fiscal advisor to report[172] and the USA.[173]

[169] Sec.3. of the International Tax Enforcement (Disclosable Arrangements) Regulations 2020

[170] Sec.4. of the International Tax Enforcement (Disclosable Arrangements) Regulations 2020

[171] Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements (DAC 6 or the Directive). Sec. 10.7. https://dre.pt/dre/legislacao-consolidada/lei/2020-138516384

[172] Art. 7 of the Tax administration (AFIP) General Resolution 4838/2020

[173] Specifically, Regs. Sec. 1. 6011-4 provides that taxpayers who are required to file a tax return and that participate in a "reportable transaction" for any tax year must disclose information about the transaction to the IRS in a

Some countries have developed a more hybrid approach – at the outset, all parties have an obligation to file, but the obligation ceases once one person has reported and the others have received proof of it. For example, in South Africa, the obligation to report is placed on all participants (which include an intermediary, a person who directly or indirectly will derive or assumes that the person will derive a "tax benefit" or "financial benefit" by virtue of an "arrangement"; or any other person who is a party to an "arrangement" listed in a public notice[174]), and the obligation only goes away if the taxpayer obtains a written statement from any other "participant" that the other "participant" has disclosed the "reportable arrangement".

Similar approach applies in Canada, where the reporting duty is placed upon every person for whom a tax benefit results, or would result from the reportable transaction, every person who has entered into, for the benefit of a person described earlier, an avoidance transaction that is a reportable transaction; every advisor or intermediary who is or was entitled to a fee in respect of any of those transactions or every person who is not dealing at arm's length with an advisor or intermediary in respect of the reportable transaction and who is or was entitled, either immediately or in the future and either absolutely or contingently, to a fee [..]. Such duty ceases once one of the persons has reported[175].

The legal privilege rules should still be considered. That is, if the intermediary is subject to the legal professional privilege, such an intermediary would not report. However, since the taxpayer has an independent obligation to report, there should not be any obligation of the intermediary to notify the taxpayer of the obligation to report.

If this option is chosen, there is no need for arrangement reference numbers, as all the parties have an obligation to file.

6.1.5 Comparison of option A and B

Table 11 Comparison of option A (single reporting) and option B (dual reporting)

	Pros	Cons	Best practices and recommendations
Option A (Single reporting)	➢ Reduced compliance efforts by intermediaries and taxpayers as only one party needs to file. ➢ Reduced inflow of information for tax authorities to review, hence less resources needed to process it.	➢ Relatively complex rules as to who is responsible for reporting, shifting of that obligation, and proof of filing. ➢ Higher risk of incomplete and incorrect filings. ➢ Typically, a taxpayer needs to be prepared to file (i.e., complete all pre-filing steps), thus,	➢ Adopted by the majority of the MDR countries as it is believed to provide for the most cost-efficient approach, especially in situations where there may be multiple intermediaries, taxpayers or countries concerned. ➢ Canada imposes reporting on all participants but only

manner and time specified in the regulations. Secs. 6111 and 6112 further require any material adviser with respect to a reportable transaction to disclose information about the transaction to the IRS and to maintain a list of persons he or she has advised with respect to it. See also: the OECD 2015 Final report that confirms that the user and material advisor both must file the report (Annex E, p. 91).

[174] Sec.39 of the Tax Administration Act No. 28 Of 2011 (GG 35491 of 4 July 2011): https://sars.mylexisnexis.co.za/#

[175] Sec. 237.3.2, 237.3.4 (RTAT regime) of Income Tax Act (RTAT) [2013]

		substantial compliance efforts are still required.	one report is required (with proof).
Option B (dual reporting)	➢ A stronger deterrent effect on both – intermediaries and taxpayers. ➢ Reduced risk of incomplete or incorrect disclosures (ability to cross-check all filings for the same arrangement).	➢ Multiple disclosures of the same transaction. ➢ Two or more parties need to report, hence multiple compliance obligations. ➢ Large volume of reports to be processed and analyzed by tax authorities. ➢ Greater administrative and compliance costs for the taxpayers, intermediaries, and potentially those of the tax administration. ➢ If reporting is identical, no added value to the tax authority.	➢ This approach has been deployed by the US and Argentina. ➢ Stronger deterrence effect but greater administrative and compliance cost, larger volume of data to analyze.

Source: Apex Consulting

6.1.5.1 Pros

The benefit of Option A is that there is a single report that discloses the details of the arrangement and the parties involved, among others. If the tax authority would feel that the information is insufficient, many MDR regimes allow further inquiries related to the filing.

The main benefit of Option B – dual reporting - is that it will have a stronger deterrent effect on both the supply (intermediary) and demand (taxpayer) side of avoidance arrangements.

A dual disclosure obligation also reduces the risk of incomplete or incorrect disclosure as the taxpayer's disclosure can be checked against the intermediary's disclosure to assess whether the information provided is accurate and comprehensive.

The option chosen is likely to have an impact on a country's choices in respect of other elements of a MDR, for instance if there is a dual reporting obligation which requires both taxpayers and intermediaries to disclose, there is no need for the use of arrangement reference numbers.

6.1.5.2 Cons

Option A – to assure that the single filing is done, relatively complex rules need to be put in place, as to when the obligation shifts to the taxpayer, proof of filing, keeping still limited filing obligations with the other parties (intermediary – the name and address of the taxpayer; or taxpayer – inclusion of the arrangement reference filings in the annual returns), etc., which adds to the complexity of the rule execution.

Secondly, there is potential for greater risk of incomplete or incorrect filing as the taxpayer may not have a full view of the structure or impacts of the cross-border arrangements, particularly, if the structure was designed abroad and includes tax impacts in various countries.

In addition, while it has been argued that having a single filing involves less compliance efforts, in practice, many taxpayers could challenge this statement. Given that intermediaries may invoke legal professional privilege or otherwise may not be required to report (due to the lack of nexus or otherwise), the taxpayers need to have an independent assessment log of all transactions that can potentially be in scope as reportable arrangements and need to be prepared to file. That means that taxpayers need to have an internal process and procedures in place in detecting arrangements that are or potentially can be in scope for reporting, collect all the relevant reportable data, coordinate with the intermediaries as to whether they will report in fact, or not (if not – be prepared to file). Hence, the only difference with Option B in many cases could be that the taxpayer does not need to do the actual reporting with the tax authorities.

Option B - This approach imposes a more extensive disclosure obligation on taxpayers compared with Option A and triggers multiple disclosures of the same transaction. Because of that, it is likely to give rise to greater administrative and compliance costs for the taxpayer, and potentially those of the tax administration as well. To the extent that the filings are coordinated by the reporting parties, and are identical, multiple filing would just add costs for all parties concerned without any meaningful benefits.

6.2 Reportable cross-border arrangement

6.2.1 Overview and recommendations

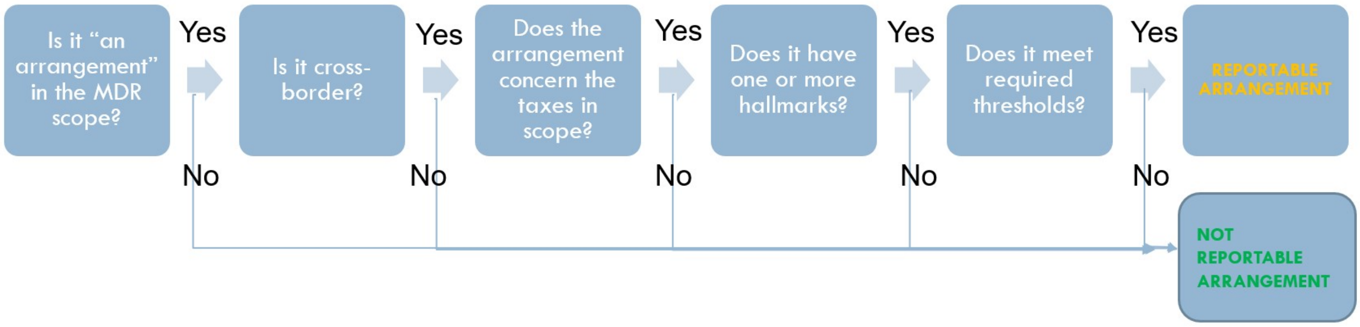
An arrangement is only reportable if all 5 elements below are met:

- It is "an arrangement" in the MDR scope;
- It is cross-border;
- The arrangement concerns taxes in scope;
- It has one or more hallmarks; and
- If required by law, it meets required thresholds (main benefit test or other thresholds).

It is recommended to define the **term "arrangement"** in order to avoid ambiguities and ease the implementation. Typically, the "arrangement" is defined broadly and is generally aimed to capture an agreement, arrangement, transaction, plan or understanding, whether or not legally enforceable; and it includes all the steps and transactions that bring it into effect.

The **temporal scope** of the "arrangement" needs to be defined (i.e., date as of which the MDR **enters into force**), and special consideration needs to be made to modifications of the pre-existing arrangements.

The **territorial scope** of the "arrangement" needs to be defined, too. Developing countries should consider limiting the MDR regime to **cross-border arrangements only or also include domestic arrangements** (capturing both would yield the best results). Further, the **term "cross-border arrangement"** needs to be clearly defined by setting out conditions, or, alternatively, have clearly drafted specific hallmarks that cover cross-border arrangements.



An arrangement is only reportable if all 5 elements below are met:

- It is "an arrangement" in the MDR scope;
- It is cross-border;
- It concerns defined taxes in scope;
- It has one or more hallmarks; and
- If required by law, it meets required thresholds (main benefit test or other thresholds).

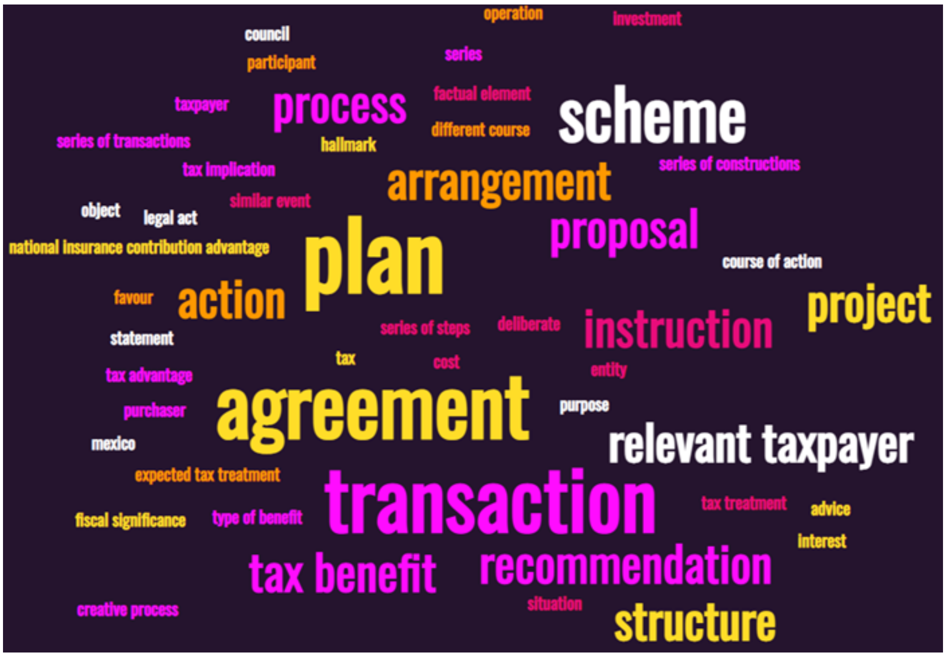
As discussed below, a number of countries have chosen not to define one or several of these elements, except for hallmarks that are always defined.

This section will deal with the first and second element – the definition of "an arrangement" and "cross-border", the others are discussed in the Chapters 6.3 Taxes in Scope and 6.4 Hallmarks of Reportable Arrangements below.

6.2.2 Definition of an "arrangement"

In order to determine which arrangements should be reported, legal frameworks must first define the concept of "arrangement". As the next figure shows, based on a summary of the analyzed countries' definitions, countries have many of the MDR terms, but not in equal proportions, suggesting that "plan", "arrangement", "agreement" and "transaction" are the most common, followed by "process", "action", "project", "instruction", "proposal", "structure" and "recommendation".

Figure: Most common terms used in the analyzed countries' definitions of "arrangement"



The next table presents the actual definitions (or an extract) of the term "reportable arrangement" in MDR regimes and countries, which includes the definition of arrangement as well as the element of obtaining a tax advantage or benefit. Not all countries define whether the tax advantage must exist or could exist.

Table 12 Definition of a reportable "arrangement".

Country	Definition of arrangement
2018 OECD MMDR[176]	"**Arrangement**" includes an agreement, arrangement, plan or understanding, whether or not legally enforceable, and includes all the steps and transactions that bring it into effect[177].
DAC 6	-
US	The term "**transaction**" includes all factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement and includes any series of steps carried out as part of a plan[178].
Canada	"**A tax shelter**" is defined as any property of which it is expected, based on statements or representations made or proposed to be made in connection with the property, that the aggregate of the losses or other amounts, calculated in any of the relevant years, which a purchaser will be entitled to deduct in taxation years ending within four years of the date of acquisition of the property will exceed the cost of the interest in the property (less prescribed benefits) to the purchaser[179].
UK	For purposes of the DOTAS regime: **Arrangements** include any arrangement, transaction or series of transactions that will or are intended to provide the user with a tax or National Insurance contribution advantage when compared to adopting a different course of action. The legislation uses the terms proposals, notifiable proposals, proposed arrangements and arrangements and notifiable arrangements. For convenience, instead

176 Guernsey has implemented this verbatim.

177 OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, sec. 1, rule 1.4

178 Sec. 1.6011-4(b)(1)) of the US Treasury Regulations

179 This applies to the Tax Shelter regime, See: Art. 3 of the Tax Shelter Guidance : https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic89-4/tax-shelter-reporting.html; for the RTAT regime there is no definition of an arrangement.

	of using these terms, the manual often uses the term "arrangement" and "notifiable arrangement" to cover both respectively[180]. For CRS avoidance and beneficial ownership hallmarks, "**arrangement**" is defined as any arrangement, transaction, or series of transactions. This is not exhaustive, and so the scope of what could be an arrangement is potentially broad.
Portugal	**An arrangement** means any plan, project, proposal, council, instruction, or recommendation, expressed directly or tacitly, object or not of materialization in agreement or transaction, constituted by a construction with one or more of a stage or part, or by a series of constructions, simultaneous or sequential, being able to be marketed or bespoke.[181]
Germany	**An arrangement** includes a deliberate creative process that changes events with tax implications, e.g., through transactions, actions, agreements, or similar events. A certain structure is thereby consciously and actively brought about or changed by the relevant taxpayer or for the relevant taxpayer. This structure, this process or this situation thereby acquires a fiscal significance that would otherwise not occur[182].
South Africa	For the domestic regime: "**arrangement**" means any transaction, operation, arrangement, agreement, or understanding […] where a "tax benefit" is or will be derived or is assumed to be derived by any "participant" due to the 'arrangement'[183]. For the CRS / beneficial ownership regime "**arrangement**" includes an agreement, arrangement, plan or understanding, whether or not legally enforceable, and includes all the steps and transactions that bring it into effect[184].
Mexico	"**Arrangement**" is defined as any plan, project, proposal, advice, instruction, or recommendation expressed or implied for the purpose of carrying out a series of legal acts" that generates or may generate, directly or indirectly, a tax benefit in Mexico and meets any Hallmark[185].
Argentina	"**International tax planning**" is any agreement, arrangement, plan, or any other action resulting in a tax advantage or any other type of benefit in favor of the taxpayers involved[186].

Source: Apex Consulting

DAC 6 does not include the definition of "arrangement", and that was intentional as the Commission was of the opinion that the inclusion of a definition would affect having a disclosure obligation as wide as possible[187]. Rather, the reportable arrangement definition defines the "cross-border" element and includes

[180] Sec. 1.1 of HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

[181] Sec. 2.1.(f) of Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements.

[182] Bundesministerium der Finanzen. (2021). *Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*. https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steuerthemen/Abgabenordnung/2021-03-29-Anwendung-Vorschriften-Pflicht-Mitteilung-grenzueberschreitende-Steuergestaltungen.pdf?__blob=publicationFile&v=3, Art. 2.3 of the Guidance

[183] Sec. 34 of the Tax Administration Act NO. 28 OF 2011 (GG 35491 of 4 July 2011): https://sars.mylexisnexis.co.za/#

[184] Sec. 9. A. Rule 1.4. of the CRS regulations of October 9, 2020: https://www.sars.gov.za/wp-content/uploads/Legal/SecLegis/LSec-Reg-2020-01-Notice-R1070-GG43781-International-Tax-Standard-9-October-2020.pdf

[185] Art. 199 of the Fiscal Code

[186] Art. 4 of the Tax administration (AFIP) General Resolution 4838/2020

[187] European Commission, Summary Record – prepared by the Commission Services, Working Party IV – Direct Taxation, September 2018.

an extensive list of hallmarks that catch a wide array of continuously adapting tax-aggressive arrangements[188]. It has drawn a lot of criticism as this approach has resulted in the Member States implementing various definitions of an "arrangement" or have completely omitted such a definition; and thus, there is no consistency across the EU[189].

OECD BEPS Action 6 (Preventing the granting of treaty benefits in inappropriate circumstances) gives good examples of what can be considered as "arrangement or transaction" for purposes of Action 6.

> The terms "arrangement or transaction" should be interpreted broadly and include any agreement, understanding, arrangement, transaction, or series of transactions, whether or not they are legally enforceable. In particular, they include the creation, assignment, acquisition, or transfer of the income itself, or of the property or right in respect of which the income accrues. These terms also encompass arrangements concerning the establishment, acquisition or maintenance of a person who derives the income, including the qualification of that person as a resident of one of the Contracting States, and include steps that persons may take themselves in order to establish residence. An example of an "arrangement" would be where steps are taken to ensure that meetings of the board of directors of a company are held in a different country in order to claim that the company has changed its residence. One transaction alone may result in a benefit, or it may operate in conjunction with a more elaborate series of transactions that together result in the benefit […] [190].

In defining the "arrangement", developing countries need to consider that:

- The broader the concept of the arrangement and the earlier stage is covered (e.g., plan versus implemented transaction), the more arrangements will need to be reported.
- The more general or ambiguous the term, the harder it is for the taxpayer to understand what is reportable, it creates more uncertainty and potentially larger volumes of reportable data.

It is recommended that the developing countries include a definition of an arrangement in their MDR regime. As the summary of the above definitions shows, the term "arrangement" is generally considered to be:

- An agreement, arrangement, transaction, plan or understanding;
- Whether or not legally enforceable; and
- It includes all the steps and transactions that bring it into effect.

6.2.3 New, old, and amended arrangements

Another element to consider is the temporal scope of the MDR. In principle, most laws become applicable after they enter into force. However:

- Some laws (for example DAC 6), may have a long implementation period, allowing countries to adopt the laws, and delay the first reporting (DAC 6 captures arrangements that became

[188] Recital 9 of Preamble, DAC 6

[189] Haslehner, W., Pantazatou, K, *Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6)*, Publication for the Subcommittee on tax matters (FISC), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg (2022), p. 31.

[190] Sec. 9 of the Commentary of Art. 10 of the OECD/G20 Base Erosion and Profit Shifting Project Preventing the Granting of Treaty Benefits in Inappropriate Circumstances ACTION 6: 2015 Final Report. https://www.oecd-ilibrary.org/docserver/9789264241695-en.pdf?expires=1666018141&id=id&accname=guest&checksum=D807FEAC77045CC86A6341DC6F29F803

reportable as of 25 June 2018, although in many countries the first reporting took place in 2021 (covering period as of 25 June 2018)); and
- Some laws may have retroactive application, especially to prevent avoidance mechanisms (e.g., to promote and sell arrangements after the law has been discussed in Congress but before its formal entry into force).[191]

If a non-reportable arrangement that existed prior to the date of MDR entering into force is renewed or modified, several special situations should be considered in order to avoid abuse:

- **Hallmark after amendment:** if the arrangement initially did not meet any hallmarks but the amendments are made in the way that the condition of one or more hallmarks is met, this should be considered as a new reportable arrangement;
- **Renewal:** an "old" arrangement (i.e., entered before the MDR entered into force) is renewed, it should be considered as "new" arrangement even if the terms and conditions have not changed; and
- **Material change:** if an "old" arrangement that has one or more hallmarks but was not reportable because it was entered before the MDR effective date is modified to include a material change, such arrangement should be considered as "new" and will be reportable.

These are the best practices that are applied in order to prevent taxpayers from extending or modifying grandfathered "old arrangements" to avoid future MDR reporting, and it is recommended that developing countries consider including these provisions in their guidelines that complement the MDR law.

6.2.4 Cross-border arrangements

The purpose of this Report is to focus on the cross-border arrangements. However, for the sake of completeness, it needs to be noted that MDR countries have taken various routes, by implementing MDR regimes that cover:

- **Only domestic arrangements** - only Portugal and Argentina have defined arrangements that are meant to capture purely domestic arrangements);
- **Only cross-border arrangements** - DAC 6 applies specifically only to cross-border arrangements. However, given that the DAC6 is a minimum harmonization directive, EU Member States can, and some have, implemented also wider rules, such, as, for example, Portugal (see analysis of Portugal), or
- **Both domestic and cross-border arrangements** - 2018 OECD MMDR, Guernsey, the US, Canada, South Africa.

In addition, MDR countries covering both domestic and cross-border may do it:

- **Implicitly** - without referring to territoriality specifically and thus covering all arrangements regardless of the involved jurisdictions; or
- **Explicitly** - by stating specific hallmarks for cross-border and domestic arrangements (like, for example, Argentina has a definition of "international tax planning" and "domestic tax planning"[192])

[191] For instance, Argentina approved its MDR on October 19th, 2020 (AFIP Resolution 4838/2020), but Art. 10 of the Resolution covered arrangements implemented since January 2019:" The arrangements included in the regime established herein that have been implemented from 01/01/2019 until the date of publication of this general resolution or that had been implemented prior to the first date indicated above but that remain at the entry in force of this, must be informed until 01/29/2021." In the case of Argentina, the regime was not discussed in Congress but was established directly by the tax administration resolution.

[192] Arts. 3 and 4 of the Tax administration (AFIP) General Resolution 4838/2020

Where there is an implicit reference, some arrangements due to their nature must be cross-border to meet the hallmark, for example:

- 2018 OECD MMDR refers to the CRS avoidance and beneficial ownership structures. CRS regime is specifically designed to capture cross-border arrangements, as are the rules relating to the concealment of beneficial ownership;
- The US MDR does not include an explicit reference to cross-border or domestic transactions; however, several hallmarks require a cross-border aspect to be present (e.g., Abusive Foreign Tax Credit Transactions or Offshore Deferred Compensation Arrangements). Similarly, Mexico captures arrangements where the non-resident taxpayer uses a Mexican double tax agreement in relation to income that is not subject to tax in their country of residence or which results in a lower tax rate than would otherwise apply or avoids the status of a permanent establishment in Mexico.

Table 13 Cross-border and domestic MDR

	Cross-border arrangements	Domestic arrangements	No explicit reference (hence potentially covers both domestic and cross-border arrangements)
2018 OECD MMDR			✓
DAC 6	✓		
Germany	✓ DAC 6		
Portugal	✓ DAC 6	✓ VAT, stamp duties, a.o.	
UK	✓ DAC 6 for CRS and beneficial ownership hallmark		✓ No explicit reference (other MDR regimes)
Guernsey			✓ No explicit reference
US			✓ No explicit reference
Canada			✓ No explicit reference
South Africa			✓ No explicit reference
Argentina	✓ Domestic arrangement hallmarks	✓ Cross-border arrangement hallmarks	
Mexico			✓ No explicit reference, but different hallmarks for domestic or cross-border arrangements[193]

[193] Although the law is silent, one paper claims there are different hallmarks for domestic or cross-border arrangements: https://taxlatam.com/noticias/los-esquemas-reportables-vs-el-secreto-profesional-en-mexico/

Source: Apex Consulting

Within MDR countries implementing MDR the definition of "cross-border" arrangements can be very broad or specific:

- **Broad approach**: Argentina applies the most direct and literal definition of "involving Argentina and one or more foreign jurisdictions"[194].
- **Specific approach**: DAC 6 (as implemented by Germany, Portugal and in part by the UK) has very specific definition of an arrangement being cross-border[195]:
    - "Cross-border arrangement" means an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the following conditions is met:
    - not all the participants in the arrangement are resident for tax purposes in the same jurisdiction;
    - one or more of the participants in the arrangement are simultaneously resident for tax purposes in more than one jurisdiction;
    - one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms a part or the whole of the business of that permanent establishment;
    - one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;
    - such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

6.2.4.1 Pros, cons, and best practices and recommendations

Table 14 Pros, cons, and best practices and recommendations (6.2.4)

	Pros	Cons	Best practices and recommendations
Only cross-border regime	➢ Clear and narrow scope, requires cross-border element ➢ Encourages compliance of MNEs operating in various countries ➢ Puts foreign intermediaries and MNEs on notice that they may have local reporting obligations, if there is sufficient nexus with the country	➢ Does not apply to domestic aggressive arrangements, hence, has somewhat limited scope ➢ Most effective if there is reciprocal reporting between participating countries	➢ Implemented only through DAC 6 (All EU Member States) ➢ Currently no developing country is using it.

[194] Art. 4 of the Tax administration (AFIP) General Resolution 4838/2020
[195] Art. 3.18 of the DAC 6

	Pros	Cons	Best practices and recommendations
Only domestic regime	➢ Clear and narrow scope, requires only domestic elements	➢ Very limited scope that would not allow to capture many aggressive tax arrangements with cross—border elements ➢ May not capture many arrangements designed by foreign intermediaries and MNEs	➢ Due to limiting scope, currently no MDR country uses only domestic regime, for all there is also a cross-border regime in place
Both – cross-border and domestic MDR	➢ Covers broad scope of arrangements that cause tax risks, regardless of domestic or cross-border elements involved	➢ Risk of being a complex regime, careful drafting is required	➢ Apart from EU countries that have implemented DAC 6 only for cross-border arrangements, this approach is used by all other countries ➢ Recommended course of action for developing countries
Cross-border arrangement clearly defined	➢ Clarity of that is in the scope, specific scenarios of what is in / out of scope ➢ Can cover a wide range of cross-border arrangements	➢ Can become relatively complex ➢ Need to be designed with focus on the domestic tax results, and capable of being enforced	➢ Implemented by 27 EU Member States, and the UK ➢ Recommended as it gives clear instructions on what cross-border arrangement is.
Use of hallmarks without defining "cross-border arrangement"	➢ Can be defined through hallmarks that apply without territorial limits, providing flexibility ➢ Effective way of targeting specifically named cross-border arrangements	➢ Cross-border aspects may not be obvious and therefore may be neglected, resulting in such arrangements not being reported ➢ Foreign intermediaries and MNEs may not be aware that they may be in scope	➢ Used in the US, Canada, UK regimes, South Africa, and Mexico ➢ If this option is chosen, the best course of action is to have clearly defined hallmarks, highlighting cross-border elements, where considered necessary
Cross-border arrangement defined very broadly	➢ Can be defined broadly (i.e., involving "other jurisdictions") and therefore can capture unknown aggressive arrangements	➢ Broad definition may result in over/underreporting of cross-border arrangements	➢ Broad and vague definitions are not the best course of action.

Source: Apex Consulting

Based on the above, in defining territorial scope of the MDR regime, developing countries should:

1. Consider limiting the MDR regime to cross-border arrangements[196] only or also include domestic arrangements; capturing both would yield the best results; and
2. Define the cross-border arrangement clearly by setting out conditions, or, alternatively, have clearly drafted specific hallmarks that cover cross-border arrangements.

6.3 Taxes in scope

6.3.1 Overview and recommendations

Developing countries must define the scope in terms of taxes that the MDR will capture. It is essential for all parties concerned – tax authorities, intermediaries, and taxpayers – to know which transactions for which type of taxes in scope should be screened for potential reporting.

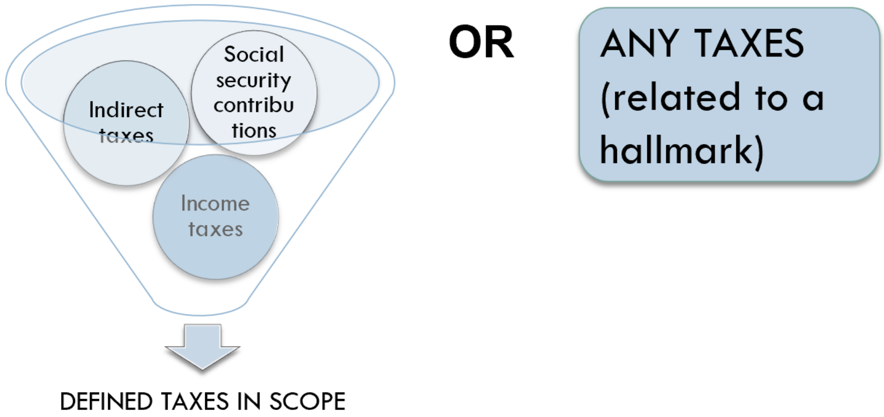
The approach taken by MDR countries ranges from a narrow, defined scope of taxes in scope to broad scope involving any tax that may be impacted by the reportable arrangement. In a cross-border arrangement context from countries that define taxes, most countries apply MDR to income taxes, some apply it also to indirect taxes, and only a few apply it also to social security contributions. Lastly, countries that have several MDR regimes may have different taxes in scope for each of the regimes.

In light that developing countries have limited resources and income taxes typically form a substantial part of revenue, the recommendation would be to narrow down the scope of taxes in scope to include income taxes, unless there are known and serious revenue risks involving also indirect taxes, social security contributions or other taxes. If so, the latter should be also captured through clearly defined hallmarks. Narrowing down the scope would ease the compliance burden on the intermediary and taxpayer side and give more targeted information to the tax authorities.

If the country has several MDR regimes implemented, for example, the 2018 OECD MMDR and a domestic unique approach, it would be recommended to have a clear scope delineation of what taxes fall under which regime.

The approach taken by countries ranges from a narrow, defined scope of taxes in scope to broad scope involving any tax that may be impacted by the reportable arrangement. Most countries apply MDR to income taxes, some apply it also to indirect taxes, and only a few apply it also to social security contributions. Countries that have several MDR regimes may have different taxes in scope for each of the regimes.

[196] Note: the scope of this Report is limited to cross-border arrangements.



Source: Apex Consulting

6.3.2 Options

Once the reportable arrangement is defined, countries have taken different routes in defining which taxes are in scope:

- **Not defined, broad scope - "any tax benefit"**
  - For example, Argentina's MDR refers to any tax advantage or any other type of benefit, defined as a reduction of the "object of the tax" (materia imponible) by a taxpayer or its direct or indirect related parties. It also includes avoiding the presentation of an information regime established by the tax administration.[197]
  - Similar approach is taken in Mexico, which puts in scope any "tax benefit" regardless of tax residence of user[198]", and the "tax benefit" is defined as "reduction, elimination or temporary deferral of a contribution, including through deductions, exemptions, non-subjections, non-recognition of an accruable gain or income, adjustments or absence of adjustments to the tax base of the contribution, the crediting of contributions, the re-characterization of a payment or activity, a change of tax regime, among others".[199]
- **Defined taxes, broad scope:**
  - The UK has 4 MDR regimes, and each has listed specific taxes in scope. For example, the DOTAS regime applies to income tax, corporation tax, capital gains tax, corporation tax, bank levy, national insurance contributions, stamp duty land tax (SDLT), annual tax on enveloped dwellings (ATED), inheritance tax (IHT), and the apprenticeship levy. [200]
  - DAC 6 [201] applies to all taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities, but does not include the value-added tax, customs duties, to excise duties covered by other EU legislation, compulsory social security contributions, and fees for certificates and other documents issued by public authorities, or dues of a contractual nature. In implementing DAC 6, the member states can further clarify the taxes that are in scope. For example, German Guidance clarifies that the MDR applies to income tax, corporation tax, trade tax, real estate

[197] Art. 3 and 5. of the Tax administration (AFIP) General Resolution 4838/2020

[198] Art. 197, para. 4 and at. 199 (2nd last paragraph) of the Fiscal Code refers to Arts. 5-5o for the definition of "Tax benefit".

[199] Art. 5o-A, 5th paragraph of the Fiscal Code

[200] HMRC Guidance Disclosure of tax avoidance arrangements, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-arrangements-guidance/disclosure-of-tax-avoidance-arrangements#introduction (see: Guidance Sec. 2.3.1)

[201] Art.2. of DAC 6

transfer tax, motor vehicle tax, insurance tax, real estate tax, inheritance and gift tax, aviation tax, and non-harmonized excise duties (e.g., coffee tax). [202]

- **Indirectly defined, narrow scope**:
    - Some MDR rulesets are imbedded in the income tax law provisions, like, for example in the Income tax Act of Canada[203]; or federal income taxes in the US[204]. In each case it can be concluded that the MDR applies only to income taxes in the scope of the income tax law as such.
- **Not defined, related to specific reportable arrangements:**
    - By listing certain arrangements, e.g., loss transaction, one can conclude that income tax benefits could be in scope, as would be the case in South Africa, where the MDR lists the reportable arrangements, but not specific taxes, in scope.
- **Not defined, related to transparency regimes (not specific taxes)**
    - The 2018 OECD MMDR (and DAC 6 hallmark D) applies only to CRS avoidance agreements and opaque offshore structures. In accordance with the 2018 OECD MMDR, a "CRS Avoidance Arrangement" is 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, through 7 defined hallmarks[205], and an Opaque Offshore Structure means a Passive Offshore Vehicle that is held through an Opaque Structure[206].

Where a country has two or more MDR regimes, taxes in scope could be defined for each regime (like, for example, in the four MDR regimes in the UK), and further could differ based on whether the arrangement is domestic or cross-border (for example, for cross-border arrangements Portugal follows the scope of taxes as defined in the DAC 6, but for domestic arrangements, the scope is broader and includes VAT, stamp duties, etc.)[207]

Finally, the countries that do define explicitly or implicitly taxes are in scope have taken different approaches:

- **Most countries - direct taxes:** corporate income tax, individual income tax, capital gains tax, estate, and gift taxes
    - Direct taxes are the most common taxes in scope (for example, all the EU (due to DAC 6 implementation), the UK, the US, Canada, and South Africa).
- **Some countries – also indirect taxes:** VAT, customs and excise taxes, stamp duties

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[202] Bundesministerium der Finanzen. (2021). *Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*. https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steuerthemen/Abgabenordnung/2021-03-29-Anwendung-Vorschriften-Pflicht-Mitteilung-grenzueberschreitende-Steuergestaltungen.pdf?__blob=publicationFile&v=3, sec. 2.2

[203] Section 237.3, Income Tax Act covers the RTAT regime, and Section 237.1 covers Tax Shelter regime

[204] Although US taxes in scope are not specifically defined, it appears that it refers to federal taxes (regulations are part of the federal tax law of Title 26). In addition, the OECD 2015 Report described for the US scope: "Income tax (individual, corporate), Estate and Gift tax, other federal tax" (See: Annex E, page 91).

[205] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, sec. 1, rule. 1.1

[206] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, sec. 1, rule. 1.2. (a)

[207] Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements (DAC 6 or the Directive). https://dre.pt/dre/legislacao-consolidada/lei/2020-138516384 Art. 4 and 8.

- Only the UK has an explicitly defined regime for indirect taxes (two regimes - VAT disclosure regime (VADR) and disclosure of Tax Avoidance Arrangements: VAT and other indirect taxes (DASVOIT)) that cover cross-border arrangements. Portugal has implemented domestic MDR regime that covers some indirect taxes (value added tax, municipal property tax, municipal tax on the onerous transfers of real estate, and stamp duty), but that does not apply to cross-border arrangements.
- Indirect taxes are specifically out of scope of the DAC 6, albeit only the harmonized indirect taxes. Germany's MDR legislation includes excise duties that are not harmonized on the EU level[208].

➢ **Few countries – also other taxes: social security**, etc.
- Only the UK directly covers social security taxes. In the UK, under DOTAS regime certain "notifiable contribution arrangements" and "notifiable contribution proposals" are captured if conditions are met[209].

➢ **Tax transparency**:
- 15 countries have adopted the 2018 OECD MMDR covering CRS avoidance and beneficial ownership hallmarks.

6.3.3 Comparison of options

Table 15 **Comparison of taxes in scope**

	Pros	Cons	Best practices and recommendations
Clear and concise definition of taxes in scope	➢ Defined and targeted scope. ➢ Reduction of compliance costs and efforts for reporting parties. ➢ Targeted information received by tax authorities.	➢ Risk of not detecting potentially aggressive tax arrangements involving taxes that are out of scope.	➢ Implemented due to DAC 6 throughout the European Union. DAC 6 has a clearly defined scope of taxes for MDR disclosure purposes, and alignment with the design of hallmarks. ➢ Recommended course of action.
Broad or undefined term of taxes in scope	➢ Tax authorities can canvass a broader spectrum of tax impacts from aggressive tax planning strategies, exposing new arrangements.	➢ Increased compliance efforts by the reporting parties as arrangements need to be screened for all tax consequences. ➢ Increased volumes of reporting, some of that potentially irrelevant to the tax authorities.	➢ This could work best if the hallmarks are very precisely tailored, and could, by definition, involve only certain taxes.

[208] Bundesministerium der Finanzen. (2021). *Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*. https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steuerthemen/Abgabenordnung/2021-03-29-Anwendung-Vorschriften-Pflicht-Mitteilung-grenzueberschreitende-Steuergestaltungen.pdf?__blob=publicationFile&v=3, sec. 2.2

[209] See: Sec. 4.2. HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

		➢ Increased resources needed to analyze the data and act on it.	

Source: Apex Consulting

6.3.3.1 Pros

If the scope of taxes in scope is clearly defined, that allows the reporting persons (intermediaries, taxpayers) to narrow down the arrangements that need to be reviewed for potential reporting, avoiding the necessity to screen for all taxes that may be impacted. Further, the tax authorities would receive more targeted information, which would allow them to be more effective in taking further steps for dealing with the potentially aggressive tax arrangements.

If the scope of taxes is not defined or is broad (i.e., any taxes that may be impacted by the arrangement), it could potentially allow tax authorities to canvas broader spectrum of tax impacts from aggressive tax planning strategies, potentially exposing new arrangements that tax authorities did not have under their radar.

6.3.3.2 Cons

If the scope of the taxes is too narrowly defined, the tax authorities may be missing potentially aggressive tax arrangements involving taxes that are out of scope.

In countries where the scope of taxes is not clearly defined, there is room for interpretation as to what is in scope. From intermediary and taxpayer perspective – to the extent that it is not certain whether the arrangement needs to be reported, prudent compliance position would require reporting. That would result in increased compliance workload for the intermediaries and taxpayers, as the arrangements would need to be screened for all tax consequences. Equally, in this case the tax authorities would receive much more information, which could be potentially irrelevant; and such increased volume of data that would need to be analyzed, grouped, and processed further, requiring much more resources and analysis.

6.3.3.3 Best Practices

The best practice is to clearly define which taxes are in scope and align those taxes with the design of hallmarks – targeting the areas where there is the greatest risk to the tax revenues. That has been done in the case of DAC 6 and its implementation throughout the European Union. Such an approach allows all parties involved to have clarity as to what arrangements need to be reviewed for reporting and for what taxes. However, if the country chooses to have a very narrow and targeted list of hallmarks that applies to limited situations, then the taxes in scope could remain undefined.

6.4 Hallmarks of reportable arrangements

6.4.1 Overview and recommendations

Hallmarks involve a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse (rather than define the concept of aggressive tax planning). Hallmarks are the key component of an MDR because they determine which types of arrangements must be reported to authorities. The fact that a certain arrangement is listed as a hallmark, normally does not, by itself, indicate that such arrangement is considered as a tax evasion or avoidance but is interpreted as an indication of a potential tax avoidance or abuse.

Hallmarks **are not mutually exclusive**; the same arrangement may fall under various hallmarks.

In designing the hallmarks, developing countries:

- Can define hallmarks in **law**, which is more rigid to change, or allow tax administrations to define it by issuing **black, grey and whitelists**;
- Should strike the right balance in drafting the hallmarks **not too narrowly**, but also **not too broadly**, to capture **targeted arrangements**, and potentially similar arrangements that may not be known yet; or, alternatively, have a list of specific hallmarks, and one catch-all hallmark (e.g., income conversion hallmark). If broader hallmarks are included, developing countries should have the **resources and knowledge** to analyze the received reports, dismiss irrelevant information, and proceed with action where potential aggressive arrangements have been detected;
- Should consider the right **mix of generic and specific hallmarks**;
- Focus on those **key hallmarks that pose the greatest risk** to their tax revenue, omit the hallmarks that are not relevant altogether, and consider the fact that the reporting persons may not have full view on the reportable arrangements;
- Could consider adding **hallmark thresholds** to narrow down the arrangements in scope (main benefit test, monetary thresholds, whitelists), where considered useful and subject to avoidance risk considerations; and
- **Learn from the experience** of both – existing MDR regimes in developed countries, as well as the experience of the developing countries, and adjust hallmarks to deal with unique circumstances of the country.

Hallmarks are divided into **generic and specific hallmarks**:

- **Generic hallmarks** are defined by reference to their overall tax effects and are capable of capturing any arrangement designed to produce those effects regardless of how the arrangement is structured; and they are typically linked to an intermediary, but also could apply to other areas, like, for example, secrecy hallmarks, see below.
- **Specific hallmarks** relate to specific, known arrangements. Specific hallmarks are further divided into:
    - **Secrecy hallmarks** (CRS avoidance arrangements and beneficial ownership related secrecy); and
    - **Other aggressive or abusive tax hallmarks**.

The combination of specific and generic hallmarks allows tax administrations to target those cross-border arrangements that raise the most significant tax policy or revenue concerns while still capturing novel or innovative arrangements.

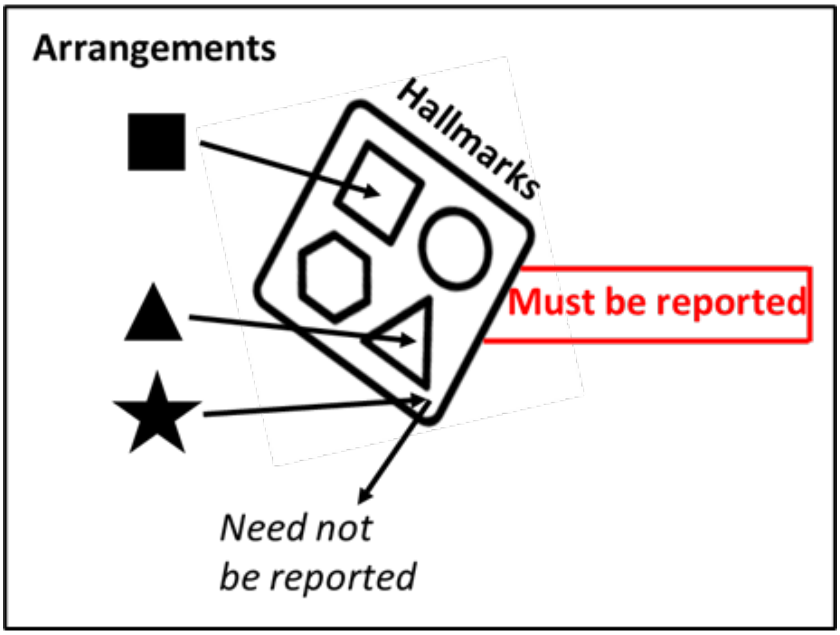
For overview and recommendations on the various specific types of hallmarks, see sections below.

Hallmarks are a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse (rather than define the concept of aggressive tax planning)[210]. The hallmarks are intended to be descriptions capable of being identified by an intermediary and taxpayer at the time the arrangement is being developed, marketed, considered, or implemented, putting them on notice that such arrangements will be reportable.

The fact that a certain arrangement is listed as a hallmark, normally by itself **does not indicate** that such arrangement is considered as a **tax evasion or avoidance** but is interpreted as an indication of a potential tax avoidance or abuse[211]. It is acknowledged that at times the hallmarks also capture arrangements that have no tax avoidance or evasion motives and may have solid underlying business rationale for carrying out.

Typically, hallmarks are **not mutually exclusive** — the same arrangement may fall under various hallmarks and will be reported under several categories.

In choosing the approach to hallmarks, developing countries should consider:



- **Defining arrangements in out and out scope:** hallmarks are the key component of an MDR because they determine which types of arrangements must be reported to authorities and, if desired or necessary, which are tacitly or expressly excluded. In a way, Hallmarks are the equivalent to a toddler's toy to learn geometric shapes. Anything falling within the hallmark's "shape" must be reported. Arrangements that do not "fit" the hallmark are not reportable.
- **Defining hallmarks broadly or narrowly:**
    - The more specific the hallmarks, the fewer types of arrangements that will have to be reported. This can be helpful if tax authorities know exactly what they are looking for and can limit overreporting and receipt of irrelevant data. However, the more specific the hallmark, the easier it could be to circumvent it, by designing an arrangement that achieves the same result in substance but has slightly different features, just enough to not "fit" in the hallmark. In addition, specific hallmarks are based on the current knowledge of authorities, but there may be aggressive arrangements that authorities are not aware of and

[210] Hallmark definition in Sec. 9 of preamble of DAC 6.

[211] Portuguese Explanatory Statement to the MDR law that states that "it should be stressed that the specific hallmarks do not reflect an effective situation of tax evasion and, even less, an anticipation of what the reaction of the tax authorities should be to the tax situations revealed by the reported arrangements. As follows from Article 2 (b) (...), in line with Directive (EU) 2018/822, the specific hallmarks, by themselves and given their objective configuration, translate, that yes, "the indictment of a potential risk of tax evasion" - "indication", in the expression also used by the Directive." The Portuguese Tax Authority (the PTA) guidance (the Guidance) on the application of Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020 of 11 August 2020; p. 45

would thus escape reporting. One solution to this challenge is to include a “catch-all hallmark” that covers arrangements that have similar structure and consequences like the defined hallmark.

- On the other side of the spectrum are MDR regimes where the hallmarks are defined very broadly. For example, Argentina covers entities that are used to... shift taxable bases abroad or attempt to avoid the presentation of any information regime[212]. Such an approach could bring much broader information to the tax authorities, and potentially include new or existing arrangements that were not known by the tax authorities. It may make it harder to circumvent the MDR reporting. However, it would also add large volumes of irrelevant information for authorities, making it harder to process the received information. That would also dramatically add costs to taxpayers and intermediaries, while making enforcement much harder. The key point is to find the right balance.

- **Defining hallmarks through law or by tax administrations (by reference to black, grey, and whitelists)**: MDR countries can choose to define the hallmark in the MDR law itself, or by a reference to specific lists:
    - Many hallmarks are established **by law**. The challenge with this approach is that it may take political support and considerable time to update hallmarks and add new ones if a formal legislative process needs to be followed.
    - One way to address this challenge is to add as a hallmark a “**list**” of arrangements to be defined by the tax administration (without needing a formal legislative process through the parliament or congress). Tax authorities can change this list over time, removing obsolete hallmarks and adding new ones to keep the list up to date. For instance, the US now has 36 “listed transactions”[213] which in a way would be 36 new specific hallmarks. Based on countries’ experiences, there are three types of lists: black, grey and white. Black and gray lists indicate reportable arrangements. Whitelists including transactions considered not to be in scope of MDR reporting.
        - **Blacklists**: arrangements that the tax administration considers to be aggressive or abusive and therefore reportable. The US’ blacklist called “listed transactions” includes 36 types of arrangements[214]. Canada prepared a sample of “notifiable transactions”.[215]
        - **Grey lists:** arrangements that the tax administration considers to be likely aggressive, although there is no concluding evidence. The US has a “grey list” called “transactions of interest”[216]. Mexico has a list of “non-binding criteria”, although it includes one type of arrangement used to circumvent the Mexican MDR (this specific anti-avoidance was then included as a hallmark)[217].

[212] Art. 4. of the Tax administration (AFIP) General Resolution 4838/2020

[213] Sec. 1.6011-4(b)(2) of US Treasury Regulations

[214] *Listed Transactions | Internal Revenue Service*. (n.d.). https://www.irs.gov/businesses/corporations/listed-transactions

[215] Department of Finance Canada. (2022, February 4). *Mandatory Disclosure Rules*. Canada.ca. https://www.canada.ca/en/department-finance/news/2022/02/mandatory-disclosure-rules.html

[216] *Transactions of Interest | Internal Revenue Service*. (n.d.). https://www.irs.gov/businesses/corporations/transactions-of-interest

[217]https://wwwmat.sat.gob.mx/cs/Satellite?blobcol=urldata&blobkey=id&blobtable=MungoBlobs&blobwhere=1461175006594&ssbinary=true

  - **Whitelists**: arrangements that the tax administration considers not to be aggressive or abusive, or irrelevant and are thus exempted from reporting. Germany has a whitelist[218].

- **Defining the types of hallmarks** to be used:
  - **Generic hallmarks** (typically linked to the intermediary, but also could apply to other areas. For example, secrecy hallmarks, see below) and specific hallmarks (related to specific, known arrangements);
  - **Specific hallmarks** can be further divided into two large categories: (a) secrecy hallmarks concerning CRS /beneficial ownership related secrecy of assets, income, and identities (related to the avoidance of the CRS for automatic exchange of financial account information or arrangements to hide the beneficial owner and governed by the OECD 2018 MMDR, as well as DAC 6 Hallmark D), and (b) other aggressive or abusive tax hallmarks (e.g., related to BEPS Action 12 and covered by the OECD 2015 Final Report).
  - It is also possible to have MDR regimes that cover both categories, such as the EU's DAC 6 (adopted throughout the EU); or to have two or more MDR regimes, one for the CRS and beneficial ownership (by adopting 2018 OECD MDDR), and one for other aggressive or abusive tax arrangements (the UK and South Africa).
- **Domestic impact of a cross-border arrangement:** A country should not require disclosure of cross-border arrangements that do not raise any material tax revenue risks in that jurisdiction. Accordingly, an arrangement that gives rise to a specified cross-border outcome should only be reportable if it involves a transaction or payment that has a material tax impact on the reporting jurisdiction[219]. An arrangement will have a tax impact on a reporting jurisdiction if the arrangement has the effect, or is likely to have the effect, of reducing the tax payable in that jurisdiction.
- **Defining hallmark thresholds**: There are several ways to further reduce or qualify the hallmarks, thus reducing the volume of the arrangements in scope for the MDR reporting, including an application of the Main benefit test ("MBT"), de minimis monetary thresholds, requirement that the arrangement needs to meet two or more hallmarks, and excluding arrangements by publishing whitelists.

In designing hallmarks, it is recommended that developing countries:

- **Consider combining specific and generic hallmarks** (as proposed by the OECD);
- **Balance between broad specific hallmarks and narrowly tailored ones**, large hallmark lists, and only a few hallmarks, and learn from the experience of both – existing MDR regimes in developed countries, as well as the experience of the developing countries;
- **Learn from DAC 6 and the 2018 OECD MMDR**, which can be used as a starting point for developing countries, but caution needs to be exercised to have hallmarks targeted to the unique circumstances of the country and to have a scope that country can manage resource-wise;
- **Learn from the experience of other developing countries**, in selecting the specific hallmarks and defining their scope. Developing countries should review these hallmarks for local relevance; copying any single regime is not recommended, as each country has different tax risks and resources to address it.
- Focus on those **key hallmarks that pose the greatest risk** to their tax revenue, omit the hallmarks that are not relevant altogether, and consider the fact that the reporting persons may not have full view on the reportable arrangements; and
- If broader hallmarks are included, developing countries should have the **resources and knowledge** to analyze the received reports, dismiss irrelevant information, and proceed with action where potential aggressive arrangements have been detected.

[218] Annex to the Guidelines

[219] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 242

In summary, developing countries should choose hallmarks based on the following principles:
Define Hallmarks

Define hallmarks

- Decide which tax risks to tackle and select related hallmarks.
- Use a mix of:
  - general hallmarks in scope (target intermediaries, involve any type of arrangement), and
  - specific hallmarks in scope (target particular areas of concern).
- Define hallmarks by law, or lists, or both.
- Draft hallmarks not too narrowly, but also not too broadly.

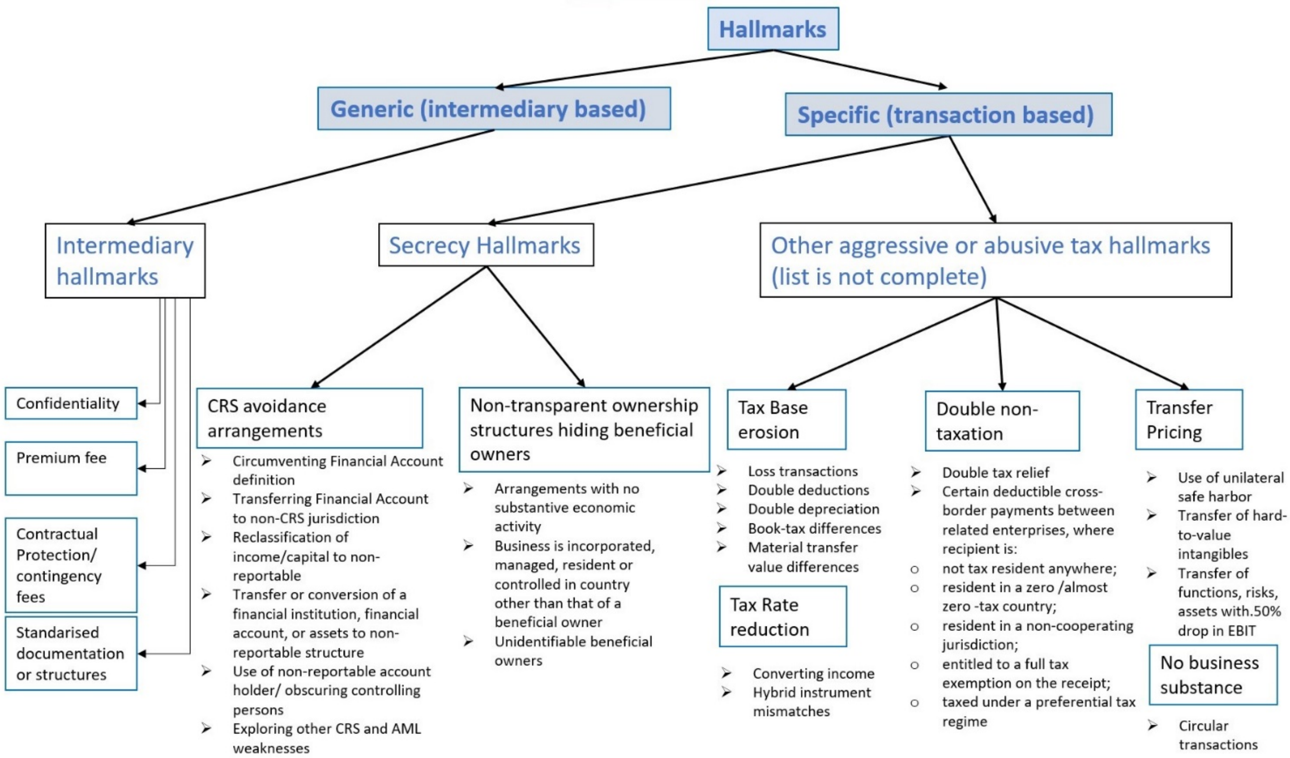
Source: Apex Consulting

For more on hallmarks, see also Sec. 5.2.2.

6.4.2 Hallmark types

There are many hallmark types. In general, hallmarks are divided into **generic and specific hallmarks,** specific hallmarks are further divided into **secrecy hallmarks** and **other aggressive or abusive tax hallmarks**, all of which are analysed below.

Hallmark types



Source: Apex Consulting

6.4.2.1 Intermediary based (generic) hallmarks

Based on the hallmarks proposed by the OECD 2015 Final Report and DAC 6, hallmarks for aggressive tax planning could be divided into two main categories: **generic** and **specific**.

6.4.2.1.1 Overview and recommendations

Generic – intermediary linked - hallmarks are based on the contractual conditions established by the intermediary, and include four key hallmarks –

- **Confidentiality**: the intermediary requires the taxpayer to keep the arrangement confidential from other intermediaries or tax authorities;
- **Premium fee**: the intermediary earns a “premium” fee based on the amount of tax advantage that the taxpayer expects to receive from the arrangement;
- **Contractual protection (or contingency fee):** the intermediary offers an “insurance” against failure, so that if the arrangement does not secure all or part of the desired tax benefits, the taxpayer is fully or partially refunded; and
- **Standardized documentation or structures**: the intermediary designs a substantially standardized arrangement that can be mass-marketed, where only minimal adjustments are necessary for each new taxpayer.

Countries that have implemented these hallmarks may also **add further narrowing conditions** (such as the main benefit test in the EU and the UK), may apply them to the in-house arrangements (the UK), and may apply not just to actually known arrangements but also to arrangements that may have similar effect (the UK).

While all developed countries with MDR regimes and South Africa apply the premium fee hallmark, the only other common hallmark among developing countries is the one relating to contingency fee. The generic hallmarks have not been widely used in developing countries presumably because of the lack of information available locally, which makes it difficult to assess whether there are such provisions and to challenge well-advised and experienced MNEs with head offices elsewhere or foreign intermediaries. Apart from that, there is no substantial detriment to including such hallmarks, if they are precisely defined, and linked to taxpayer's reason to know.

Generic – intermediary linked - hallmarks are based on the contractual conditions established by the intermediary when offering an arrangement, such as a premium fee measured by the amount of avoided tax. These hallmarks are usually referred to as "generic" because they could involve any type of arrangement. The focus of the hallmark is not the arrangement itself, but rather the contractual conditions, which suggest that the intermediary is offering an aggressive or at least an innovative arrangement, or an arrangement that may be easily replicated and sold to a large variety of taxpayers without substantial changes. This is an indirect way to detect aggressive arrangements[220].

Based on the OECD 2015 Final Report and DAC 6, the most common intermediary based generic hallmarks are confidentiality, premium fee, contractual protection (or contingency fee), and standardized documentation or structures, all of which are discussed below.

Most countries implementing generic hallmarks qualify such hallmarks with the main benefit test (See Sec. 6.4.4.2) in order to narrow down to obtaining only information on those arrangements where the main benefit of the transaction is to obtain tax advantage. Absent the main benefit test, tax authorities could receive a lot of information about arrangements that have nothing do to with aggressive tax planning (for example, standardized documentation on formation of a new company)

6.4.2.2 Confidentiality

The intermediary requires the taxpayer to keep the arrangement confidential from other intermediaries or tax authorities. This limitation is to protect the value of the arrangement designed by the intermediary and enables the intermediary to sell the arrangement to different taxpayers. It is understood that the clause has to be in the agreement between the intermediary and the taxpayer; memos to the taxpayer with "confidential" watermarks by themselves may not amount to meeting this hallmark, as it is a unilateral provision.

6.4.2.2.1 Confidentiality hallmark

Table 16 Confidentiality hallmark

Regime/ Country	Confidentiality Hallmark
DAC 6	An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them

[220] For sake of completeness, it is worth to mention that beside generic – intermediary based – hallmarks, there are (and could be) designed also other generic hallmarks, like for example, the CRS avoidance hallmark, which apply to situations which may not be identified yet as aggressive, but which may have such an effect.

Regime/ Country	Confidentiality Hallmark
	not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities[221]. This is linked to the main benefit test[222].
UK	Arrangements are prescribed if they satisfy (a) Conditions 1 and 2; or (b) Conditions 1 and 3. The Conditions are as follows[223]. ➢ Condition 1 - Any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements. ➢ Condition 2 - It might reasonably be expected that a promoter would wish the way in which that element of those arrangements secures a tax advantage to be kept confidential from any other promoter at any time in the period beginning with the opening date and ending with the appropriate date. ➢ Condition 3 - The promoter would, but for the requirements of these Regulations, wish to keep the way in which that element secures that advantage confidential from Her Majesty's Revenue and Customs for some or all of the period beginning with the opening date and ending with the appropriate date, and a reason for doing so is to facilitate repeated or continued use of the same element, or substantially the same element, in the future. Arrangements are prescribed if (a) no person is a promoter in relation to them; (b) the intended user of the arrangements is a business which is not a small or medium-sized enterprise; (c) any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements; (d) the user of those arrangements wishes the way in which that element is expected to secure a tax advantage to be kept confidential from Her Majesty's Revenue and Customs for some or all of the period […] and (e) a reason for the user's wishing to keep that element confidential from Her Majesty's Revenue and Customs is to facilitate repeated or continued use of the same element, or substantially the same element, in the future[224].
Canada	Confidential protection, in respect of a transaction or series of transactions, means anything that prohibits the disclosure to any person or to the Minister of the details or structure of the transaction or series under which a tax benefit results, or would result but for section 245, but for greater certainty, the disclaiming or restricting of an advisor's liability shall not be considered

[221] Annex IV, Part II, Sec. A of DAC 6
[222] DAC 6 Annex IV, Part I
[223] Sec. 6 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 https://www.legislation.gov.uk/uksi/2006/1543/regulation/6/made
[224] Sec. 7 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 https://www.legislation.gov.uk/uksi/2006/1543/regulation/6/made

Regime/ Country	Confidentiality Hallmark
	confidential protection if it does not prohibit the disclosure of the details or structure of the transaction or series.[225]
US	A confidential transaction is a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer has paid an advisor a minimum fee.[226]

Source: Apex Consulting

6.4.2.3 Premium fee

The intermediary earns a "premium" fee based on the amount of tax advantage that the taxpayer expects to receive from the arrangement. A fee is paid by the taxpayer in case the arrangement is successful and secures promised tax advantages. This fee is attributable to the tax advantage itself or is contingent on the tax advantage; and no other factors, for example, the reputation or special skills of the advisor.

The sample clauses for the premium fee are as follows:

Table 17 Premium fee hallmark

Country/ Regime	Premium Fee Hallmark
DAC 6	An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to the amount of the tax advantage derived from the arrangement.[227] This is linked to the main benefit test[228].
South Africa	An 'arrangement' is a reportable arrangement if a person is a participant in the arrangement and the arrangement contains provisions in terms of which the calculation of interest, finance costs, fees, or any other charges is wholly or partly dependent on the assumptions relating to the tax treatment of that arrangement[229].
Canada	Contractual protection, in respect of a transaction or series of transactions, means: (a) any form of insurance (other than standard professional liability insurance) or other protection, including, without limiting the generality of the foregoing, an indemnity, compensation, or a guarantee that, either immediately or in the future and either absolutely or contingently, (i) protects a person against a failure of the transaction or series to achieve any tax benefit from the transaction or series, or (ii) pays for or reimburses any expense, fee, tax, interest, penalty or similar amount that may be incurred by a person in the course of a dispute in respect of a tax benefit from the transaction or series; and (b) any form of undertaking provided by a promoter, or by any person who does not deal at arm's length with a promoter, that provides, either immediately or in the future and either absolutely or contingently, assistance, directly or indirectly

[225] Sec. 237.1.1 (definitions) Income Tax Act (RTAT) [2013]
[226] Sec. 1.6011-4(b)(3)) of the US Treasury Regulations
[227] Annex IV, Part II, Sec. A.2 (a) of DAC 6
[228] Annex IV, Part I of DAC 6
[229] Sec. 35.1 a of the Tax Administration Act No. 28 Of 2011 (GG 35491 of 4 July 2011): https://sars.mylexisnexis.co.za/#

	in any manner whatever, to a person in the course of a dispute in respect of a tax benefit from the transaction or series[230].

Source: Apex Consulting

6.4.2.4 Contractual protection (or contingency fee)

The intermediary offers an "insurance" against failure, so that if the arrangement does not secure all or part of the desired tax benefits, the taxpayer is fully or partially refunded. This may also include situations where the intermediary pays for or reimburses any expense, fee, tax, interest, penalty, or similar amount that may be incurred by a person in the course of a dispute in respect of a tax benefit from the arrangement.

Table 18 Contractual protection / contingency hallmark

Country/ Regime	Contractual Protection / Contingency Hallmark
DAC 6	An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.[231] This is linked to the main benefit test[232].
UK	Arrangements are prescribed if they satisfy (a) Conditions 1 and 2; or (b) Conditions 1 and 3. The Conditions are as follows[233]. Condition 1 - Any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements. Condition 2 - It might reasonably be expected that a promoter would wish the way in which that element of those arrangements secures a tax advantage to be kept confidential from any other promoter at any time in the period beginning with the opening date and ending with the appropriate date. Condition 3 - The promoter would, but for the requirements of these Regulations, wish to keep the way in which that element secures that advantage confidential from Her Majesty's Revenue and Customs for some or all of the period beginning with the opening date and ending with the appropriate date, and a reason for doing so is to facilitate repeated or continued use of the same element, or substantially the same element, in the future. Arrangements are prescribed if (a) no person is a promoter in relation to them; (b) the intended user of the arrangements is a business which is not a small or medium-sized enterprise; (c) any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage.

[230] Sec. 237.1.1 (definitions) Income Tax Act (RTAT) [2013]
[231] Annex IV, Part II, Sec. A 2. ((b) of DAC 6
[232] Sec. 6 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 https://www.legislation.gov.uk/uksi/2006/1543/regulation/6/made
[233] Sec. 6 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 https://www.legislation.gov.uk/uksi/2006/1543/regulation/6/made

Country/ Regime	Contractual Protection / Contingency Hallmark
	expected to be obtained under the arrangements; (d) the user of those arrangements wishes the way in which that element is expected to secure a tax advantage to be kept confidential from Her Majesty's Revenue and Customs for some or all of the period […] and (e) a reason for the user's wishing to keep that element confidential from Her Majesty's Revenue and Customs is to facilitate repeated or continued use of the same element, or substantially the same element, in the future[234].
Canada	Confidential protection, in respect of a transaction or series of transactions, means anything that prohibits the disclosure to any person or to the Minister of the details or structure of the transaction or series under which a tax benefit results, or would result but for section 245, but for greater certainty, the disclaiming or restricting of an advisor's liability shall not be considered confidential protection if it does not prohibit the disclosure of the details or structure of the transaction or series[235].
US	A confidential transaction is a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer has paid an advisor a minimum fee[236].

Source: Apex Consulting

6.4.2.5 Standardized documentation or structures

This hallmark captures situations where the intermediary designs a substantially standardized arrangement that can be mass-marketed[237], where only minimal adjustments are necessary for each new taxpayer. The fundamental characteristic of such arrangements is their ease of replication (hence they are called "off the shelve", "shrink-wrapped", or "plug and play" arrangements). Essentially, the taxpayer purchases a readymade tax product that requires little, if any, modification to suit their circumstances. The adoption of the arrangement does not require the taxpayer to receive significant additional professional advice or services[238]. This hallmark may not be an indication of an aggressive arrangement, but it is increasing the risk of dissemination of aggressive tax planning arrangements. How frequently the arrangement has actually been sold or used is not relevant (DAC 6, for example, requires availability to more than one taxpayer).

Table 19 Standardized documentation hallmark

Country / Regime	Standardized Documentation Hallmark
DAC 6	An arrangement that has substantially standardized documentation and/or structure and is available to more than one relevant taxpayer without a need to

[234] Sec. 7 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 https://www.legislation.gov.uk/uksi/2006/1543/regulation/6/made

[235] Sec. 237.1.1 (definitions) Income Tax Act (RTAT) [2013]

[236] Sec. 1.6011-4(b)(3)) of US Treasury Regulations

[237] DAC 6 requires that it is available to more than one taxpayer. See: DAC 6, Annex IV, Part II, Sec. A.3.: " An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation."

[238] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 140

	be substantially customized for implementation[239]. This is linked to the main benefit test[240].
UK	Arrangements are a product if— (a) the arrangements have standardized, or substantially standardized, documentation— (i) the purpose of which is to enable the implementation, by the client, of the arrangements; and (ii) the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client; (b) a client must enter into a specific transaction or series of transactions; and (c) that transaction or that series of transactions are standardized, or substantially standardized in form. Arrangements are a tax product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage. Arrangements are standardized if a promoter makes the arrangements available for implementation by more than one other person[241].

Source: Apex Consulting

6.4.2.6 Generic, intermediary based, hallmarks in developing countries

Based on the above analysis, only developed countries[242] (EU Member States[243], the UK[244], Canada[245], and the US[246]) have used these generic hallmarks, although South Africa also covers as a specific hallmark which could be considered a premium fee[247]. These provisions are not part of the 2018 OECD MMDR, as it has focus on the CRS and beneficial ownership only.

As the next table describes, while all developed countries with MDR regimes and South Africa apply the premium fee hallmark, the only other common hallmark among developed countries is the one relating to contingency fee. Apart from South Africa, developing countries have not used these hallmarks.

Table 20 Generic hallmarks

	EU (DAC 6)	UK	US	Canada	South Africa	Argentina	Mexico	Brazil, Colombia, Ecuador
Confidentiality	✓	✓	✓	✓				
Contingency / Premium fee	✓	✓	✓	✓	✓			

[239] Annex IV, Part II, Sec. A.3. of DAC 6.
[240] Annex IV, Part I of DAC 6
[241] Sec. 10 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations https://www.legislation.gov.uk/uksi/2006/1543/regulation/10/made
[242] From the countries analyzed in this Report.
[243] Annex IV, Part II, Sec. A.3. Of DAC 6
[244] See: DOTAS Sec. 5.5. of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated 16 June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction; Hallmark 5: standardised tax products
[245] Sec. 237.1.1 (definitions) Income Tax Act (RTAT) [2013]
[246] Sec. 1.6011-4(b)(3)) of the US Treasury Regulations
[247] Annex IV, Part I, (Main benefit test) of DAC 6

	EU (DAC 6)	UK	US	Canada	South Africa	Argentina	Mexico	Brazil, Colombia, Ecuador
Contractual protection	✓		✓	✓				
Standardization	✓	✓						

Source: Apex Consulting

There are several modifications that the MDR countries have used:

- In the EU and the UK, these hallmarks are linked to the main benefit test, i.e., it must be established that the main benefit or one of the main benefits which a person may reasonably expect to derive from an arrangement is the obtaining of tax advantage[248].
- In the UK, these provisions can also apply to a limited number of in-house arrangements where there are no intermediaries involved[249].
- Further, in the UK, the confidentiality and premium clause applies not only to actual cases where there is a contractual clause in the agreement with the intermediary, but also cases, where such clause does not exist, but the intermediary can sell the scheme for a premium fee (see reference to "Might it reasonably be expected that any promoter of the arrangements would wish the way in which any element of those arrangements gives rise to a tax advantage to be kept confidential from any other promoter"[250]). Such a clause would make its application subjective and complicated, therefore, it is not advisable to developing countries.

6.4.2.7 Pros, cons, and best practices and recommendations

Table 21 Pros, cons, and best practices and recommendations (6.4.2)

	Pros	Cons	Best practices and recommendations
Generic hallmarks (Intermediary's contractual conditions)	➢ Relatively simple hallmarks, unless options are added (MBT, potential cases, in-house arrangements).	➢ Mostly reliant on intermediary's compliance. ➢ In developing countries, it is possible that intermediaries would not have sufficient reporting nexus and that the taxpayers may not be aware of the arrangement's nature and contractual provisions	➢ Except for South Africa, developing countries have not used these hallmarks, presumably because of the lack of information available locally, which makes it difficult to assess whether there are such provisions, and to challenge well-advised and experienced MNEs with head offices elsewhere or foreign intermediaries.

248 Annex IV, Part I, (Main benefit test) of DAC 6
249 DOTAS https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introductionHallmark 3: premium fee applies to both promoted and 'in-house' arrangements of non-SMEs Sec. 5.4. of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction;
250 Condition 2 of the Sec. 6 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 https://www.legislation.gov.uk/uksi/2006/1543/regulation/6/made

	with the intermediary (where the head office is in other country).	➢ Apart from that, there is no substantial detriment to including such hallmarks, if they are precisely defined, and linked to taxpayer's reason to know. ➢ If generic hallmarks are used, a main benefit test should be added, to prevent "generic" arrangements unrelated to tax issues from being reported.

Source: Apex Consulting

6.4.3 Transaction based (specific) hallmarks

Besides the intermediary based (generic) hallmarks, the other group of hallmarks are transaction based and therefore in general considered as "**specific**". The specific hallmarks reflect specific concerns of tax authorities and target areas of perceived high risk such as the use of losses and income conversion schemes. Specific hallmarks are also a useful way of keeping a disclosure regime up to date[251].

The "specific" types of hallmarks could be classified depending on their object broadly into two groups:

- **Secrecy based hallmarks** (related to the CRS avoidance arrangements and non-transparent ownership structures hiding beneficial owners); and
- **Other aggressive or abusive tax hallmarks** (related to a wide variety of arrangements).

6.4.3.1 Secrecy hallmarks

6.4.3.1.1 Overview and recommendations

There are **two types of secrecy hallmarks** - **CRS avoidance arrangements**; and **non-transparent ownership structures hiding beneficial owners**. These hallmarks are covered by two international regimes - the 2018 OECD MMDR and the DAC 6; which are similar, but not precisely identical.

CRS avoidance hallmarks include several arrangements that are designed to circumvent the CRS regime, such as:

- Circumventing Financial Account definition;
- Transferring Financial Account to non-CRS jurisdiction;
- Reclassification of income/capital to non-reportable;
- Transfer or conversion of a financial institution, financial account, or assets to non-reportable structure;
- Use of non-reportable account holder/obscuring controlling persons; and
- Exploring other CRS and AML weaknesses.

[251] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 118

CRS avoidance hallmarks have been implemented with the EU, the UK, Guernsey, South Africa and Mexico, and a number of other countries[252]. With regard to developing countries, these hallmarks are only relevant if the country has implemented CRS. Therefore, it is not useful yet to many developing countries (in most of Africa and beyond) that have not committed to the CRS. Where the developing country has adopted the CRS, these hallmarks are useful to strengthen the CRS regime, and thus financial account tax transparency.

Given that the OECD estimates that over EUR 30 billion in additional tax revenues have been identified through voluntary disclosure programmes, offshore tax investigations and related measures since 2009[253] by developing countries as a result of exchange of information[254], it is recommended that developing countries adopt CRS, and along with that – the 2018 OECD MMDR.

Hallmarks for non-transparent ownership structures hiding beneficial owners include several hallmarks designed to obscure beneficial ownership, such as:

- Arrangements with no substantive economic activity;
- Business is incorporated, managed, resident or controlled in country other than that of a beneficial owner; and
- Unidentifiable beneficial owners.

The hallmarks for non-transparent ownership structures hiding beneficial owners are already implemented by some developing countries (South Africa, Mexico), and other signatories to the 2018 OECD MMDR, and by most of the developed countries with MDR (EU member states). These hallmarks are more useful in developing countries that are establishing **beneficial ownership registration** (especially in Latin America and some countries in Africa); and in those countries, these hallmarks can strengthen compliance with such registration requirements.

In implementing CRS avoidance hallmarks and hallmarks for non-transparent ownership structures hiding beneficial owners, it is recommended that the developing country **adopts the 2018 OECD MMDR verbatim**, working directly with the OECD in the implementation of the regime (OECD has dedicated resources to such support).

Secrecy based hallmarks were introduced almost simultaneously by the OECD MMDR (March 2018) and the DAC 6 (May 2018), and are similar, but not precisely identical. As of November 2022, the OECD MMDR is adopted by 15 countries, including some developing countries (such as Colombia, Costa Rica, South

[252] OECD. Signatories Of The Multilateral Competent Authority Agreement On The Automatic Exchange Regarding Crs Avoidance Arrangements And Opaque Offshore Structures MDR-MCAA https://www.oecd.org/tax/exchange-of-tax-information/mdr-mcaa-signatories.pdf. Such countries include Belgium, Bermuda, Cayman Islands, Colombia, Costa Rica, Cyprus, Finland, Guernsey, Iceland, Isle of Man, Jersey, Portugal, Slovenia, South Africa, Spain, and the UK.

[253] OEDC: Global Forum reports significant progress on global transparency and exchange of tax information, while noting further work is needed. https://www.oecd.org/tax/global-forum-reports-significant-progress-on-global-transparency-and-exchange-of-tax-information-while-noting-further-work-is-needed.htm

[254] OECD Raising the Bar on Tax Transparency 2022 Global Forum Annual Report. https://www.oecd.org/tax/transparency/documents/global-forum-annual-report-2022.pdf p.3

Africa).[255] In comparison, DAC 6 has had a wider territorial coverage, including 27 Member States of the EU. DAC 6 is also inspiring other countries, like Norway.

There are two different types of secrecy hallmarks:

- **CRS avoidance arrangements; and**
- **Non-transparent ownership structures hiding beneficial owners.**

6.4.3.1.2 CRS avoidance arrangements

CRS avoidance hallmark is only relevant if the country has implemented the CRS. As of October 2022, there are 117 jurisdictions committed to the CRS[256]. However, as seen from the map below, there are many developing countries (in most of Africa and beyond) which have not committed to the CRS yet. Therefore, this hallmark is not yet useful.

Given that the OECD estimates that over EUR 30 billion in additional tax revenues have been identified through voluntary disclosure programmes, offshore tax investigations and related measures since 2009[257] by developing countries as a result of exchange of information[258], it is recommended that developing countries adopt CRS, and along with that – the 2018 OECD MMDR.

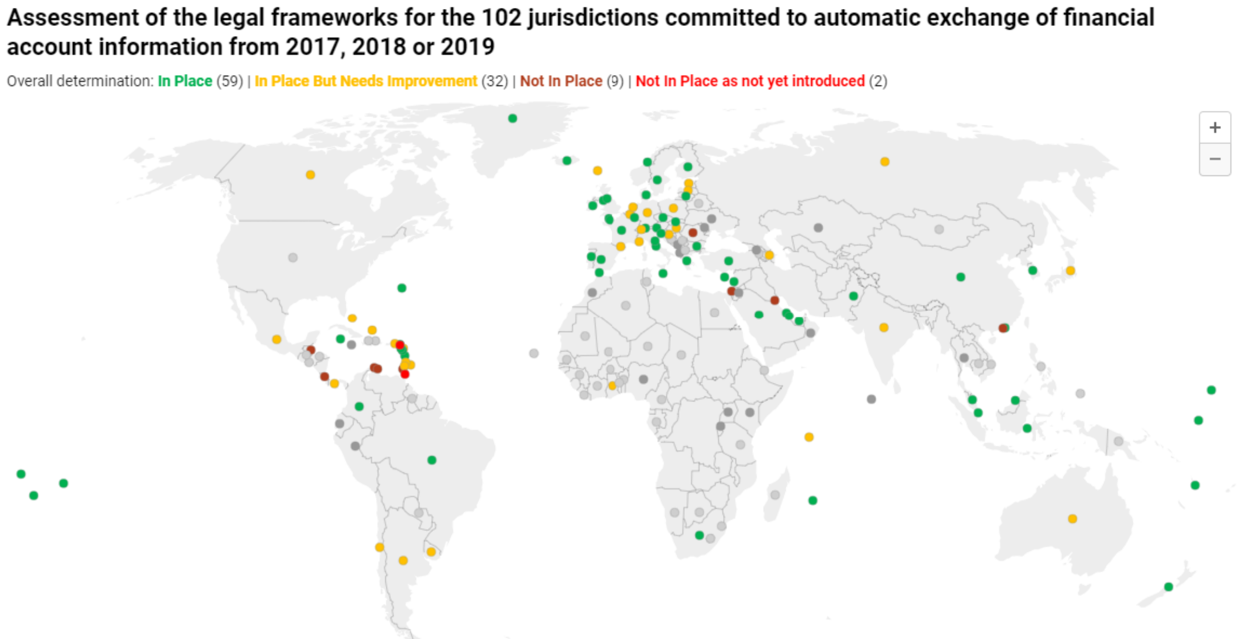
[255] OECD. Signatories Of The Multilateral Competent Authority Agreement On The Automatic Exchange Regarding Crs Avoidance Arrangements And Opaque Offshore Structures MDR-MCAA https://www.oecd.org/tax/exchange-of-tax-information/mdr-mcaa-signatories.pdf. Such countries include Belgium, Bermuda, Cayman Islands, Colombia, Costa Rica, Cyprus, Finland, Guernsey, Iceland, Isle of Man, Jersey, Portugal, Slovenia, South Africa, Spain, and the UK.

[256] OECD: SIGNATORIES OF THE MULTILATERAL COMPETENT AUTHORITY AGREEMENT ON AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION AND INTENDED FIRST INFORMATION EXCHANGE DATE (2022) https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/crs-mcaa-signatories.pdf

[257] OECD: Global Forum reports significant progress on global transparency and exchange of tax information, while noting further work is needed. https://www.oecd.org/tax/global-forum-reports-significant-progress-on-global-transparency-and-exchange-of-tax-information-while-noting-further-work-is-needed.htm

[258] OECD Raising the Bar on Tax Transparency 2022 Global Forum Annual Report. https://www.oecd.org/tax/transparency/documents/global-forum-annual-report-2022.pdf p.3

Image: OECD Assessment of Legal Frameworks for the CRS



Source: OECD website[259]

This hallmark covers CRS avoidance arrangements that relate to transferring financial accounts to countries not engaging in the automatic exchange system (e.g., most African countries and other countries, see the map above) or keeping financial accounts within a country exchanging information but where there is a deliberate attempt to modify conditions not to fit under the types of financial accounts, account holders, income or capital that fall outside the scope of the CRS definitions.

The hallmarks set forth by the OECD 2018 MMDR and DAC 6 broadly include:

- **Circumventing Financial Account definition**: offering a type of financial account that would escape the scope and definition of reportable financial account established by the CRS.
- **Transferring Financial Account to non-CRS jurisdiction:** given that only jurisdictions implementing the CRS will exchange information with each other, a way to avoid reporting is to transfer financial accounts to countries which are not participating in the CRS, including many developing countries.
- **Reclassification of income/capital to non-reportable:** given that some types of income and capital (e.g., royalties) are not reported, one strategy would be to reclassify income or capital into non-reportable products or payments.
- **Transfer or conversion of a financial institution, financial account, or assets to non-reportable structure**: the CRS exempts some types of financial institutions (e.g., certain retirement funds), financial accounts (e.g., certain escrow accounts) and types of structures (e.g., trust managed by an individual). By using these arrangements, a taxpayer would avoid being reported under the automatic exchange system.
- **Use of non-reportable account holder/ obscuring controlling persons:** some types of account holders are excluded (e.g., financial institution), and/or do not need to report their beneficial owners (e.g., controlling persons of entities classified as "active non-financial entities"). Otherwise, obscuring controlling persons would also be covered by the hallmarks regarding hiding the beneficial owner.

[259] Data as of October 2022. https://www.oecd.org/tax/transparency/

- **Exploring other CRS and AML weaknesses**: a generic residual hallmark to cover other arrangements that explore weakness in, the due diligence procedures, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.

While DAC 6 is classifying these hallmarks as "specific"[260], 2018 OECD MMDR considers the last hallmark as "generic" hallmark[261] because it includes not only specific arrangements (known schemes), but also arrangements that can become aggressive arrangements. That is because they are designed to have or marketed as having, the effect of circumventing CRS Legislation, which is to be understood as the arrangement resulting in the avoidance of accurate reporting of CRS information. An arrangement therefore circumvents CRS Legislation where it avoids the reporting of CRS information to the jurisdiction(s) of residence of a taxpayer in a way that undermines its intended policy, including by[262]:

- Exploiting the absence of CRS Legislation or inadequate implementation of such legislation;
- Exploiting the absence of a CRS exchange agreement with one or more jurisdiction(s) of tax residence of such taxpayer;
- Undermining or exploiting weaknesses in the due diligence procedures applied by a Financial Institution under CRS Legislation; or
- Otherwise undermining the intended policy of the CRS.

Such generic hallmark could, for example, capture the following arrangements:

- **The abuse of golden visas (passport or citizenship for sale)[263]**- many countries offer citizenship or residency in exchange for investment, without needing to move or reside in that country. A taxpayer could present to the bank a residence certificate (acquired in exchange for investment) to convince the bank that the taxpayer is a tax resident in that country, while in reality the taxpayer's tax residence is elsewhere. This way, financial account information will not be sent to the proper country of tax residence, but rather to the country of purchased tax residence.
- **Holding accounts in the US (and other non-reportable jurisdictions) through entities -** given that the US under FATCA-related inter-governmental Model 1 agreements does not exchange with other countries information at the beneficial ownership level, it is possible to avoid reporting under FATCA by holding an account through an offshore entity, including through a US entity.[264]
- **Use of cryptocurrencies, and central bank digital currencies to obscure ownership -** blockchain and digital currencies provide an opportunity to remain undetected and unreported. In October 2022, the OECD issued Crypto-Asset Reporting Framework and Amendments to the CRS designed to close these loopholes by ensuring that indirect investments in crypto-assets through derivatives and investment

[260] Annex IV, Part II, D (Specific hallmarks concerning automatic exchange of information and beneficial ownership) of DAC 6

[261] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, para 2 of the Commentary

[262] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, para 2 of the Commentary

[263] *Residence/Citizenship by investment - Organisation for Economic Co-operation and Development*. (n.d.). https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/; https://www.taxjustice.net/wp-content/uploads/2018/03/20180305_Citizenship-and-Residency-by-Investment-FINAL.pdf
https://www.europarl.europa.eu/RegData/etudes/STUD/2018/627128/EPRS_STU(2018)627128_EN.pdf

[264] KNOBEL, Andres. (2016). THE ROLE OF THE U.S. AS A TAX HAVEN IMPLICATIONS FOR EUROPE. In *A STUDY COMMISSIONED BY THE GREENS/EFA GROUP IN THE EUROPEAN PARLIAMENT*. https://www.greens-efa.eu/legacy/fileadmin/dam/Documents/Studies/Taxation/The_US_as_a_tax_haven_Implications_for_Europe_11_May_FINAL.pdf

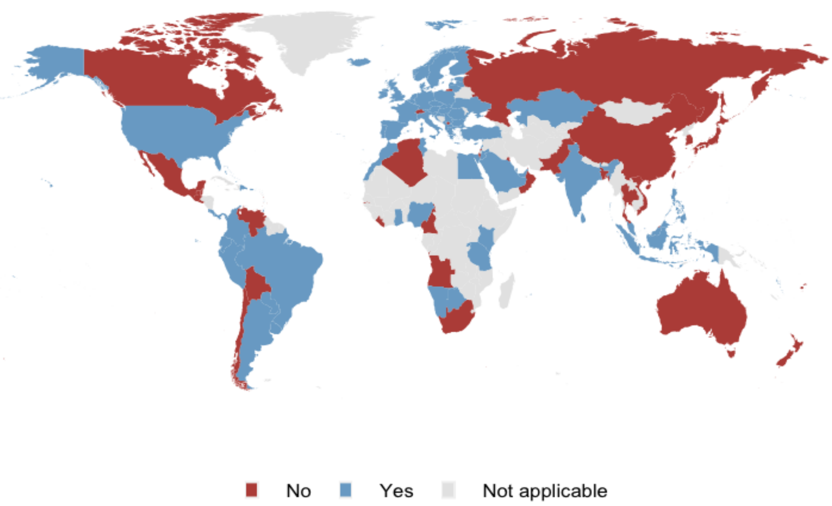
vehicles are now covered by the CRS. In addition, amendments have been made to strengthen the due diligence and reporting requirements (including requiring the reporting of each controlling person)[265].

6.4.3.1.3 Non-transparent ownership structures hiding beneficial owner

The OECD 2018 MMDR and DAC 6 both include hallmarks relating to obscuring the beneficial owner. This hallmark does both[266]:

- Supplements the specific hallmark for CRS Avoidance Arrangements by specifically identifying those features of offshore structures that do not allow the accurate determination of the identity of the Beneficial Owner (identification and reporting of the beneficial owners -called "controlling person" under the CRS- is one of the cornerstones of the CRS); and
- Goes beyond the CRS (and is not per se linked to the CRS), as it captures arrangements where the ownership of the investment vehicle has been structured so as to not allow the accurate determination of the identity of natural person(s) with ultimate effective control over that vehicle, such as the use of nominee shareholders, indirect control arrangements or arrangements that provide a person with access to assets held by, or income derived from, the offshore vehicle, without being identified as the beneficial owner.

Given that more than 90 countries already have laws requiring beneficial ownership registration[267] (which will become a requirement based on the 2022 Reform of the FATF Recommendation 24[268]), these hallmarks are also relevant for countries that established beneficial ownership registries, even if they have not committed to the automatic exchange of information under the CRS.



Source:" The State of Play of Beneficial Ownership Registration in 2022", Tax Justice Network, November 2022.[269]

[265] *Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard - OECD*. (n.d.). https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-to-the-common-reporting-standard.htm

[266] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, para 26 of the Commentary, p.30

[267] Tax Justice Network. (2020). *Ownership registration of different types of legal structures from an international comparative perspective State of play of beneficial ownership - Update 2020*. https://taxjustice.net/wp-content/uploads/2020/06/State-of-play-of-beneficial-ownership-Update-2020-Tax-Justice-Network.pdf

[268] *Documents - Financial Action Task Force (FATF)*. (2022). https://www.fatf-gafi.org/publications/fatfrecommendations/documents/r24-statement-march-2022.html

[269] www.taxjustice.net/sop22

The DAC 6 and 2018 OECD MMDR include the following hallmarks for non-transparent ownership structures hiding beneficial owner[270]:

- **Arrangements with no substantive economic activity**: where such activity is not supported by adequate staff, equipment, assets, and premises[271].
- **Business is incorporated, managed, resident, or controlled in a country other than that of a beneficial owner**: if a beneficial owner creates an offshore entity in a foreign country rather than creating a local entity in his/her country of residence, this may be an indication of an attempt to conceal the beneficial ownership, especially if the local entity will operate locally.
- **Unidentifiable beneficial owners**: when the structure of an entity involves so many layers, or combination of different types of legal vehicles, or dividing ownership into many parts to avoid identifying a beneficial owner.

Based on a study on complex ownership chains to hide the beneficial owner[272], these hallmarks could cover, for example, the following arrangements:

- **The use of bearer shares and nominees in the ownership chain**: bearer shares are paper documents that entail ownership over shares. They create secrecy because the owner of the shares is whoever holds the paper-bearer-share at any given time, making it impossible to always know the owner (unless there is perfect information on who is holding the bearer share). Nominees are allowed in some countries and prohibited in others. In essence, they involve a person or entity appearing as the legal owner of an entity, on behalf of an (undisclosed) beneficial owner.
- **Circular ownership structures:** involve structures where there may be no beneficial owner at all because Company A is owned by Company B, which in turn is owned by Company A (the longer the chain, the harder it is to determine that a structure involves circular ownership).
- **The combination of trusts and companies:** by combining several types of legal vehicles, it is possible to create secrecy. For instance, based on the FATF Recommendations, in the case of trusts all parties to the trust, including all beneficiaries, must be identified as beneficial owners, regardless of their rights to the trust income or assets. However, by interposing a company as a trustee, thresholds would be imposed de facto because the beneficial ownership definition for companies usually involves thresholds (e.g., anyone with more than 25% of the shares). In such case, the beneficial owners of the trust in relation to the trustee would include only those individuals with more than 25% of the shares over the corporate trustee, rather than all trustees (or all individuals with at least one share over the corporate trustee).

Secrecy hallmarks have been implemented as follows:

[270] Annex IV, Part II, D.2. of DAC 6

[271] 2018 OECD MMDR refers to the" passive offshore vehicle", see: Para 28. et seq. of the 2018 OECD MMDR Commentary, p. 30

[272] Tax Justice Network. (2022). *Complex Ownership Structures: Addressing the Risks for Beneficial Ownership Transparency*. https://taxjustice.net/wp-content/uploads/2022/02/Complex-ownership-chains-Reduced-Andres-Knobel-MB-AK.pdf

Table 22 Secrecy hallmarks

	EU (incl. Germany and Portugal)	UK	Guernsey	US[273]	Canada	South Africa	Argentina	Mexico
CRS avoidance arrangements	✓	✓	✓			✓		✓ (very general mention related automatic exchange of info)
Non-transparent ownership structures hiding beneficial owner	✓	✓	✓			✓		✓ (very general mention)

Source: Apex Consulting

As the table shows:

1. The EU and the UK include all the DAC 6 and 2018 OECD MMDR hallmarks for avoidance arrangements and non-transparent ownership structures hiding beneficial owner.
2. South Africa includes most hallmarks except for two: "other weaknesses" in the case of the CRS avoidance arrangement, and cases where the beneficial owner is not resident in the country where the entity is incorporated or managed[274].
3. Mexico only includes a general reference to both hallmarks.
4. Neither Argentina, the US or Canada include these secrecy hallmarks. In the case of the US and Canada, this may be related to the fact that their MDR pre-date the CRS/FATCA, and the US only recently approved beneficial ownership registration [275].

[273] Although the US is not implementing the CRS, it is implementing a very similar automatic exchange of information system based on its Foreign Account Tax Compliance Act (FATCA) and the inter-governmental agreements (IGAs) signed with many countries. The US system involves an enforcement mechanism based on imposing withholding taxes on non-compliant financial institutions. Nevertheless, this withholding tax does not apply to financial institutions from countries that signed an IGA and exchange information with the US (see for instance Art. 4 of the IGA Model 1A). In relation to this, a recent investigation by the US Senate revealed a" shell bank" loophole that allowed banks offshore to accept funds from U.S. persons without reporting them to the IRS. For more details on this investigation and loophole see: https://www.finance.senate.gov/chairmans-news/wyden-investigation-uncovers-major-loophole-in-offshore-account-reporting

[274] This was the status as of October 2022. In November 2022, South Africa adopted the 2018 OECD MMDR, and therefore all hallmarks should be fully aligned with the 2018 OECD MMDR, however, related South African regulations have not been updated / released yet as of mid-November.

[275] The Corporate Transparency Act was approved in January of 2021 and FinCen final rules will make it applicable since 2024, https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet

6.4.3.2 Pros, cons, and best practices and recommendations

Table 23 Pros, cons, and best practices and recommendations (6.4.3.1)

	Pros	Cons	Best practices and recommendations
CRS Avoidance	➢ Strengthens CRS regime, and thus financial account tax transparency, which is estimated to have enabled developing countries to identify over EUR 30 billion in additional tax revenues since 2009.[276] ➢ Builds on global (2018 OECD MMDR) and regional (DAC 6) ruleset, infrastructure, and experience.	➢ Many developing countries have not committed to the automatic exchange based on the CRS. ➢ Relatively complex hallmark requires full understanding of the CRS regime and underlying rules and requirements.	➢ Useful where the country has adopted the CRS (which is strongly encouraged). ➢ If developing country has adopted CRS, it is recommended that the developing country adopts the 2018 OECD MMDR verbatim, as well as works with, and gets support from, the OECD in the implementation of the regime (OECD has dedicated resources to such support).
Non-transparent ownership structures hiding beneficial owner	➢ Strengthens beneficial ownership transparency, and compliance with international standards. ➢ Builds on global (2018 OECD MMDR) and regional (DAC 6) ruleset, infrastructure and experience.	➢ Only some developing countries currently treat beneficial ownership registry and transparency as their immediate priority. ➢ Setting up non-transparent structures that hide ownership requires sophisticated tax planning that may not	➢ Several developing countries are establishing beneficial ownership registration (especially in Latin America and some countries in Africa[277]), hence this regime could strengthen compliance with such registration requirement.

[276] *Global Forum reports significant progress on global transparency and exchange of tax information, while noting further work is needed - OECD*. (n.d.). https://www.oecd.org/tax/global-forum-reports-significant-progress-on-global-transparency-and-exchange-of-tax-information-while-noting-further-work-is-needed.htm

[277] According to the Tax Justice Network's" State of Play of Beneficial Ownership Registration", as of March 2022 at least 10 countries in Latin America and 12 in Africa had approved laws establishing beneficial ownership registration. For more details see here: www.taxjustice.net/sop22

	be prevalent in developing countries.

Source: Apex Consulting

6.4.3.3 Other aggressive or abusive tax hallmarks

6.4.3.3.1 Overview and recommendations

Besides secrecy hallmarks, there are numerous specific hallmarks that are designed to target potentially aggressive or abusive tax arrangements. Such hallmarks target, among other, one or more of the following:

- Tax base erosion (e.g., loss transactions, double deduction for the same income item, etc.);
- Tax rate reduction (e.g., converting income into other categories of revenue which are taxed at a lower level or exempt from tax, etc.);
- Double non-taxation (e.g., payments to low/no tax jurisdictions, and payments to tax nomads, entities subject to preferential tax treatments, etc.);
- Avoiding being subject to tax (e.g., artificial avoidance of permanent establishment, etc.);
- Potentially aggressive transfer pricing practices (e.g., transfer of hard to value intangibles, etc.); and
- Transactions without business substance (e.g., roundtripping of funds, etc.).

The more frequently used hallmarks include:

- Loss transactions;
- Converting income;
- Hybrid instrument mismatches;
- Circular transactions;
- Significant book- tax differences;
- Double depreciation;
- Double tax relief;
- Material transfer value differences;
- Certain deductible cross-border payments between related enterprises; and
- Hallmarks concerning transfer pricing.

Relatively few developing countries have adopted or considered adopting a MDR. MDR have been implemented by Argentina, South Africa and Mexico, and considered by several other developing countries - Brazil, Ecuador, and Colombia. The most common hallmarks used in the MDR regimes of developing countries include:

- Payments to:
  - the recipient is not tax resident anywhere;
  - the recipient is resident in a zero/almost zero -tax country;
  - the recipient is resident in a non-cooperating jurisdiction;
  - the recipient is entitled to a full tax exemption on the receipt; and
  - the recipient is taxed under a preferential tax regime.
- Arrangements that are “listed transactions” to be issued by the tax administrations;

- Exploiting asymmetries re: entity, contract, payment or instrument, other distortions (such as, for example hybrid instrument mismatches, significant book-tax differences); and
- Tax treaty shopping (or direct application of a double tax treaty).

Apart from the 27 European Union Member States that have implemented DAC6 in a broadly uniform manner, and countries that have implemented the 2018 OECD MMDR, there is no consistency in the choices of hallmarks that MDR countries – both developed and developing – have used so far. This reflects the fact that each MDR country has different risks to tax revenues and resources to manage such risks, which then define the scope of the hallmarks to be used.

MDR countries often use a "list of transactions" adopted by tax authorities to keep an updated list of reportable hallmarks. Such lists can include a wide variety of arrangements in scope.

Developing countries should consider whether their legislative processes permit easy updating of hallmarks. Recommended approach to developing countries where the legislative process is cumbersome is to have a list of transactions in scope published by the tax authorities if tax authorities use their discretion objectively. Having such a list allows for quick and effective update of hallmarks when and if needed.

While many developing countries include a list of transactions in the framework, many of these lists have not been published yet. Using the OECD's Aggressive Tax Planning Directory may be of help.

Besides the secrecy hallmarks, there are many other specific hallmarks that are designed to target potentially aggressive or abusive tax arrangements.

Such hallmarks target, among other, one or more of the following:

- **Tax base erosion** (e.g., loss transactions, double deduction for the same income item, etc.);
- **Tax rate reduction** (e.g., converting income into other categories of revenue which are taxed at a lower level or exempt from tax, etc.);
- **Double non-taxation** (e.g., payments to low/no tax jurisdictions, and payments to tax nomads, entities subject to preferential tax treatments, etc.);
- **Avoiding being subject to tax** (e.g., artificial avoidance of permanent establishment, etc.);
- **Potentially aggressive transfer pricing practices** (e.g., transfer of hard to value intangibles, etc.); and
- **Transactions without business substance** (e.g., roundtripping of funds, etc.)

Below is a summary of some of the most common hallmarks used.

6.4.3.3.2 Loss transaction

This hallmark covers various loss creation and acquisition arrangements, and it is used in practically all MDR regimes in variable detail but is normally designed to provide all or some of the individual participants with losses that will be used to reduce their income tax or capital gains tax liabilities or to generate a repayment[278].

- DAC 6 (and thus all EU Member State MDR) covers transactions where “losses” are acquired: an arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company, and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses[279].
- The Canadian tax shelter regime includes the acquisition of property or a gifting arrangement for which representations are made that losses, deductions, or credits in the first four years would be equal to or greater than the net cost of the property invested or acquired under the gifting arrangement[280].
- Versions of specific hallmarks involving loss transactions are also found in the United Kingdom[281], South Africa[282], the United States[283], and Mexico[284].

This type of hallmark could be coupled with a threshold applied to the amount of the loss, which is applied in the US[285] and South Africa[286].

6.4.3.3.3 Converting income

Converting income hallmark covers arrangements where an arrangement has the effect of converting income into capital, gifts, or other categories of revenue which are taxed at a lower level or exempt from tax[287] (i.e., ordinary income is converted into capital gains, etc.). This hallmark is specifically named only under the DAC 6 MDR regime and captures a wide variety of arrangements, in effect serving as a catch-all provision for many arrangements. Under other regimes, the concept may be covered in a much narrower sense, by targeting specifically known arrangements that are based on income conversion (for example, hybrid instruments, below).

[278] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 120

[279] Annex IV, Part II, B.1. of DAC 6

[280] 237.1.1 of the Income Tax Act, Art. 3 of Guidance, and Para 120 of the 2015 OECD Report

[281] Sec. 5.6. of the DOTAS (loss schemes). HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

[282] Sec. 2.4. of the South African Revenue Service public notice (Government Notice 140, published on 3 February 2016, GG No 39650) sets forth “an arrangement in terms of which one or more persons acquire the controlling interest in a company that (a) (i) has carried forward or reasonably expects to carry forward a balance of assessed loss exceeding R50 million from the year of assessment immediately preceding the year of assessment in which the controlling interest is acquired; or (ii) has or reasonably expects to have an assessed loss exceeding R50 million in respect of the year of assessment during which the controlling interest is acquired; or (b) directly or indirectly holds a controlling interest in a company referred to above.”

[283] Sec. 1.6011-4(b)(5)(i) of the US treasury Regulations

[284] Art. 199.III and IV of the Fiscal Code: Hallmark III. Transfer of tax losses allowing reduction of tax profits (Art. 199.III); Hallmark XI. Operations to exploit tax losses that are about to expire result in deductions for the taxpayer or related party. (Art. 199.XI)

[285] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 120

[286] Sec. 2.4. of the South African Revenue Service public notice (Government Notice 140, published on 3 February 2016, GG No 39650), see footnote above

[287] Annex IV, Part II, B.2. of DAC 6

6.4.3.3.4 Hybrid instrument mismatches

This hallmark covers hybrid instrument mismatches where securities are structured to possess elements of both debt securities as well as characteristics of equity, and they are used in aggressive tax planning to exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to achieve double non-taxation, including long-term taxation deferral[288].

This hallmark is implemented in Argentina, where it is covered by hallmark targeting asymmetries in the tax laws of two or more jurisdictions with regard to the treatment and/or qualification of an entity or contract or a financial instrument, resulting in a tax advantage or any other type of benefit[289], South Africa[290], Mexico[291].

6.4.3.3.5 Circular transactions

This hallmark covers circular transactions resulting in the round-tripping of funds through involving interposed entities without other business purpose, or transactions that offset or cancel each other or that have other similar features.

This hallmark is included in the DAC 6[292], and is adopted across the EU with some modifications. For example, Germany covers "structures that have as their object that [...] c) Transactions through the involvement of intermediary entities that do not engage in significant economic activity, or transactions that cancel out or offset each other, are used for circular wealth transfers" [293].

South Africa covers arrangements that include round-trip financing; an accommodating or tax indifferent party; or elements that have the effect of offsetting or canceling each other[294]. Mexico includes interconnected payments or transactions that are fully or partially returned to the original payor (or to any of its partners, shareholders, or related parties)[295].

6.4.3.3.6 Significant book-tax differences

This hallmark covers significant book-tax differences, where there is a significant difference between tax accounting and financial accounting. For example, Mexico includes transactions where accounting and tax records show differences above 20%, except those resulting from the calculation of depreciation[296]. South Africa pursues arrangements, where there is a deduction for purposes of the Income Tax Act but not as an expense for purposes of 'financial reporting standards'; or revenue for purposes of 'financial reporting standards' but not as gross income for purposes of the Income Tax Act[297].

[288] For more, see: BEPS Action 2, https://www.oecd.org/tax/beps/beps-actions/action2/

[289] Art. 4.c of the Tax administration (AFIP) General Resolution 4838/2020

[290] Sec 2.1 of the SARS notice listing certain arrangements which are deemed to be reportable (refer Government Notice 140, published on 3 February 2016, GG No 39650) ("Notice") https://www.sars.gov.za/wp-content/uploads/Legal/SecLegis/LAPD-LSec-TAdm-PN-2016-02-Notice-140-GG-39650-3-February-2016.pdf

[291] Art. 199.IX of the Fiscal Code: Hallmark IX. Hybrid mechanism

[292] Annex IV, Part II, B.3. of the DAC 6

[293] 138.e.1.3.c of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, page 2875 on 30 December 2019 (BGBl. I no. 52/2019, at 2875)

[294] Sec. 35.1 (b) of the Tax Administration Act NO. 28 OF 2011 refers to round trip financing; an accommodating or tax indifferent party; or elements that have the effect of offsetting or canceling each other

[295] Art. 199.IV of the Fiscal Code

[296] Art. 199.XIV of the Fiscal Code

[297] Sec. 35.1. of the Tax Administration Act NO. 28 OF 2011 (GG 35491 of 4 July 2011): https://sars.mylexisnexis.co.za/#

6.4.3.3.7 Double depreciation

This hallmark covers double depreciation, where the same depreciation on the asset is claimed in more than one jurisdiction[298]. It is covered under DAC 6, and also in Mexican MDR, which captures a transfer of a totally or partially depreciated asset, which allows its depreciation by another related party[299].

6.4.3.3.8 Double tax relief

This hallmark covers double tax relief, where tax relief in respect of the same item of income or capital is claimed in more than one jurisdiction[300]. It is covered under DAC 6, with variations in the EU Member States. For example, Germany covers structures that have as their object that in more than one tax jurisdiction an exemption from double taxation is granted for the same income or capital and the income or capital therefore remains untaxed in whole or in part[301].

6.4.3.3.9 Material transfer value differences

This hallmark covers material transfer value differences, where an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved[302]. It is included in the DAC 6. Similarly, Mexico covers transactions between related parties in business restructurings for the transfer of assets, functions, and risks without "consideration" (*contraprestación)* or which result in more than a 20% reduction of the operating income[303].

6.4.3.3.10 Certain deductible cross-border payments between related enterprises

Several hallmarks cover deductible cross-border payments between related enterprises, where profits are shifted to countries with low- or no-income tax, or entities subject to limited or no tax (i.e., there is a deduction in one country and no/almost no matching income inclusion in the other country), and include payments to:

- the recipient is not tax resident anywhere;
- the recipient is resident in a zero /almost zero -tax country;
- the recipient is resident in a non-cooperating jurisdiction;
- the recipient is entitled to a full tax exemption on the receipt; and
- the recipient is taxed under a preferential tax regime.

These hallmarks are included in DAC 6[304], and in different scope in Argentina that covers arrangements with non-cooperative jurisdictions or jurisdictions with low or no taxation are involved[305], and Mexico has a hallmark for the avoidance of tax on income from foreign controlled entities subject to preferential tax treatment[306].

[298] Annex IV, Part II, Sec. C.3. of the DAC 6
[299] Art. 199.VIII of the Fiscal Code
[300] Annex IV, Part II, Sec. C.3. of the DAC 6
[301] 138.e.2.1.b.bb of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, page 2875 on 30 December 2019 (BGBl. I no. 52/2019, at 2875).
[302] Annex IV, Part II, Sec. C.3. of DAC 6
[303] Art. 199.VI of the Fiscal Code
[304] Annex IV, Part II, Sec. C.1. of the DAC 6
[305] Art. 4.b) of the Tax administration (AFIP) General Resolution 4838/2020
[306] Art. 199.II of the Fiscal Code

6.4.3.3.11 Hallmarks concerning transfer pricing

These hallmarks concern transfer pricing: and involving transactions within a MNE, such as, for example:

- Use of unilateral safe harbor rules;
- Transfer of hard to value intangibles; and
- Transfer of intra-group functions, risk, assets, with 50% or more projected drop in EBIT.

These hallmarks are included in DAC6[307], and similar ones can be found in the Mexican MDR regime, which uses additional hallmarks and different thresholds. In particular, Mexican MDR includes transactions between related parties which involve[308]:

- Transfer of hard to value intangibles;
- Business restructurings for the transfer of assets, functions, and risks without "consideration"; (contraprestación) or which result in more than a 20% reduction of the operating income;
- Temporary transfer of use or enjoyment of goods and rights without "consideration", or provision of services or functions without remuneration;
- Lack of reliable comparables (transactions involve unique or valuable functions or assets); and
- Use of unilateral protection regime granted by a foreign law.

6.4.3.3.12 Other hallmarks

Besides the mentioned hallmarks, MDR countries use a wide variety of other, country-specific hallmarks.

For example:

- UK has hallmarks for leasing arrangements[309], employment income[310], financial products[311], and has a separate regime for other taxes, like, for example DASVOIT regime that has 8 hallmarks.
- Portugal has hallmarks for certain domestic arrangements (covering VAT, etc.)[312].
- Argentina has hallmarks for[313]:
    - entities are (ab)used to: engage in tax treaty shopping, avoid a permanent establishment, result in international double-non-taxation, shift taxable bases abroad or attempt to avoid the presentation of any information regime;
    - arrangements with any party has rights as (or similar to) a settlor, trustee or beneficiary of foreign trusts, private interest foundations or any other similar type of foreign entity.
- South Africa has hallmarks[314] for:

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[307] Annex IV, Part II, Sec. E. of the DAC 6

[308] Art. 199.VI of the Fiscal Code

[309] Queen's Printer of Acts of Parliament. (2006). *The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006*. https://www.legislation.gov.uk/uksi/2006/1543/contents/made, Sec. 5.7 of Regulations 13-17

[310] Queen's Printer of Acts of Parliament. (2006). *The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006*. https://www.legislation.gov.uk/uksi/2006/1543/contents/made, Sec. 5.8

[311] Queen's Printer of Acts of Parliament. (2006). *The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006*. https://www.legislation.gov.uk/uksi/2006/1543/contents/made, Sec. 5.9

[312] Sec. 5 of the Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements

[313] Art. 4 Tax administration (AFIP) General Resolution 4838/2020

[314] Sec. 35.1 and 35.2. of the Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements (DAC 6 or the Directive)

  - arrangements that do not result in a reasonable expectation of a “pre-tax profit” for any “participant”; and
  - arrangements that result in a reasonable expectation of a ‘pre-tax profit’ for any ‘participant’ that is less than the value of that ‘tax benefit’ to that ‘participant’ if both are discounted to a present value at the end of the first year of assessment when that ‘tax benefit’ is or will be derived or is assumed to be derived, using consistent assumptions and a reasonable discount rate for that ‘participant’.
- The US has a list of specifically named (currently 36) transactions in scope[315];
- Mexico’s MDR includes the following hallmarks related to arrangements that[316]:
  - are with non-resident taxpayer who uses a Mexican double tax agreement in relation to income which is not subject to tax in their country of residence or which results in a lower tax rate than would otherwise apply;
  - avoid the status of permanent establishment in Mexico;
  - avoid the additional rate of 10% related to certain payments of dividends; and
  - avoid disclosure regimes.
- Canada is considering modifying its existing Tax Shelter regime to include future hallmarks[317] of:
  - manipulating status of Canadian Controlled Private Corporation (CCPC);
  - straddle creation transactions using a partnership;
  - avoiding the 21-year deemed disposition rule for trusts;
  - manipulation of bankrupt status to reduce debt forgiveness;
  - avoidance of acquisition of control of a corporation in certain circumstances; and
  - back-to-back lending to avoid either thin capitalization rules or non-resident withholding tax.
- Other hallmarks in developing countries, as set forth below.

As discussed above, and summarized below, there are wide differences in the chosen hallmarks across all MDR countries (unless, of course, the country has adopted the DAC 6 or 2018 OECD MMDR regime). This reflects the fact that each MDR country has different risks to tax revenues and resources to manage such risk, which then define the scope of the hallmarks to be used.

A comparative table of hallmarks for other aggressive or abusive tax arrangements can be found below.

Table 24 Other specific hallmarks for other aggressive or abusive tax arrangements

	Germany	DAC 6 (Portugal etc.)	UK	US	Canada	South Africa	Argentina	Mexico
Loss transaction	✓	✓	✓	✓		✓		✓
Converting income	✓	✓						
Circular transactions	✓	✓				✓		✓
Hybrid instruments			✓			✓	✓*	✓

[315] Sec. 1.6011-4(b)(2) of the US Treasury Regulations
[316] Art. 199 of the Fiscal Code
[317] *New Mandatory Tax Disclosure Rules Announced for 2022*. (2022). https://www.dentons.com/en/insights/articles/2022/february/9/mandatory-disclosure-rules-in-the-income-tax-act-expanded-in-2021-canadian-federal-budget

	Germany	DAC 6 (Portugal etc.)	UK	US	Canada	South Africa	Argentina	Mexico
Listed transactions	✓ (White)		✓ (Black)	✓ (Black & Grey)	Proposed Black	✓ (Black)	✓ (Black)	✓ (Grey)
Book-tax differences				No longer				✓
Certain deducible payments between related partied	✓	✓					✓	✓
Double depreciation	✓	✓						✓
Double tax relief	✓	✓						
Material transfer value differences	✓	✓						✓
Transfer pricing hallmarks	✓	✓						✓

Source: Apex Consulting

6.4.3.3.13 Analysis of the other specific hallmarks for aggressive or abusive tax arrangements in developing countries

As the next table shows, also developing countries have diverse hallmarks – both for existing and proposed MDR regimes. Only Mexico and to some degree South Africa share some of the specific hallmarks used by developed countries (e.g., hybrid instruments, double depreciation, loss transactions, etc.). Although the MDR of Brazil, Ecuador, and Colombia is currently not in force, the proposed regimes are a good indicator of hallmark choices considered for implementation by developing countries.

Table 25 Other specific hallmarks for aggressive or abusive tax arrangements in developing countries[318]

	Argentina[319]	Mexico[320]	South Africa[321]	Colombia[322]	Brazil[323]	Ecuador[324]
Value of tax benefit exceeds pre-tax profit or no relevant non-tax purpose			✓		✓	
Tax treaty shopping	✓	✓		✓		
Avoidance of permanent establishment	✓	✓				
Double non-taxation or no pre-tax profit for any participant	✓		✓			
Shifting tax base abroad	✓			✓		
Use of non-cooperative jurisdictions; no/low tax	✓	✓		✓		✓

318 Note some of the hallmarks are designed very broadly and therefore may include other hallmarks listed underneath

319 Resolution by the tax administration AFIP 4838/2020, Art. 4, available in: https://www.boletinoficial.gob.ar/detalleAviso/primera/236310/20201020

320 Art. 199 of the Federation's Fiscal Code, available here: https://leyes-mx.com/codigo_fiscal_de_la_federacion/199.htm

321 Annex E to the 2015 OECD Report and Sec. 35 of the Tax Administration Act NO. 28 OF 2011 (GG 35491 of 4 July 2011): https://sars.mylexisnexis.co.za/# , as well as in SARS notice listing certain arrangements which are deemed to be reportable (refer Government Notice 140, published on 3 February 2016, GG No 39650) https://www.sars.gov.za/wp-content/uploads/Legal/SecLegis/LAPD-LSec-TAdm-PN-2016-02-Notice-140-GG-39650-3-February-2016.pdf and SARS Reportable Arrangements circular dated 9 February 2022 https://saicawebprstorage.blob.core.windows.net/uploads/resources/Reportable-Arrangements.pdf

322 Proposed Art. 884 of the draft law 178 of 2016 (rejected) mentioned: The generation or use of tax losses whose value is equal to or greater than 31,000 UVT; the participation of entities or investment vehicles, transparent or not, that are fiscal residents, in the case of the former, or are constituted in, in the case of the latter, of jurisdictions whose rate nominal income tax is equal to or less than at 80% of the nominal income tax rate and complementary; The application of any of the agreements for avoiding double taxation signed by Colombia; The presence of payments likely to constitute a deduction for tax purposes, which would not be taxed on the head of the effective beneficiary thereof; Others set by the regulations that have the potential to erode the tax base or constitute a transfer of profits abroad. A summary of the hallmarks is available here (page 53): https://www2.deloitte.com/content/dam/Deloitte/co/Documents/tax/Bolet%C3%ADn%20extraordinario%20v%202%20(dise%C3%B1ado).pdf

323 The regulation was repealed but it used to contain three hallmarks in Art. 7 of Provisory Measure 685/2015: the legal acts or transactions performed do not have relevant extra-tax reasons; the form adopted is not usual, uses an indirect legal transaction or contains a clause that distorts, even partially, the effects of a typical contract; or are mentioned by a future act of the Federal Revenue Service of Brazil. The text of Provisory Measure 685/2015 is available here: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/mpv/mpv685.htm

324 Ecuador's Art. 102.2 of the Law of Fiscal Regime (declared unconstitutional in 2022) states: "Promoters, advisers, consultants, and legal firms are required to report under oath to the Tax Administration in accordance with the forms and deadlines that are issued for this purpose by means of a general resolution, a report on the creation, use, and ownership by Ecuadorian beneficial owners of companies located in tax havens or jurisdictions with lower taxation.". This version of Art. 102 was incorporated into the Law of Fiscal Regime by a 2016 Law called "Organic law of solidarity and citizen co-responsibility for the reconstruction and reactivation of the areas affected by the earthquake of April 16, 2016 ". The section called" Third Reformatory Disposition" of the 2016 Law established the amendment to Art. 102 of the Law of Fiscal Regime. It is available here (page 10): https://www.finanzaspopulares.gob.ec/wp-content/uploads/downloads/2016/11/Ley-Org%C3%A1nica-de-Solidaridad.pdf

	Argentina [319]	Mexico [320]	South Africa[321]	Colombia[322]	Brazil[323]	Ecuador[324]
jurisdictions, or preferential regimes						
Exploiting asymmetries re: entity, contract, payment or instrument, other distortions	✓		✓	✓		
Use of trusts / private foundations	✓		✓			
Avoidance of Controlled Foreign Corporation (CFC) rules		✓				
Avoidance of the MDR	✓	✓				
“Listed” transactions[325]	✓		✓	✓	✓	
Loss transactions		✓		✓		
Double depreciation		✓				
Book and tax accounting differences		✓				
Hybrid instruments	✓*	✓	✓	✓*		
Circular transactions		✓	✓			
Transfer pricing	➢ *	✓				
Avoidance of the CRS for automatic exchange of information		✓	✓			
Obscuring the beneficial owner		✓				

** Implicitly covered.*

Source: Apex Consulting

In some cases, especially for MDR regimes which are not in force, hallmarks are very few and general (e.g., Brazil and Ecuador). In other cases, such as for Argentina, Mexico or South Africa, hallmarks are more extensive and specific, but still lack common features with each other, and may not be reflective of the needs of other developing countries.

From the analyzed countries, the most common hallmarks include:

- Payments to:
  - the recipient is not tax resident anywhere;
  - the recipient is resident in a zero /almost zero -tax country;
  - the recipient is resident in a non-cooperating jurisdiction;
  - the recipient is entitled to a full tax exemption on the receipt; and
  - the recipient is taxed under a preferential tax regime.
- Arrangements that are “listed transactions” to be issued by the tax administrations;

[325] ” Listed transactions” refers to MDR arrangements published on a tax authority list, as authorized by MDR law (sample language could read like "any other hallmark or transaction or situation indicated in ’the list’ to be published by the tax administration").

- Exploiting asymmetries re: entity, contract, payment or instrument, other distortions (such as, for example hybrid instrument mismatches[326], significant book-tax differences); and
- Tax treaty shopping (or direct application of a double tax treaty).

That reflects the fact that each developing country has unique circumstances in terms of tax risks for revenue leakage, existing tax compliance frameworks, and resources to address tax compliance. However, bearing in mind that most developing countries lack resources to implement, process, and enforce large and complex tax regimes with extended hallmark list, it is recommended that the developing countries focus only on those key hallmarks that pose the greatest risk to tax revenue, omit the hallmarks that are not relevant altogether, and consider the fact that the reporting persons may not have full view on the reportable arrangements.

The best way to address the design of the hallmarks is to determine the most common tax avoidance and evasion risks and match them with the hallmarks that could decrease such risks. For example, if developing country has the following risks as outlined in the 2014 OECD report[327], then the listed hallmarks could help in addressing such risks:

Table 26 Developing countries: tax avoidance and evasion risks and matching hallmarks

Tax avoidance and evasion risks in developing countries	Hallmarks that can be used to address it
Excessive payments to foreign affiliated companies in respect of interest, service charges, management and technical fees and royalties.	➢ Transfer pricing hallmarks - use of unilateral safe harbor rules, transfer of hard-to-value intangibles, use or enjoyment of goods and rights without proper consideration, or provision of services or functions without remuneration, use of unilateral protection regime granted by foreign law.
Profit shifting through supply chain restructuring that contractually reallocates risks, and associated profit, to affiliated companies in low tax jurisdictions.	➢ Transfer pricing hallmarks - transfer of intra-group functions, risk, assets, with (20 - 50%) or more projected drop in EBIT.
Significant difficulties in obtaining the information needed to assess and address BEPS issues, and to apply their transfer pricing rules.	➢ Measures outside of the MDR regime related to enforcement of the transfer pricing regimes. ➢ Transfer pricing hallmarks.
The use of techniques to obtain treaty benefits in situations where such benefits were not intended.	➢ Payments to: o the recipient is not tax resident anywhere; o the recipient is resident in a zero /almost zero -tax country; o the recipient is resident in a non-cooperating jurisdiction;

[326] This contrasts with the 2012 OECD Report which considered that Action 2 on hybrid mismatches was of "low" relevance for developing countries, see: OECD 2014 Report to the G20 on the impact of BEPS in low-income countries, p.32

[327] OECD. (2014). TWO-PART REPORT TO G20 DEVELOPING WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES. In *G 20*. https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf, p. 8

Tax avoidance and evasion risks in developing countries	Hallmarks that can be used to address it
	○ the recipient is entitled to a full tax exemption on the receipt; and ○ the recipient is taxed under a preferential tax regime. ➢ Exploiting asymmetries re: entity, contract, payment or instrument, other distortions (such as, for example hybrid instrument mismatches, significant book-tax differences); and ➢ Relief from double taxation for the same item of income or capital is claimed in more than one country.
Tax loss caused by the techniques used to avoid tax paid when assets situated in developing countries are sold.	➢ Transfer of assets where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved; ➢ Loss transactions; and ➢ Converting income hallmark.

Source: Apex Consulting

Although there is no sufficient evidence on effectiveness to understand which types of hallmarks have resulted in the reduction of aggressive tax avoidance or secrecy arrangements, there are some conclusions that can be reached based on the MDR countries' experiences:

- MDR countries use a combination of generic and specific thresholds; and
- MDR countries often use a "list of transactions" adopted by tax authorities to keep an updated list of reportable hallmarks.

6.4.3.4 Pros, cons, and best practices and recommendations related to hallmarks for other specific aggressive or abusive tax arrangements

Table 27 Other aggressive or abusive tax hallmarks pros, cons, best practices, and recommendations

	Pros	Cons	Best practices and recommendations
Including specific hallmarks in the MDR	➢ Target known tax risks for revenue leakage. ➢ All MDR countries have adopted specific hallmarks, hence many hallmarks have been tested, and there are best practices to learn from.	➢ None.	➢ Implemented by all MDR countries. ➢ Developing countries should include specific hallmarks in their MDR regime but should balance between broad specific hallmarks and narrowly tailored ones, large hallmark lists and only few hallmarks, and should learn from the experience of both – existing MDR regimes in

	Pros	Cons	Best practices and recommendations
			developed countries, as well as experience of the developing countries.
Adopting broad specific hallmark regime that closely follows existing DAC 6	➢ DAC 6 regime is implemented in 27 countries, with existing best practices and lessons learned. ➢ Targets well drafted, extensive scope of known and potentially aggressive cross-border tax arrangements. ➢ Combines specific and generic hallmarks ➢ It is designed to have hallmarks updated every 2 years, capturing the latest tendencies. ➢ Includes specific transactions, and a catch-all clause to target unknown aggressive tax arrangements.	➢ Designed for developed countries. ➢ Designed with a focus on cross-border reporting in mind, which is not available if a country implements a domestic MDR regime. ➢ Implementation could require substantial resources to implement, process, and enforce large and complex tax regime, which developing countries may not have; and equally cause high taxpayer compliance costs. ➢ May include hallmarks that are irrelevant to developing countries, therefore blind copy-paste is not recommended.	➢ Adopted in 27 EU Member States and used as an example by other countries in drafting their regimes. ➢ Can be used as a starting point for developing countries, but caution needs to be exercised to have a scope that MDR can manage resource wise. ➢ Developing countries should consider combining specific and generic hallmarks (as proposed by the OECD[328]). ➢ Developing countries should focus only on those key hallmarks that pose the greatest risk to their tax revenue, omit the hallmarks that are not relevant altogether, and consider the fact that the reporting persons may not have full view on the reportable arrangements. ➢ If broader hallmarks are included, developing countries should have resources and knowledge to analyze the received reports, dismiss irrelevant information, and proceed with action where potential aggressive arrangements have been detected.
Learning from other	➢ These MDR regimes include hallmarks that indicate the tax risks	➢ There are very few developing countries that have adopted MDR	➢ MDR regimes have been implemented by Argentina, South Africa and Mexico, and

[328] " It is, however, recommended that mandatory disclosure regimes include a mixture of generic and specific hallmarks." (2015 OECD Report, p. 49, para. 135)

	Pros	Cons	Best practices and recommendations
developing countries	for revenue leakage that may be relevant to other developing countries.	regimes, and the approach adopted may not be reflective of the needs of other developing countries. ➢ Existing regimes lack uniformity, and greatly vary in their design. ➢ Each country addresses their unique tax risks and has different resources and infrastructure, which other countries may not have.	considered by several other developing countries - Brazil, Ecuador, and Colombia[329]. ➢ Most common hallmarks relate to: ○ payments to the recipient is resident in a zero /almost zero -tax country, a non-cooperating jurisdiction, or the recipient is taxed under a preferential tax regime. ○ arrangements that are "listed transactions" to be issued by the tax administrations; ○ exploiting asymmetries re: entity, contract, payment or instrument, other distortions (such as, for example hybrid instrument mismatches, significant book-tax differences); and ○ tax treaty shopping (or direct application of a double tax treaty). ➢ Developing countries should review these hallmarks for local relevance; copying any single regime is not recommended, as each country has different tax risks and resources to address it.
Hallmarks included in law	➢ Fixed upon adoption of the MDR. ➢ Single source of the MDR regime (no need to look up multiple legal acts). ➢ Legal certainty.	➢ May be difficult to update if legislative changes require lengthy and complex process and procedures.	➢ DAC 6 requires hallmarks to be adopted by law and requires bi-annual updates of the hallmarks. ➢ Most MDR countries with domestic regimes have hallmarks set forth in both -

[329] As of November 2022, Costa Rica and Colombia have also adopted the 2018 OECD MMDR.

	Pros	Cons	Best practices and recommendations
			MDR law, and by reference to transaction lists to be set forth by tax administrations. ➢ Developing countries should consider whether their legislative processes permit easy updating of hallmarks.
Hallmarks lists defined by tax authorities	➢ Can be authorized by MDR law. ➢ Provides flexibility to quickly update the hallmarks as and when needed - tax administration can act quickly to close new loopholes. ➢ Informs intermediaries and taxpayers about the most relevant reportable arrangements from the perspective of the tax administration.	➢ Not defined yet in many developing countries. ➢ Requires tax authorities to know what the most relevant tax risks are. ➢ May not provide sufficiently visible notice to the taxpayers who may not be following tax authority publications, especially, if that concerns taxpayers with decision powers outside of the country. ➢ May not be fully subject to legislative checks and balances if the tax authorities have full discretion.	➢ Common approach in many MDR regimes. ➢ Recommended approach to the developing countries where legislative process is cumbersome if tax authorities use their discretion objectively. ➢ Allows for a quick and effective update of hallmarks when and if needed. ➢ While many developing countries include lists of transactions in the framework, many of these lists have not been created yet to test them. In designing such a list, the OECD's Aggressive Tax Planning Directory[330] may be helpful.

Source: Apex Consulting

6.4.4 Hallmark thresholds and other narrowing conditions

6.4.4.1 Overview and recommendations

There are several ways to further reduce or qualify the hallmarks, thus reducing the volume of the arrangements in scope for the MDR reporting:

- **Main benefit test** ("MBT") - if MBT is used, an arrangement that meets a hallmark will be reportable if the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.
- **Monetary - de minimis thresholds** an arrangement will only be reportable if it is above a certain threshold (this can be applied to hallmarks, intermediaries and taxpayers in scope).
- Reportable only if **two or more hallmarks are met** – an arrangement will only be reportable if it meets two or more hallmarks.

[330] https://www.oecd.org/ctp/aggressive/co-operation-and-exchange-of-information-on-atp.htm

- **Whitelist** – a list of arrangements that are not reportable even if they meet the conditions of the hallmark.

MBT can be used to **filter out irrelevant disclosures** and to **reduce the compliance and administration burden** of the regime by targeting only tax-motivated transactions that are likely to pose the greatest tax policy and revenue risks and only such agreements and can be particularly useful for those arrangements that may have strong business or other reasons to be entered into and are not tax driven.

Given that MBT does not include objective criteria, it could be subjective and subject to interpretation, potentially allowing otherwise reportable arrangements escape reporting. Therefore, it is generally not recommended for use in developing countries, unless an objective test for MBT can be put in place and properly enforced. Such objective test should clarify that MBT should not consider the intent of the parties, i.e., the fact that a person is not seeking to obtain a tax advantage is irrelevant in determining whether the test has been satisfied. Rather, a comparison needs to be made between the value of the expected tax advantage and any other benefits likely to be obtained from the transaction.

Developing countries need to decide whether meeting MBT would be required for some or all of the reportable arrangements, because if no other narrowing conditions are used, it would potentially generate a large number of disclosures. Developing countries could consider controlling the volume of disclosures by:

- having narrower or more tightly defined hallmarks using objective criteria (e.g., non-cooperative jurisdiction); and/or
- filtering disclosures by reference to a monetary threshold (if suitable and considering related risks as well).

Monetary thresholds are used in widely (the US, Mexico, and South Africa), with respect to hallmarks, intermediaries, and taxpayers in scope, and are a useful tool to limit the volume of disclosures. If chosen to be implemented, rules should clearly indicate whether the monetary threshold applies to the amount of the tax advantage or the value of the transaction. Given that monetary thresholds could be easily circumvented by dividing transactions or designing them to be just below the threshold, developing countries should carefully weigh the pros and cons of such thresholds and avoid monetary thresholds where possible. Having a strong anti-avoidance rule in place could help targeting such abuse.

Canada and the UK have a provision that certain arrangements only are reportable **if two or more hallmarks are present**. Recommended approach is that arrangement becomes reportable where one hallmark is present.

Whitelists are used in Germany and South Africa and are useful tool to filter out arrangements that meet the definition of a reportable arrangement but should be out of scope (due to size, type of the taxpayer or the nature of the arrangement).

There are a number of ways to further reduce or qualify the hallmarks, thus reducing the volume of the arrangements in scope for the MDR reporting:

- **Main benefit test ("MBT") -** if MBT is used, an arrangement that meets a hallmark will be reportable if the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a **tax advantage**.
- **De minimis thresholds –** if monetary thresholds are used, then an arrangement will only be reportable if it is above a certain threshold (this can be applied to hallmarks, intermediaries, and taxpayers in scope).

- **Reportable if two or more hallmarks are met** – an arrangement will only be reportable if it has two or more hallmarks.
- **Whitelist** – a list of arrangements that are not reportable even if they meet the conditions of the hallmark.

6.4.4.2 Main benefit test

The main benefit test (MBT) is included in DAC 6 and hence used by the EU Member States, as well as is included in the UK, South African (limited scope[331]), and Canadian MDR regimes and is used as an effective tool of filtering out all but the most relevant schemes.

MBT can:

- be used to filter out irrelevant disclosures and to reduce some of the compliance and administration burden of the regime by targeting only tax-motivated transactions that are likely to pose the greatest tax policy and revenue risks[332] and only such agreements[333];
- be applied to one hallmark or a group of hallmarks; and
- can differentiate between hallmarks based on whether or not the arrangement can have strong business or other non-tax reasons to be entered into (e.g., standardized advice, loss acquisition).

Defining the right scope of the MBT can be challenging. It generally includes the condition that the tax advantage is or might be expected to be the main benefit or one of the main benefits of entering into the arrangement.

What is considered a tax advantage differs from one MDR country to another. Same as for the various general anti-avoidance rules (GAAR), MDR jurisdictions provide their own domestic guidance on the application of MBT, which differs from country to country, requiring MNEs and intermediaries to analyze such requirements carefully per each country[334].

In the EU, some Member States do not include such a definition in their laws as to what constitutes a tax advantage (Belgium, Croatia, Hungary, Slovenia), whereas other Member States do not apply their 'traditional' definition of the tax advantage when applying the MBT (France, Luxembourg). Austria, on the other hand, considers that the MBT is fulfilled when the tax advantage is realized in a third country. Other Member States, like Ireland, have introduced extensive guidelines as to what they consider a tax advantage and how they perform the MBT[335].

For Ireland, a tax advantage is defined broadly, including not only tax avoidance and tax reductions, but also tax reliefs, tax repayments, and tax deferrals, as well as the avoidance of an obligation to deduct tax[336]. For

[331] Section 36.6 of the Tax Administration Act (the MBT is used to avoid exclusions mentioned in Art. 36 so that such an arrangement is not excluded but rather is required to be disclosed)

[332] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 80

[333] Offermanns R. and Botelho Moniz R., *DAC6 in a Selection of EU Member States: The Practical Application of the Main Benefit Test and Its Hallmarks*, European Taxation (2021), p.229

[334] Hadnum, L. and Moreno, J., *DAC6 Hallmarks—Practical Application in EU Jurisdictions,* Bloomberg (2021), see also: Offermanns R. and Botelho Moniz R., *DAC6 in a Selection of EU Member States: The Practical Application of the Main Benefit Test and Its Hallmarks*, European Taxation (2021), p.231

[335] Haslehner, W., Pantazatou, K, *Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6)*, Publication for the Subcommittee on tax matters (FISC), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg (2022), p. 39

[336] René Offermanns and Rita Botelho Moniz, 'DAC6 in a Selection of EU Member States: The Practical Application of the Main Benefit Test and Its Hallmarks' in European Taxation (June 2021), pp. 229 – 241, 235

the MBT to be satisfied the tax advantage to be obtained must be one of the main benefits and not just a benefit. The test is deemed to be an objective test, requiring a comparison – in the context of the arrangement- of the value or significance of an expected tax advantage with any other benefit likely to be obtained from an arrangement[337]. The French tax authorities take a similar position and clarify that the analysis of whether or not the main benefit test is satisfied must be objective, without considering the intent of the parties. Therefore, the fact that a person is not seeking to obtain a tax advantage is irrelevant in determining whether the test has been satisfied[338].

In summary, the gist of the MBT is to compare the value of the expected tax advantage with any other benefits likely to be obtained from the transaction, and an objective assessment of the tax benefits must be made.

On the other hand, the test is considered not to be met if the benefits are mainly economic or commercial and the tax benefits are negligible. If, however, the arrangement is at least partially tax driven, the test might be met[339].

It is recognized that the consideration as to whether a hallmark applies is made more difficult if MBT is applied and can cause a significant issue where cross-border arrangements are concerned. The difficulties lie in the fact that such arrangements may not meet the disclosure threshold if the taxpayer can demonstrate that the value of any domestic tax benefits was incidental when viewed in light of the commercial and foreign tax benefits of the transaction as a whole. In certain cases, the foreign tax benefits of a cross-border scheme may even be returned to the taxpayer in the reporting jurisdiction in the form of a lower cost of capital or higher return. This has the effect of converting a tax benefit for a foreign counterparty in the offshore jurisdiction into a commercial benefit for the taxpayer in the reporting jurisdiction, thereby further reducing the overall significance of the domestic tax benefits under the transaction that nevertheless may pose a risk to the domestic tax administration[340].

Table 28 Application of the main benefit test

Country / Regime	Main benefit test
DAC 6 (and the EU Member States)[341]	DAC 6 provides for two separate cross-border arrangements: 1. With hallmarks that are linked to the MBT (i.e., the cross-border arrangement needs to meet the hallmark +MBT); and 2. Stand-alone hallmarks (no further testing is required, should be reported even where the main benefit is not tax-related)[342]. The hallmarks of DAC 6 are categorized as follows: A. Generic hallmarks linked to the main benefit test B. Specific hallmarks linked to the main benefit test

[337] Haslehner, W., Pantazatou, K, *Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6)*, Publication for the Subcommittee on tax matters (FISC), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg (2022), p.39

[338] René Offermanns and Rita Botelho Moniz, 'DAC6 in a Selection of EU Member States: The Practical Application of the Main Benefit Test and Its Hallmarks' in European Taxation (June 2021), pp. 229 – 241, 232

[339] As applied in Belgium. Offermanns R. and Botelho Moniz R., *DAC6 in a Selection of EU Member States: The Practical Application of the Main Benefit Test and Its Hallmarks*, European Taxation (2021)

[340] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 239

[341] Hadnum, L. and Moreno, J., *DAC6 Hallmarks—Practical Application in EU Jurisdictions,* Bloomberg (2021)

[342] Annex IV, Part I of DAC 6

Country / Regime	Main benefit test
	C. Specific hallmarks related to cross-border transactions D. Specific hallmarks concerning automatic exchange of information and beneficial ownership E. Specific hallmarks concerning transfer pricing. **Hallmarks with MBT are**: 1. Confidentiality clause 2. Success fee 3. Standardized documentation / structure 4. Loss acquisition 5. Income conversion 6. Roundtripping of funds 7. Deductible cross-border payments to associated enterprises subject to a zero / almost zero rate, full tax exemption, or a preferential tax regime **Stand-alone hallmarks are**: 1. Deductible cross-border payments to associated enterprises in a blacklisted jurisdiction 2. The same asset depreciated in more than one jurisdiction 3. Multiple double tax relief claims 4. Transfer of assets with the material difference in the purchase price 5. CRS circumvention 6. Non-transparent legal or beneficial ownership chains used 7. Unilateral transfer pricing safe harbor rules used 8. Transfers of hard-to-value intangibles 9. Restructuring with substantial profit shifts (50%)
2018 OECD MMDR	CRS Avoidance Arrangement is only in scope where it is reasonable to conclude that such Arrangement is designed to circumvent or is marketed as, or has the effect of, circumventing CRS Legislation or exploiting an absence thereof[343]. Opaque Offshore Structure is only in scope where it is reasonable to conclude that the Structure 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[344].
UK[345]	Under the DOTAS regime, a tax arrangement should be disclosed where it will, or might be expected to, enable any person to obtain a tax advantage, or that tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the scheme, or it falls within any description (the 'hallmarks') prescribed in the relevant regulations[346]. Not all arrangements must meet the

[343] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, Sec. 1. Rule 1.1

[344] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, Sec. 1. Rule 1.2

[345] Only reference to DOTAS regime is included. For DAC 6 purposes, the UK does not apply MBT because Hallmarks D do not have MBT attached to them

[346] Section 2.3.2. of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

Country / Regime	Main benefit test
	main benefit test. “Tax advantage” is a defined term, and it includes the avoidance or reduction of a charge to tax, a relief from tax, repayment of tax. In addition, the deferral of tax and the avoidance of an obligation to deduct tax are both expressly treated as “tax advantages” when applying the DOTAS rules[347].
South Africa	South Africa applies MBT regarding some excluded transactions on the whitelist; and such transactions are brought back into the scope of reporting if the transactions were undertaken with the main purpose or one of its main purposes of obtaining or enhancing a “tax benefit”; or in a specific manner or form that enhances or will enhance a “tax benefit[348]”.
Canada	Under the RTAT regime, a "reportable transaction" is an "avoidance transaction" that meets 2 out of 3 hallmarks. "Avoidance transaction" means "any transaction that […] would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit[349]".

Source: Apex Consulting

MBT is not used by Argentina, the US, and Mexico. In Mexico, it is sufficient that the arrangement generates or may generate a tax benefit[350].

6.4.4.3 Monetary thresholds

MDR countries use various monetary thresholds with respect to hallmarks, intermediaries, and taxpayers:

- **Hallmarks** -
  - The US covers loss transactions if the loss is above a threshold, such as USD 10,000 or USD 20 M – depending on the user and the arrangement)[351] ;
  - South Africa uses thresholds both to include and exclude hallmarks from the scope. Several hallmarks are excluded if they are below ZAR 5M threshold[352]. Several hallmarks are included if they meet the following thresholds[353]:
    - ZAR 5 M threshold for certain foreign insurance arrangements;

[347] Section 4.3.2. of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

[348] Sec. 36 of the Tax Administration Act NO. 28 of 2011 (GG 35491 of 4 July 2011): https://sars.mylexisnexis.co.za/#

[349] Sec. 237.3.1 of the Income Tax Act (RTAT) [2013]

[350] Sec. Art. 199, 1st paragraph of the Fiscal Code

[351] For loss transactions: *$10 million in a single tax year or $20 million in any combination of tax years for corporations; *$10 million in any single tax year or $20 million in any combination of tax years for partnerships that have only corporations as partners, whether or not any losses flow through to one or more partners; * $2 million in any single tax year or $4 million in any combination of tax years for all other partnerships, whether or not any losses flow through to one or more partners; * $2 million in any single tax year or $4 million in any combination of tax years for individuals, S corporations, or trusts, whether or not any losses flow through to one or more shareholders or beneficiaries; or * $50,000 in any single tax year for individuals or trusts if the loss arises in a foreign currency transaction (as defined in Sec. 988(c)(1)) of the Internal Revenue Code and Sec. 1.6011-4(b)(5)(i)) of the US Treasury Regulations

[352] As per the Notice of the South African Revenue Service (“SARS”) public notice (Government Notice 140, published on 3 February 2016, GG No 39650) the arrangement set for in Sec. 35(1) of the law is excluded if the aggregate tax benefit which is or may be derived from that arrangement by all participants to that arrangement does not exceed ZAR5-million

[353] Sec. 2. of the South African Revenue Service public notice (Government Notice 140, published on 3 February 2016, GG No 39650)

    - ZAR 10 M threshold for certain share buy-back arrangements and payments to trusts;
    - ZAR 50M threshold for certain loss carry-backs and carry-forwards; and
    - Percentage change thresholds are used by DAC 6 (transfer of intra-group functions, risk, assets, with 50% or more projected drop in EBIT[354]), and Mexico (for example, a hallmark for transactions where accounting and tax records show differences above 20%, except those resulting from the calculation of depreciation[355]).
  - Mexico exempts "personalized arrangements" (those arrangements designed, marketed, organized, implemented, or managed to adapt to the particular circumstances of a specific taxpayer[356]), where the expected tax benefit does not exceed MXN 100 million (approx. USD 5M[357]).
- **Intermediaries** - the US covers intermediaries with a gross income above USD 10,000 or USD 250,000 – depending on the type of taxpayer and type of transaction.[358]
- **Taxpayers** – the UK has some generic hallmarks that apply only to the large taxpayers, and not SMEs[359].

In drafting these thresholds, care needs to be exercised as to whether the threshold applies to the amount of the tax advantage or the value of the transaction.

6.4.4.4 Whitelists

An additional way to narrow down hallmarks is to establish a whitelist, setting for certain types of specific arrangements that are not required to be disclosed even if they technically fall under the hallmark definition in order to avoid disclosure of arrangements that are known to the tax administration and are not thought to raise any tax policy issues. That can help to limit the volume of reports. That is applied in the case of Germany[360] and South Africa (excluding transactions below ZAR 5 M thresholds, see above, as well as certain loans, leases, regulated exchange transactions, collective investment schemes, or arrangements published on the list of Commissioner, if such transactions do not meet the MBT test[361].)

6.4.4.5 Two or more hallmarks met

Finally, one way to reduce the number of reported transactions is to require that the arrangement meets two or more hallmarks to become reportable. It has been implemented by Canada and the UK. Canada

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[354] Annex IV, Part II, Sec. E.3. of the DAC 6

[355] Art. 199 of the Fiscal Code

[356] Art. 199, second paragraph after point XIV of Fiscal Code

[357] Agreement 13/2021:
https://www.dof.gob.mx/nota_detalle.php?codigo=5610665&fecha=02/02/2021#gsc.tab=0
Section 6111-3. b.3 of the Internal Revenue Code

[359] Under DOTAs regime, when the arrangement is designed 'in-house', it is a hallmarked scheme when any one of the following hallmarks applies. The first 3 hallmarks only apply when the person receiving the tax advantage is not a small or medium enterprise:
hallmark 3: premium fee (Sec. 5.4)
hallmark 7: leasing arrangements (Sec. 5.7)
hallmark 8: employment income (Sec. 5.8)
hallmark 9: financial products (Sec. 5.9)
Hallmark 7 does not apply when determining a hallmarked National Insurance contribution scheme. HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022:
https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

[360] Article 138d para. 3 sentence 3 of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, page 2875 on 30 December 2019 (BGBl. I no. 52/2019, at 2875). The full list is contained in the Annex to the German Guidelines

[361] Sec. 36 of the Tax Administration Act NO. 28 of 2011 (GG 35491 of 4 July 2011):
https://sars.mylexisnexis.co.za/#

requires that two out of three hallmarks must be met for a transaction under RTAT to be reportable[362]. However, Canada has opened a consultation where the proposal is to reduce the requirement to meeting at least one hallmark[363]. UK requires meeting two out of three conditions to meet the confidentiality hallmark[364].

As a practical matter, many arrangements would meet more than one hallmark under MDR regimes and would need to be reported indicating all hallmarks.

6.4.4.6 Narrowing down hallmarks

As the next table shows there is a wide range of limitations to the hallmarks by all countries except for Argentina. Some countries only apply one limitation, some use two or more. The most common threshold used is MBT, and second most used is application of monetary thresholds.

Table 29 Narrowing of hallmarks

	2018 OECD MMDR	DAC6	Germany	Portugal	UK	US	Canada	South Africa	Argentina	Mexico
Main benefit test (all or some of hallmarks, especially generic ones)		✓	✓	✓	✓		✓	✓		
Monetary thresholds						✓		✓		✓
2 or more hallmarks					✓		✓			
Whitelist			✓					✓		

Source: Apex Consulting

6.4.4.7 Pros, cons, best practices, and recommendations

Table 30 Pros, cons, best practices, and recommendations (6.4.4)

	Pros	Cons	Best practices and recommendations
Main benefit test (MBT)	➢ Is used as a pre-condition for a hallmark to apply. ➢ Can filter out irrelevant disclosures.	➢ Can be used inappropriately as a justification for not reporting tax avoidance schemes that would be of interest to the tax administration (therefore	➢ MDR countries have a range of views on the inclusion of MBT – it is included in DAC 6, the UK, South Africa, and Canada, but not in other MDR regimes.

[362] "A "reportable transaction" is an avoidance transaction that bears at least two of the following three hallmarks i. tax-results oriented fee such as a contingency fee, ii. confidential clause, iii. contractual protection" (Annex E, 2015 OECD Report). This is based on the definition of" Reportable transaction" of Art. 237.3.1 of the Income Tax Act

[363] https://www.canada.ca/en/department-finance/news/2022/02/mandatory-disclosure-rules.html

[364] Sec. 6 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 https://www.legislation.gov.uk/uksi/2006/1543/regulation/6/made

	Pros	Cons	Best practices and recommendations
	➢ Reduces some of the compliance and administration burden by targeting only tax driven transactions that are likely to pose the greatest tax policy and revenue risks. ➢ MBT test can be used across a group of selected hallmarks, requiring that for those arrangements tax planning element is required.	test needs to have objective criteria) ➢ May make enforcement of the disclosure obligations more complex. ➢ Can create uncertain outcomes for taxpayers.	➢ MBT can be used, depending on how well MBT can be understood or applied by taxpayers in a compliant manner. ➢ From developing countries, only South Africa uses it. ➢ Given that MBT is subject to interpretation, and thus somewhat subjective, it may allow otherwise reportable arrangements escape reporting. ➢ Therefore, MBT is generally not recommended for use in developing countries, unless objective criteria can be efficiently used and enforced (i.e., intent of the taxpayer is not relevant, actual tax outcome is). ➢ Developing countries could also consider using other objective criteria (e.g., hallmark related to non-cooperative jurisdiction) and monetary thresholds (if suitable and considering related risks as well).
Not using main benefit test	➢ Simpler regime, where all arrangements are reportable, regardless of the tax motivation. ➢ Provides more certainty to the taxpayers ➢ Arguably less prone to abuse.	➢ Could generate many disclosures increasing the costs to both taxpayers and tax administrations and diluting the relevance of the information received.	➢ The US, Argentina, and Mexico do not use MBT. ➢ It could potentially generate a large number of disclosures, that can be controlled by having narrower or more tightly defined hallmarks and/or by filtering disclosures by reference to a monetary threshold.
Monetary thresholds	➢ Reduces reportable arrangements thus reducing the overreporting. ➢ Suitable for arrangements which can potentially capture large	➢ Could create circumvention opportunity. E.g., in Mexico “generalized” arrangements were deliberately called “personalized” to take advantage of a threshold.	➢ Are used by the US, Mexico, and South Africa, with respect to hallmarks, intermediaries, and taxpayers in scope. ➢ Useful tool to limit the volume of disclosures. ➢ In drafting these thresholds, care needs to be exercised as

	Pros	Cons	Best practices and recommendations
	numbers of reportable transactions. ➢ Can remove smaller size arrangements, hence focusing on large transactions capable of generating larger tax risks. ➢ Different thresholds can be applied to different hallmarks.	➢ Adds further complexity. ➢ Allows small transactions to escape the reporting; if there are many small arrangements of the same type, this could still cause great tax revenue losses ➢ Could suggest that tax avoidance in small amounts is acceptable.	to whether the threshold applies to the amount of the tax advantage or the value of the transaction. ➢ Given the risk that thresholds can easily be circumvented by dividing transactions or designing them to be just below the threshold, developing countries should way the pros and cons of such thresholds. Having a strong anti-avoidance rule in place could help targeting such abuse.
2 or more hallmarks	➢ Can be used to target specific arrangements that can be structured in various ways to result in similar outcomes.	➢ Can be used only if hallmark design would benefit from it in capturing targeted arrangements. ➢ The better way is to have one hallmark per arrangement.	➢ Used by Canada and the UK (Canada, which is currently considering changing back to one hallmark). ➢ Recommended approach is that arrangement becomes reportable where one hallmark is present.
Whitelists	➢ Clear indication of out-of-scope arrangements that otherwise meet the definition of a reportable arrangement.	➢ Arrangements could be designed to artificially or nominally meet the conditions of the whitelist.	➢ Used in Germany and South Africa, useful tool to filter out arrangements that meet the definition of a reportable arrangement but should be out of scope (due to size, type of the taxpayer or the nature of the arrangement).

Source: Apex Consulting

In summary, developing countries need to follow the following key principles and considering hallmark thresholds.

Consider adding thresholds

- Could consider adding hallmark thresholds to narrow down the arrangements in scope by using:
  - main benefit test,
  - de minimis monetary thresholds,
  - requirement that the arrangement needs to meet two or more hallmarks, or
  - whitelists
- Use them to filter out less relevant disclosures, subject to avoidance risk considerations.

6.5 When information is reported

6.5.1 Overview and recommendations

Keeping in mind the MDR overall goals (early detection, identification of arrangements and participants, and deterrence) tax authorities need to consider various issues when defining the timing of the MDR reporting:

- What situations trigger the reporting;
- How long after the trigger the arrangement must be reported (by the intermediary; and/or by the taxpayer);
- Once the MDR is launched, what is the implementation period of the regime and when does the first reporting take place; and
- Retroactive reporting.

MDR countries can use a **single trigger event or multiple trigger events**. The single trigger event is not recommended, unless a very simple and operational approach is preferred by a developing country. Multiple trigger events are used by majority of the MDR regimes, and are the recommended approach for the developing countries, provided that the trigger events are clearly defined and simple.

MDR regimes use a wide variety of trigger events. The **most common trigger events are availability and implementation**. In choosing the trigger events, it is recommended that developing countries use availability trigger event in combination with the implementation trigger event. For clarity purposes, it is recommended that the developing countries define in their guidance notes what elements constitute "availability", and "implementation".

Regarding **reporting by the taxpayer**, the MDR regimes apply two different approaches:

- Use the **same triggers** and timing as for the **intermediary** (applies in the case of DAC 6, Argentina, South Africa, and Canada) - recommended as the maximum standard to developing countries, assuming they have resources to administer this approach.

- Use **the implementation (first steps) trigger event** (used in the 2018 OECD MMDR, the UK, the US), recommended a minimum standard for developing countries that need a cost-efficient application.

MDR countries have set various timeframes for reporting:

- **Short reporting timeframe** (5-45 days): Applied by all analyzed MDR countries, except for the US and Canada, ranging from 5 – 45 days from the trigger event; recommended option for the developing countries because the earlier the reporting, the earlier a tax administration can act against it (provided that the term is reasonable).
- **Medium reporting timeframe** (few months): Applied by the US and recommended only as a second-best option (short time frame is preferred)
- **Long reporting timeframe** (over a year): Applied by Canada, not recommended approach for the developing countries because this option strongly impacts a tax administration's ability to react quickly, potentially causes greater revenue loss and reduces deterrent effect.
- Optionally, MDR countries may require **different times for reporting for intermediaries and taxpayers**, but that is generally not recommended, unless the timeframes remain short, and taxpayers are assumed to need more time.
- Lastly, MDR countries may require **updated reporting**, either to track the marketing of specific arrangements, annual use of the tax benefits, or substantial changes, which may impact tax authorities' tax revenue collection. Implementation of such an option needs to be weighed against available resources.

Developing countries should assess the **reasonable minimum deadline for the first MDR reporting**, considering their own ability to implement the regime, resources, and market readiness to implement the MDR, and considering that the longer the period, the more significant potential tax revenue loss, as well as the volume of the first reporting.

Developing countries could consider **covering reportable arrangements retroactively**, i.e., as of the date the MDR was proposed, but before it was adopted by law. This option should only be considered where permitted by local law, tax authorities have necessary resources to deal with the volume and type of transactions (could be narrowed through thresholds), and intermediary/taxpayer compliance ability is reasonably considered.

As discussed earlier, the MDR regimes have three main objectives:

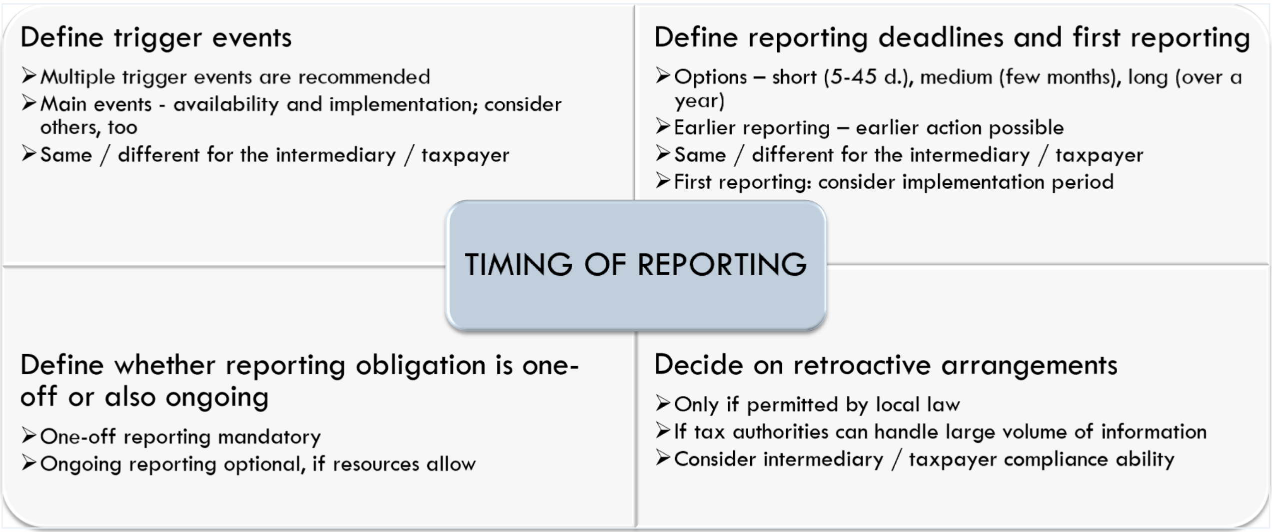
- Detect - obtain early information about potentially aggressive or abusive tax avoidance arrangements in order to inform risk assessment;
- Identify - arrangements, taxpayers, and intermediaries of arrangements in a timely manner; and
- Deter - reduce the promotion and use of avoidance arrangements.

In achieving these goals, the **timing of the reporting is essential**. The sooner information is received by tax authorities, the sooner they can detect potentially aggressive or abusive tax avoidance arrangements and take measures (e.g., as prohibiting the marketing of the scheme, reforming laws to neutralize the arrangement, alerting taxpayers against their use, proceeding with tax audits and other measures, etc.).

Prompt action may enhance the deterrent effect by reducing the time available to take advantage of any tax benefit, so altering the economics of the transaction[365].

If, on the contrary, tax authorities receive information a long time after such arrangements were implemented, it may be too late to take preventive actions, or such measures would be less effective, and taxpayers may have (wrongly) benefited from broader scope of the tax advantages gained.

Regarding the timing of the reporting, the tax authorities need to consider several key points, as outlined below in the diagram, and further discussed in the sections, below.



Source: Apex Consulting

6.5.2 Trigger events

6.5.2.1 Trigger event options

The OECD 2015 Report described two main possible trigger events[366]:

- **Option A: Trigger event – availability of arrangement**: the arrangement is sufficiently well-developed to be marketable and all the necessary information on how it works is already available to the taxpayer to acquire it.
- **Option B: Trigger event– implementation:** the taxpayer has already taken the first step to implement, such as creating an offshore entity, acquiring an entity with losses, etc.

Broadly, most of the MDR countries have followed these two trigger events, however, with various nuances. In addition, there is a wide variation in other trigger events and the time to the report after the trigger event, see below:

[365] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 139

[366] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, pp. 49-52

Table 31 Trigger events and reporting time

	Reporting time from the trigger event	Intermediary	Taxpayer
DAC 6 (and the EU Member States)	➢ 30 days ➢ Every 3 months	➢ Within 30 days beginning: (a) on the day after the reportable cross-border arrangement **is made available** for implementation; or (b) on the day after the reportable cross-border arrangement **is ready for implementation**; or (c) when the **first step in the implementation** of the reportable cross-border arrangement has been made, whichever occurs first[367]. ➢ In the case of marketable arrangements, Member States shall take the necessary measures to require that a periodic report be made by the intermediary **every 3 months** providing an update that contains **new reportable information that has become available since the last report was filed**[368]. ➢ Certain intermediaries are required to file information within **30 days** beginning on the day after they **provided, directly or by means of other persons, aid, assistance, or advice**[369].	The relevant taxpayer with whom the reporting obligation lies shall file the information within **30 days**, beginning on the day after the reportable cross-border arrangement is: ➢ **made available** for implementation to that relevant taxpayer, or ➢ is **ready for implementation** by the relevant taxpayer, or ➢ when the **first step in its implementation** has been made in relation to the relevant taxpayer, ➢ whichever occurs first[370].
2018 OECD MMDR (and Guernsey[371])	30 days	The disclosure shall be made **30 days** after the Intermediary: (a) makes the CRS Avoidance Arrangement or Opaque Offshore Structure **available for implementation**; or (b) **supplies Relevant Services** in respect of the CRS Avoidance	If a taxpayer has an obligation to report, then the disclosure shall include all the information required to be disclosed by the Intermediary and be made within **30 days** after **the first step** of the CRS Avoidance Arrangement or Opaque

[367] Art. 8ab (1) of DAC 6
[368] Art. 8ab (2) of DAC 6
[369] Art. 8ab (1) of DAC 6
[370] Art. 8ab (7) of DAC 6
[371] For Guernsey, see: Art. 5. and 9.3 of the Income Tax (Approved International Agreements) (Implementation) (Mandatory Disclosure Rules) Regulations, 2020

	Reporting time from the trigger event	Intermediary	Taxpayer
		Arrangement or Opaque Offshore Structure[372].	Offshore Structure has been **implemented**[373].
Argentina	10 days	Within **10 days** from the beginning of its **implementation** (the moment when the **first steps** are taken to implement the tax planning[374]).	Same as for the intermediary.
South Africa	45 business days	For CRS MDR purposes South Africa follows the 20018 OECD MMDR. For domestic MDR purposes: within **45 business days** after that date that **arrangement qualifies as a 'reportable arrangement'** or a **person becomes a participant** in a reportable arrangement[375].	For CRS MDR purposes South Africa follows the 2018 OECD MMDR. For domestic MDR purposes it is the same as for the intermediary.
UK[376]	5 days 30 days	Under the DOTAS regime, where a promoter is required to disclose a notifiable proposal, he must do so within **5 days** beginning with the day after the earliest of the following events: (i) the promoter **makes a firm approach** to another person with a view to making the scheme available for implementation by that person or others, (ii) the promoter **makes a scheme available for implementation** by another person	Schemes with no promoter, including 'in-house' schemes must be reported within **30 days** of **entering into the first transaction forming part of the scheme**[378].

[372] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, sec. 2, Rule 2.2

[373] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, sec. 2, Rule 2.6. (c)

[374] Art. 9 of the Tax administration (AFIP) General Resolution 4838/2020

[375] Sec. 37.1 of the Tax Administration Act NO. 28 OF 2011 (GG 35491 of 4 July 2011)

[376] For DAC 6 hallmarks, the UK has aligned its approach with the DAC 6 triggers and deadlines

[378] Sec. 10.6. of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

	Reporting time from the trigger event	Intermediary	Taxpayer
		(iii) the promoter **becomes aware of a transaction forming part of the scheme**[377].	
Canada	Before selling the arrangement End of February the year after End of June the year after In tax return for the year in	Under the TS regime: promoters are required to **disclose the arrangement and obtain an identification number before selling a scheme** and promoters must report all participants and amounts **by the end of February of the following year**[379].	TS: investors (taxpayers) must include the details in the income tax return for the year in which the claim is made[380]. RTAT: Same as for the promoters[381], but see the proposed changes.

[377] As described by the Guidance:" Part I - Filing of Application for Tax Shelter Identification Number and Undertaking to Keep Books and Records - Form T5001: 4. Subsection 237.1(2) of the Income Tax Act requires the promoter of a tax shelter to apply in prescribed form for an identification number for each tax shelter.... Subsection 237.1(3) of the Act states the Minister shall issue an identification number upon application if the prescribed information is submitted and an undertaking satisfactory to the Minister is given in respect of the custody of the books and records of the tax shelter....The prescribed information required is detailed on form T5001 and includes the name and address of the promoter, location of the books and records, the person to contact for further information, the price per unit and number of units offered for sale. In addition, copies of the sales brochure, prospectus, selling instruments, and other relevant documentation are to be attached to the form", available in: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic89-4/tax-shelter-reporting.html

[379] As described by the Guidance:" Part I - Filing of Application for Tax Shelter Identification Number and Undertaking to Keep Books and Records - Form T5001: 4. Subsection 237.1(2) of the Income Tax Act requires the promoter of a tax shelter to apply in prescribed form for an identification number for each tax shelter.... Subsection 237.1(3) of the Act states the Minister shall issue an identification number upon application if the prescribed information is submitted and an undertaking satisfactory to the Minister is given in respect of the custody of the books and records of the tax shelter....The prescribed information required is detailed on form T5001 and includes the name and address of the promoter, location of the books and records, the person to contact for further information, the price per unit and number of units offered for sale. In addition, copies of the sales brochure, prospectus, selling instruments, and other relevant documentation are to be attached to the form", available in: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic89-4/tax-shelter-reporting.html

[380] Guidance, Part III:" Part III - Filing Requirements for Investors. 17. Subsection 237.1(6) of the Act provides that no amount may be claimed or deducted by a person in respect of an interest in a tax shelter unless the person provides the identification number for the tax shelter. The investor may use the authorized form, Statement of Tax Shelter Loss or Deduction - T5004, available at all District Taxation offices of Revenue Canada, Taxation to provide the tax shelter identification number to the Minister by including this form in the relevant income tax return. The investor should also include a copy of Supplementary T5003 in the first year of a claim. 18. The investor must provide documentation that substantiates the claim. Both the authorized form and the relevant documentation are to be included in the investor's income tax return for the year in which the claim is made." available in: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic89-4/tax-shelter-reporting.html

[381] Section 373.3.2 and 373.3.5 of the Income Tax Act " (2) An information return in prescribed form and containing prescribed information in respect of a reportable transaction must be filed with the Minister by (a) every person for whom a tax benefit results, or would result but for section 245, from the reportable transaction, from any other reportable transaction that is part of a series of transactions that includes the reportable transaction or from the series of transactions; (b) every person who has entered into, for the benefit of a person described in paragraph (a), an avoidance transaction that is a reportable transaction; (c) every advisor or promoter in respect of the reportable transaction... (5) An information return required by subsection (2) to be filed by a person for a reportable transaction is to be filed with the Minister on or before June 30 of the calendar year following the calendar year in which the transaction first became a reportable transaction in respect of the person." available in: https://laws-lois.justice.gc.ca/eng/acts/I-3.3/page-199.html#docCont

	Reporting time from the trigger event	Intermediary	Taxpayer
	which the claim is made	Under the RTAT regime, a reportable transaction must be disclosed by **30 June of the following calendar year in which the transaction became a reportable transaction**. PROPOSED CHANGES: A taxpayer, or another person, who enters a reportable transaction for the benefit of the taxpayer, would be required to report the transaction to the Canada Revenue Agency (CRA) within 45 days of the day the taxpayer (or the person who entered the transaction for the benefit of the taxpayer) **becomes contractually obligated to enter the transaction or enters the transaction**.	
The US	The last day of the month that follows the end of the calendar quarter Next year's tax return	Material advisor is required to file a material advisor disclosure statement with the IRS Office of Tax Shelter Analysis (OTSA) by **the last day of the month that follows the end of the calendar quarter** in which the advisor **became a material advisor**[382]. A person becomes a material advisor when all of the following events occur in no particular order: (1) the person **provided material aid, advice, or assistance** with respect to a reportable transaction; (2) the person indirectly or directly **derived fees in excess of the threshold**; (3) the **taxpayer entered into the reportable transaction**; and (4) in the case of a listed transaction or transaction of interest **the**	The disclosure statement for a reportable transaction must be attached to the taxpayer's **tax return** for each taxable year for which a **taxpayer participates in a reportable transaction**[384].

[382] Secs. 301.6111-3(d) and (e) of the US Treasury Regulations
[384] Sec. 6011-4. (e) of the US Internal Revenue Code

	Reporting time from the trigger event	Intermediary	Taxpayer
		guidance is published identifying the transaction as such[383].	
Mexico	30 days	Within **30 days**: (i) since the **first day of marketing**, i.e., when user become aware (generalized schemes); (ii) since the scheme was **made available to the user** for implementation; or (iii) since the **first event or legal act forming part of the scheme took place**, whichever is first[385].	[386]

Based on the above, the **intermediary reporting trigger events** can be organized from relatively earlier trigger event to the later (note that sequence below is only indicative, for some the timing could be earlier or later).

Table 32 Intermediary reporting triggers

Trigger event	Regime/ Country using it
➢ Before being marketed	➢ The earliest available trigger event is Canada's tax shelter regime, which requires an arrangement to be receive an identification number before it can be marketed to taxpayers. (However, note that for the other regime (RTAT) the arrangement is reported only in the next tax year.)[387]

[383] § 301.6111-3. b).4.(i) and (iii): "(i)In general. A person will be treated as becoming a material advisor when all of the following events have occurred (in no particular order) - (A) The person provides material aid, assistance or advice as described in paragraph (b)(2) of this section; (B) The person directly or indirectly derives gross income in excess of the threshold amount as described in paragraph (b)(3) of this section; and (C) The transaction is entered into by the taxpayer to whom or for whose benefit the person provided the tax statement, or in the case of a tax statement provided to another material advisor, when the transaction is entered into by a taxpayer to whom or for whose benefit that material advisor provided a tax statement.... (iii) Listed transactions and transactions of interest. If a transaction that was not a reportable transaction is identified as a listed transaction or a transaction of interest in published guidance after the occurrence of the events described in paragraph (b)(4)(i) of this section, the person will be treated as becoming a material advisor on the date the transaction is identified as a listed transaction or a transaction of interest." available in: https://www.law.cornell.edu/cfr/text/26/301.6111-3

[385] Art. 201, para. 3 of the Fiscal Code

[386] Art. 201.3 does not refer to either intermediaries or taxpayers but defines the time in which the arrangements must be reported:" Generalized reportable schemes must be disclosed no later than 30 days following the day on which the first contact is made for their commercialization. It is understood that the first contact for its commercialization is made, when the necessary measures are taken so that third parties know the existence of the scheme. Personalized reportable schemes must be disclosed no later than 30 days following the day the scheme is available to the taxpayer for its implementation, or the first fact or legal act that is part of the scheme is carried out, whichever comes first. Tax advisors and taxpayers required to disclose reportable schemes may do so from the moment their design has been completed."

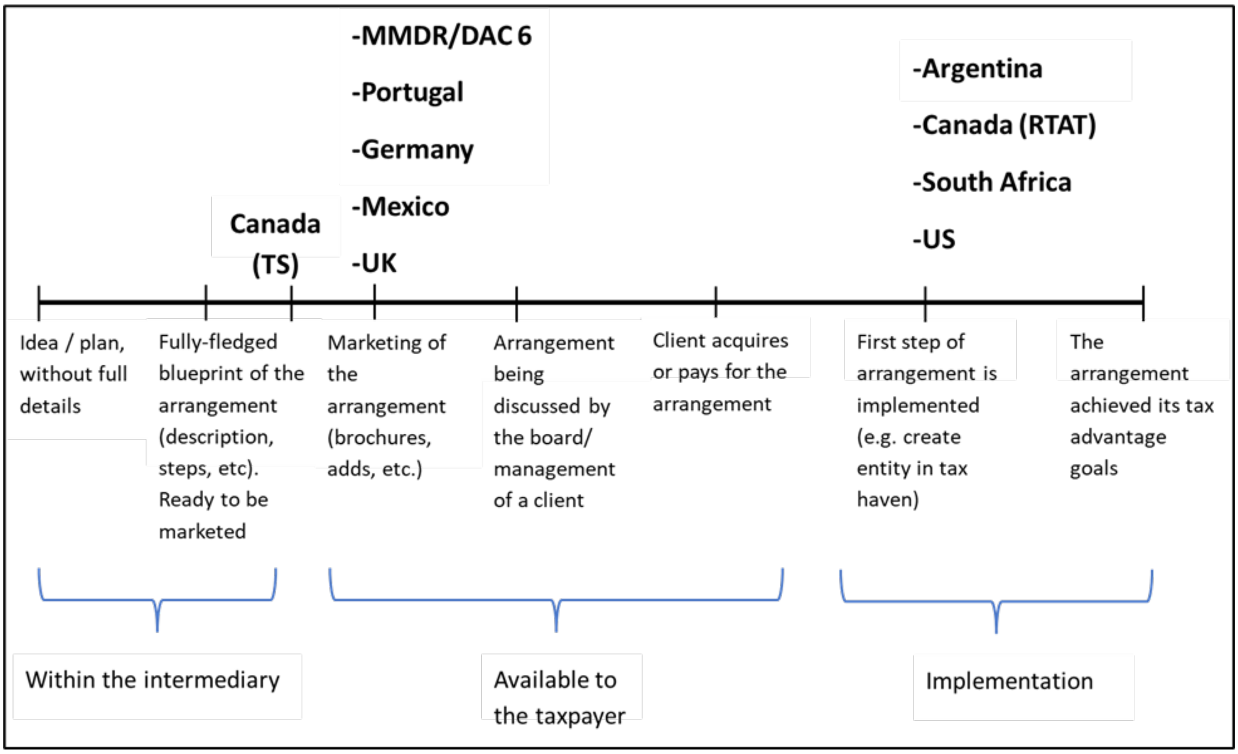
[387] "A person may, at any time, whether as a principal or an agent, sell or issue, or accept consideration in respect of, a tax shelter only if: (a) the Minister has issued before that time an identification number for the tax shelter; and (b) that time is during the calendar year designated by the Minister as being applicable to the identification number. Sec. 237.1.4 of the Income Tax Act (RTAT)

Trigger event	Regime/ Country using it
➢ Being aware of transaction being a part of a reportable arrangement ➢ Provision of services with regards to a reportable arrangement	➢ These trigger events are not per se conditioned on implementation, or actions taken by the taxpayer, but rather these are the actions of the intermediary that trigger the reporting obligation. ➢ It is used under the UK DOTAS regime, the DAC 6, 2018 OECD MMDR (regarding opaque Offshore Structures), and the US.
The earlier of: ➢ the day after the reportable cross-border arrangement is made available for implementation; or ➢ the day after the reportable cross-border arrangement is ready for implementation; or ➢ when the first step in the implementation of the reportable cross-border arrangement has been made	➢ These trigger events involve participation by the taxpayer. ➢ The full list of triggers is used by the DAC 6, and very similar triggers are used by Mexico. ➢ A number of MDR regimes use only some of the triggers: o 2018 OECD MMDR – uses the first trigger - available for implementation (regarding CRS avoidance arrangements); o UK uses the first two triggers (the promoter makes a firm approach with a view to making the scheme available for implementation; the promoter makes a scheme available for implementation); and o Argentina uses only the last trigger – making the first step of the implementation.
Meeting the definition of a reportable arrangement/reporting intermediary/participant: ➢ arrangement qualifies as a “reportable arrangement” ➢ person becomes a participant ➢ intermediary becomes “material advisor”	➢ These triggers are used in Canada and the US. ➢ The OECD 2015 Final Report confirms that these steps are akin to implementation and assumes that the taxpayer has entered the arrangement[388]. ➢ If implemented, there is a need to consider having clear and precise definitions as to which date the event occurs.
➢ Payment of excess fees	➢ In the US, the payment of the fees in excess of the threshold is part of the trigger event of becoming a material advisor (the payment could be structured as a success fee –in which case it would be received after the arrangement is implemented; however, fees can be also paid upfront)

Source: Apex Consulting

[388] “South Africa: under the South African regime a reportable arrangement must be disclosed within 45 days after the date that any amount is first received by or accrued to a taxpayer or is paid or actually incurred by a taxpayer in terms of that arrangement. The disclosure obligation is therefore triggered where there is receipt or payment of money, for a transaction forming part of a reportable arrangement; this effectively shows that the arrangement has been implemented.” Canada: “In Canada a reportable transaction must be disclosed by 30 June of the calendar year following that in which the transaction became a reportable transaction. A reportable transaction is an avoidance transaction that meets at least two of the hallmarks in the Canadian regime. The timeframe for reporting is therefore triggered by the transaction becoming reportable. This would occur once it has been implemented” (p.51, paras 146-147)

Figure: Reporting triggers



Source: Apex Consulting

Note that with regards to the **reporting by the taxpayer**, the MDR regimes apply two different approaches:

- **Same triggers and timing as for the intermediary** (applies in the case of DAC 6, Argentina, Mexico, South Africa, and Canada); or
- **Implementation (first steps)** (used in the 2018 OECD MMDR, the UK, and the US).

6.5.2.2 Pros, cons, best practices, and recommendations

Table 33 Pros, cons, best practices, and recommendations (6.5.2)

	Pros	Cons	Best practices and recommendations
Single trigger event	➢ Simple and clear regime. ➢ Ease of administration.	➢ If the trigger is implementation, this may not provide an early notice to the tax authorities to deter the taxpayer from entering into the arrangement. ➢ If the trigger is availability – it would be challenging to apply it to the in-house schemes that	➢ Currently applied in Argentina. ➢ **Not recommended**, unless a very simple and operational approach is preferred by a developing country (but pros and cons of the chosen trigger event should be considered, see below), in which case the recommendation is to use the earliest

	Pros	Cons	Best practices and recommendations
		are implemented by the taxpayer.	possible trigger event (see analysis).
Multiple trigger events	➢ Allows to capture multiple trigger events, whichever occurs first. ➢ Secures the earliest warning of all triggers.	➢ It is more complex to apply and to administer.	➢ Used by majority of the MDR regimes (DAC6, the UK, etc.). ➢ **Recommended** approach for the developing countries, provided the trigger events are clearly defined and simple (not too many).
Key reporting triggers for the intermediary			
Before marketing	➢ Provides the earliest warning to the tax authorities, enabling faster prevention of aggressive tax arrangements.	➢ May never be implemented by the taxpayers and therefore could be irrelevant. ➢ May not be sufficiently detailed as to the elements of the arrangement and anticipated tax benefits. ➢ Does not indicate whether there will be any actual interest in the market. ➢ May be hard to enforce (i.e., in essence, could capture too many tax ideas that could be considered aggressive). ➢ May require substantial resources.	➢ Currently implemented by Canada (TS regime) which requires that an ID is issued before the arrangement is marketed/sold. ➢ **Optional**, implement only if the developing country has resources to deal with the implementation of this trigger, or only use to issue arrangement id numbers (and apply other trigger events for reporting of implemented arrangements).
Intermediary focused triggers (awareness of a reportable arrangement; provision of services)	➢ Targets intermediaries only, thus lighter compliance burden on the taxpayers. ➢ Allows early detection.	➢ In MDR regime where both – intermediary and taxpayer must report – these trigger events should not be applied towards taxpayer reporting (and untangling the hallmarks to apply them only to the intermediary would	➢ It is used under the UK DOTAS regime, the DAC 6, 2018 OECD MMDR (regarding opaque Offshore Structures), and the US. ➢ **Optional**, not recommended in MDR regimes where both

	Pros	Cons	Best practices and recommendations
		make the regime more complex)	intermediary and taxpayer must report.
Availability	➢ Anticipated tax benefits and the workings of the arrangement should be sufficiently clear for reporting. ➢ Strong deterrence effect (reporting before the implementation). ➢ No tax revenue loss has been incurred yet, and tax authorities may prevent such from occurring.	➢ The arrangement may or may not be actually implemented; in the latter case there would be no tax revenue loss to the tax authorities (but still reporting serves as a preventive measure), and potential overreporting. ➢ Less certainty where the taxpayer needs to report. ➢ May be difficult to administer.	➢ Implemented by most MDR regimes. ➢ **Relevant, consider implementing** (in combination with the implementation trigger event). ➢ For clarity purposes, it is recommended that the developing countries define in their guidance notes what elements constitute "availability". ➢ Where arrangements are disclosed, that authorities could, for example, publish a notice on why the desired tax benefits could not be obtained.
Implementation (first step)	➢ The last recommended stage of the trigger events. ➢ Provides a clear cut-off point. ➢ Pursues actual arrangements entered into, not just potential deals that may never be implemented. ➢ Provides for a more targeted scope of reportable arrangements, optimizing the use of the tax authority resources.	➢ Limited potential to influence the taxpayer's behavior - it may be too late to prevent taxpayers from entering into a potentially aggressive arrangement. ➢ The overall tax revenue loss could be greater than with earlier trigger events.	➢ **Most relevant, minimum implementation standard recommended** to developing countries. ➢ Recommended to be used in combination with the "availability" trigger event. ➢ The definition of "implementation" needs to identify the point at which it is clear that a transaction will proceed, this will provide certainty

	Pros	Cons	Best practices and recommendations
			but also prevent taxpayers from artificially delaying disclosure[389].
Reporting triggers for the taxpayer			
Same as for intermediary	➢ Easier and simpler regime, same rules apply for all parties with reporting obligations. ➢ Assures early notice to the tax authorities, and therefore early ability to react. ➢ No delay in reporting where intermediary invokes legal privilege.	➢ If a taxpayer needs to report arrangements that it has not implemented yet (and may not implement), the effect of this obligation may be viewed as a policing obligation to report the intermediaries. ➢ May require reporting on offshore intermediaries the tax authorities do not have effective powers over. ➢ Therefore, it could be costly to taxpayers and difficult to administer.	➢ Applies in the case of DAC 6, Argentina, South Africa, and Canada. ➢ Recommended as the **optional approach** to developing countries, assuming they have resources to administer this approach.
(First steps of) the implementation	➢ Only actually implemented arrangements are subject to reporting, shrinking the scope of reportable arrangements to ones causing potential tax revenue loss. ➢ Ease of administration, as the taxpayers do not need to report on steps taken by intermediaries.	➢ Tax authorities are not notified about the arrangements proposed by intermediaries to the taxpayers, and therefore may not be able to act in a timely manner.	➢ Used in the 2018 OECD MMDR, the UK, the US. ➢ Recommended as a **minimum standard** for developing countries that desire cost efficient application.

[389] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para 151

6.5.3 Reporting timeframe after the trigger event

6.5.3.1 Reporting timeframe options

Regardless of the chosen trigger events, the MDR framework must determine the timeframe to report the arrangement once the trigger event has taken place.

The OECD 2015 Final report differentiated between reporting by intermediaries (proposing the availability trigger) or taxpayers (proposing the implementation trigger), as well as suggesting that the timescale for disclosure should aim to maximize the tax administration's ability to react to the scheme quickly and to influence taxpayers' behavior[390].

However, the experience of the analyzed countries shows that there are significant differences as to when countries require disclosure of the arrangements. Timing depends on the relevant trigger event and who needs to report, and varies from within days, months, to over a year. Both the 2018 OECD MMDR and DAC 6 regimes use a timeframe of 30 days. In contrast, the analyzed MDR countries have adopted timeframes that range between 5 days to next tax year.

The reporting timeframe adopted by various MDR countries can be divided into:

- **Short reporting timeframe**: Among countries that establish a timeframe since the trigger took place, the shortest timelines are 5 days[391] (the UK) followed by 10 days (Argentina). The most common timeframe of 30 days was established by the 2018 OECD MMDR and DAC 6 (adopted by all EU Member States), and by Mexico. South Africa comes next with a timeframe of 45 business days.
- **Medium reporting timeframe**: The US establishes "the last day of the month that follows the end of the calendar quarter in which the advisor became a material advisor[392]", which suggests that at the most it may be 120 days (assuming the trigger starts on the first day of the calendar quarter of 90 days and the reporting becoming due by the last day of the following month, so additional 30 days).
- **Long reporting timeframe**: Under Canadian TS regime the promoters are required to obtain an identification number before selling a scheme and must report all participants and amounts by the end of February of the following year; under the RTAT regime, a reportable transaction must be disclosed by 30 June of the following calendar year in which the transaction became a reportable transaction. In the US, the taxpayer disclosure must be made on the tax return, meaning that it could be more than a year after the arrangement is entered into.

In addition, the following options could be used:

- **Different reporting timeframe for intermediary and taxpayer**, for example, in the UK general intermediary reporting timeframe is 5 days from the trigger, but for the taxpayer it is 30 days, in the US – intermediary has around up to 120 days, the taxpayer reports with the annual tax return.
- **One-off v. update obligation** - while most MDR regimes require one-off reporting of the arrangement, several MDR regimes require ongoing updates:
    - Under DAC 6

[390] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p. 52, paras. 156-157

[391] Note that 5-day reporting timeline applies to reporting intermediaries only; taxpayers have 30 days to report, see above

[392] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p. 50, para 155

  - Each Member State may take the necessary measures to require that each relevant taxpayer file information about **their use** of the arrangement to the tax administration in **each of the years** for which they use it[393]. This option is used, for example, in Portugal, where the relevant taxpayer must, in each of the years in which the reportable arrangement is applied, inform the tax authority by including an update of previously reported information[394].
  - As of 2020, the Member States that have implemented or intend to implement this secondary reporting obligation were Bulgaria, Croatia, France, Germany, Ireland, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Spain, and the United Kingdom. In Germany, Ireland, Luxembourg and the United Kingdom, the annual reporting was proposed to be included in the annual tax return. In Poland and Spain, there will be a separate form for reporting with specific deadlines. The remaining Member States that have implemented or intend to implement the annual reporting obligation will provide information on the form of reporting in future guidance[395].
  - In the case of marketable arrangements, a **periodic report** must be made by the intermediary **every 3 months** providing an update that contains new reportable information that has become available since the last report was filed[396].
- Germany requires an updated filing if the **tax arrangement already reported is extended or changed and if there are for that reason deviations** from the planned tax arrangement[397], and Mexico, too, requires an updated reporting within 20 days of changes[398].

Table 34 Timeframe for reporting since trigger event

	Timeframe to report
Canada (TS)	Arrangement ID needs to be obtained before the arrangement is marketed
UK (intermediaries)	5 days
Argentina	10 days
2018 OECD MMDR **DAC 6 (27 EU Member States)** **UK (taxpayers)** **Mexico**	30 days
South Africa	45 business days
US (intermediary)	Up to 120 days
Canada	End of February the year after (TS regime) End of June the year after (RTAT regime)

393 Art. 8ac (11) of DAC 6
394 Sec. 12.2 of the Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements
395 EY, *DAC 6 Newsletter: DAC 6 local country status and reporting trends* (2020)., p.4 https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/tax/ey-dac-6-newsletter-may-2020.pdf
396 Art. 8ab (2) of DAC 6
397 138h.2 of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, page 2875 on 30 December 2019 (BGBl. I no. 52/2019, at 2875)
398 Art. 202, para. 3 of the Fiscal Code

US (taxpayer)	Filed with annual tax return (i.e., could be more than a year after the arrangement is implemented)

Source: Apex Consulting

6.5.3.2 Pros, cons, best practices, and recommendations

Table 35 Pros, cons, best practices, and recommendations

	Pros	Cons	Best practices and recommendations
Short reporting timeframe (5-45 days)	➢ Provides early information on avoidance arrangements schemes and their users. ➢ The earlier the reporting, the more quickly a tax administration can act against an arrangement. ➢ This may enhance the deterrent effects by reducing the time available to take advantage of any tax benefit, so altering the economics of the transaction[399].	➢ Places an increased compliance burden on the reporting intermediary and/or taxpayer (this is a very short period for MNEs with complex tax reporting processes requiring various approvals). ➢ All required information may not be present. ➢ Really short timeframes may lead to poor quality disclosures. ➢ In order to enhance the deterrence effect and prevent tax revenue loss, also tax authorities need to act fast.	➢ Applied by all analysed MDR countries, except for the US and Canada, ranging from 5 – 45 days from the trigger event. ➢ **Recommended as first option** for the developing countries because the earlier the reporting, the more quickly a tax administration can act against an arrangement. This needs to be weighed against the risk that overly short timeframe (e.g., 5 days) could be difficult to comply with and may lead to poor quality disclosures.
Medium reporting timeframe (120 days)	➢ Provides somewhat early notice. ➢ Balances with intermediary / taxpayer needs to have time to prepare the necessary reporting.	➢ May be too late to deter (see below) and stop the revenue leakage.	➢ Applied by the US regarding intermediaries. ➢ Recommended only as a second-best option (short time frame is preferred).
Long reporting timeframe (potentially over a year)	➢ Aligned with normal income tax reporting deadlines. ➢ The easiest option for intermediaries / taxpayers to	➢ There could be a significant time gap between implementation and subsequent disclosure.	➢ Applied by Canada (all reporting) and in the US (taxpayer reporting).

399 OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para 139

	Pros	Cons	Best practices and recommendations
	administer - can be used as a part of annual tax reporting cycle. ➢ Provides ample time to collect necessary reporting information.	➢ The bigger the gap between the trigger event and the eventual disclosure the more users there could be. The tax administration will therefore need to challenge more cases, potentially tying up resources. ➢ This strongly impacts a tax administration's ability to react quickly. ➢ Potentially greater revenue loss ➢ Reduced deterrent effect.	➢ **Not recommended** approach for developing countries.
Different timeframe for intermediary and taxpayer	➢ Gives more time to taxpayer to prepare the reporting (it assumes intermediary is in a better position to file).	➢ Adds complexity. ➢ If there is a large gap between the 2 reporting timeframes, it may negatively impact tax authorities' reaction options, collected tax revenues and deterrence effect.	➢ Used by the UK and the US. ➢ Generally not recommended, unless the timeframes remain short, and taxpayers are assumed to need more time.
Updated reporting	➢ Allows tax authorities to track the use of the arrangement and react to any changes that can cause further tax revenue loss. ➢ Provides a stronger deterrence effect.	➢ Ongoing compliance burden. ➢ Potential overreporting.	➢ Used in the EU (DAC 6) and Mexico. ➢ Should be considered where necessary to track the tax revenue loss risks, but such a decision needs to be weighed against available resources.

6.5.4 First reporting and retrospective reporting

Once the MDR is launched, MDR countries need to decide:

1. The implementation period of the regime and when the **first reporting** takes place; and
2. Whether the MDR regime will capture **retrospective arrangements** entered into prior to the effective date of the MDR law (where legally permissible).

6.5.4.1 First reporting

In general, it needs to be assumed that the market requires some time to understand and implement the MDR regime and to be ready to report. Equally, the tax authorities will likely need some time themselves to set up the required reporting infrastructure.

From the intermediary and taxpayer perspective, preparing for the MDR reporting may require substantial preparation which may include, among other:

- Preparing a strategy, policy, and guidance for the MDR (establish in-house process, responsible persons, reporting lines, and training of all relevant tax and other key personnel);
- Establishing process regarding other reporting intermediaries / taxpayers, where required (who is making disclosures, proofs, etc.);
- Collection of the reporting information (need to have complete reporting data for the arrangements), evaluation of whether the arrangement is reportable; and
- Setting up the actual reporting process

If the reporting intermediary or taxpayer is a large, international business, this process may take 6-18 months to be put in place, preparing people, processes, and systems.

In recognition of these needs, DAC 6 originally provided for an extended implementation period of 2 years during which the intermediaries did not have an obligation to report. Note that it is a postponement of the reporting deadline, but not a cancellation of the obligation to report the arrangements in scope as of the effective date. Therefore, the first report includes reportable information as of the effective date of the regime, and typically would include the 2 years of reportable arrangements. Due to Covid, the actual first reporting deadlines were extended further by at least 3 months[400], and the first MDR reporting took place in all EU Member States in 2021.

However, not all MDR countries have implemented this approach, for example Argentina only gave 3 months to the first reporting, and Guernsey used 6-month period (see the table below).

6.5.4.2 Retrospective reporting

It is a general principle of law that obligations cannot be imposed retroactively, prior to the law becoming effective. However, if the deviations from this principle are permitted by the local law, the MDR framework may consider retrospective application to pre-existing arrangements that were implemented after the proposal of the MDR regime, but before entry into force of the MDR. This may be a useful tool to deter intermediaries and taxpayers from entering into such arrangements, especially if the legislative process may take a long time.

This approach has been used:

- In 2018 OECD MMDR (as adopted by South Africa and Guernsey): The CRS was first published on 15 July 2014, the CRS legislation in various countries only started to enter into effect as of 2016 or later.

[400] EU extended by 3 months, https://taxation-customs.ec.europa.eu/taxation-1/tax-co-operation-and-control/general-overview/enhanced-administrative-cooperation-field-direct-taxation_en. The UK extended by 6 months, see IEIM800010, https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim610020), Portugal as well pushed the first reporting to the end of February 2021). https://assets.kpmg/content/dam/kpmg/xx/pdf/2021/04/mdr-factsheet-portugal-april-2021.pdf

This has provided a "window of opportunity" to implement CRS avoidance arrangements prior to the effective date of CRS Legislation. Therefore, 2018 OECD MMDR requires to report a CRS avoidance arrangement entered into as of 29/10/2014 but prior to the effective date of the disclosure rules (as adopted by the respective MDR country), provided that the aggregate balance or value of the financial account is USD 1,000,000 or more. The promoter is required to disclose the arrangement to the tax authorities within 6 months (180 days) of the effective date of the MDR coming into effect.

- Argentina has a 2-year retrospective application.

6.5.4.3 First reporting and retrospective reporting summary

Table 36 Retrospective application and first reporting

	Adopted	Certain retrospective arrangements as of	Retrospective arrangements (prior to the effective date)	First reporting by	Implementation timeframe to first reporting
2018 OECD MMDR	08/03/2018	29/10/2014[401]	4+ years	180 days + (to be established by the MDR country)	At least 6 months
South Africa (implementing the 2018 OECD MMDR)	09/10/2020	29/10/2014	6 years	01/03/2023	2,5 years
Guernsey (implementing the 2018 OECD MMDR)	11/03/2020	29/10/2014	5,5, years	02/05/2021[402]	6 months
DAC 6	25/05/2018	N/a	N/a	31 August 2020[403]	2 years
Argentina	19/10/2020	01/01/2019	2 years	29/1/2021[404]	3 months

Source: Apex Consulting

[401] Only for certain arrangements with aggregate balance or value of U.S. $1,000,000 or more and relating to CRS Avoidance Arrangement where: (i) that Arrangement was implemented on or after 29 October 2014 but before the effective date of these rules; and (ii) that person was a Promoter in respect of that Arrangement; irrespective of whether that person provides Relevant Services in respect of that Arrangement after the effective date. See: Sec. 2. Rule 2.7. of the 2018 OECD MMDR

[402] Sec.10 of the Income Tax (Approved International Agreements) (Implementation) (Mandatory Disclosure Rules) Regulations, 2020

[403] Art.8 ab (12) of DAC 6, but has been further extended, see above

[404] Art. 10 of the Tax administration (AFIP) General Resolution 4838/2020

6.5.4.4 Pros, cons, best practices, and recommendations

Table 37 Pros, cons, best practices, and recommendations

	Pros	Cons	Best practices and recommendations
Use of implementation period to delay the first reporting	➢ Allows time for tax authorities to set up a reporting framework. ➢ Allows the intermediaries and taxpayers to implement proper MDR framework.	➢ Significant time gap between implementation of arrangements and subsequent disclosure. ➢ This strongly impacts a tax administration's ability to react quickly. ➢ Potentially greater tax revenue loss. ➢ The tax administration will need to be prepared to handle large amounts of data (resources needed).	➢ MDR implementation timelines differ from 3 months (Argentina) to DAC 6 (2+ years). ➢ The longer the period, the larger potential tax revenue loss, as well as the volume of the first reporting. ➢ Developing countries should assess what is a minimum reasonable deadline for the MDR first reporting, considering their own ability to implement the regime, resources, and the market readiness to implement the MDR.
Retroactive application	➢ This may be a useful tool to deter intermediaries and taxpayers from entering into such arrangements, especially if the legislative process may take a long time. ➢ Could be qualified to include only arrangements above certain thresholds.	➢ May not be permitted as a matter of law. ➢ May generate large volumes of reported arrangements. ➢ Greater compliance costs for intermediaries / taxpayers, who would need to go back to analyze past arrangements (could be challenging if people, data locations, operations, etc., have changed). ➢ Could create challenges if the wording of adopted law differs from the draft triggering the reporting obligation.	➢ Used by the 2018 OECD MMDR (going back 4+ years) and Argentina (2 years). ➢ Can be considered only if permitted by local law, tax authorities have necessary resources to deal with the volume and type of transactions (could be narrowed through thresholds), and intermediary / taxpayer compliance ability is reasonably considered.

Source: Apex Consulting

6.6 Grouping arrangements and taxpayers

6.6.1 Overview and recommendations

In analyzing and grouping the received reportable data, tax authorities may choose to adopt:

- **Independent approach** (analyze and group received data by same arrangement, intermediary, taxpayers), or
- **Compiling approach** (require dual reporting by intermediary and taxpayer; and/or use of arrangement ID number; and/or use of the client lists, which allows to compile and group the arrangements and the clients using them more easily).

The **independent approach** is a relatively simple option and is embedded in the 2018 OECD MMDR and the DAC 6. It requires singular reporting and preserves resources and costs; however, tax authorities need resources to detect patterns and assess underlying risks. If these patterns and relationships are not detected, there is a potentially larger revenue loss risk. If this option is chosen, then the hallmarks should be drafted narrowly (to capture the same type of arrangements), and MDR countries should consider undertaking data analysis for the obtained information in order to identify common arrangements, taxpayers, and intermediaries.

The **compiling approach** is implemented by the majority of the MDR countries. While it is more complex and more costly to both - the tax authority and the intermediaries/taxpayers, compiling information from multiple sources has a number of benefits. Firstly, the arrangement ID helps the tax administration to identify (nearly) identical arrangements, their intermediaries, and taxpayers, and thus quantify the risks and the extent of any revenue loss early. Secondly, the client list identifies all taxpayers that participated in the arrangement and allows to validate if they had filed. Furthermore, it allows to deal with such group of taxpayers simultaneously and has a strong deterrent effect. Last, but not least, dual reporting by the intermediary and the taxpayer allows the tax authorities to compare the two filings for inconsistencies.

If the compiling approach is chosen, and depending on the available resources and capacity, the developing countries should consider including one or more of the following options in the MDR regime:

- Require the main intermediary to first obtain an arrangement ID to be shared with the taxpayer and/or other intermediaries;
- Require the taxpayer to file the full details of the arrangement including the arrangement ID, or at least just the arrangement ID; and/or
- Require the intermediary to file a list of clients at the time of filing the arrangement and to update it upon any new client, or regularly (e.g., monthly).

Once the arrangement is determined to be a reportable arrangement, it is reported to the tax authorities by intermediary and /or taxpayer. Unless further obligations are imposed on the intermediaries and /or taxpayers, tax authorities will be able to see arrangements grouped by relevant hallmarks, but they may not easily detect whether:

- The reported arrangements are substantially the same (i.e., it is the same standardized scheme, or otherwise nearly identical arrangement);
- How many and which intermediaries are offering the particular arrangement;
- How many taxpayers have used the same type of arrangement;
- Which taxpayers have used the same type of arrangement; or

- Whether all the taxpayers have reported the arrangements, where required.

Some of this information may be deduced from the information received through reporting. If the hallmarks are narrowly drafted, they may be sufficient to group the arrangements. Similarly, patterns can be detected (especially by using the data analytics tools) because:

- The intermediaries and taxpayers use their tax IDs when reporting;
- The reporting information typically includes the list of all the parties involved in the transaction, and the value of the transaction, among other things.

However, it may still be challenging to see the popularity and the market uptake of specific arrangements for many reasons (for example, the same arrangements are described differently; tax authorities may lack resources and capacity to analyze the data).

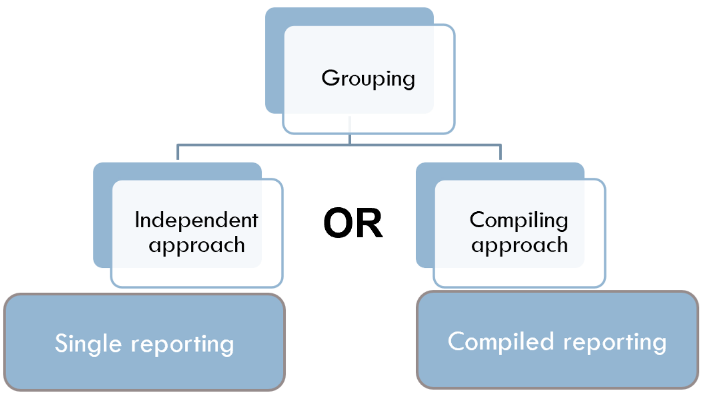
Therefore, several MDR countries impose further obligations on the intermediaries and taxpayers, such as, for example (referred to further as "compiled approach"):

- Requirement of dual reporting (intermediary and taxpayer); and /or
- Use of arrangement ID number; and/or
- Use of the client lists

which allows to compile and group the arrangements and the clients using them easier.

6.6.2 Compiled and independent approaches

As discussed above, the MDR countries may choose to apply:

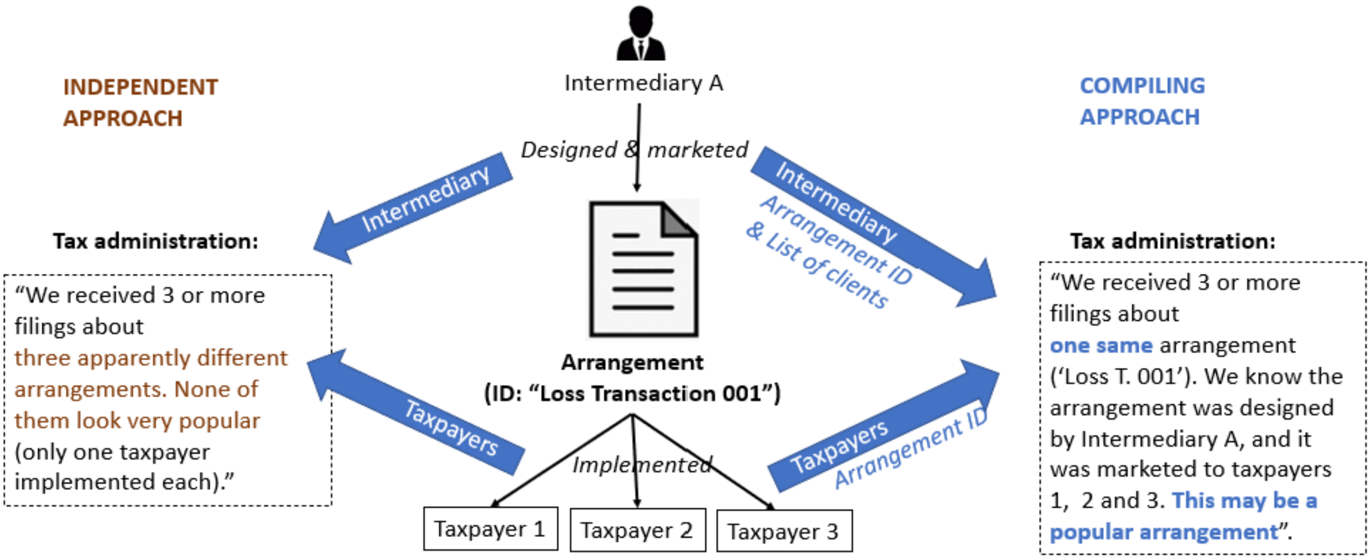


- **Independent approach**; or
- **Compiled approach** (with variety of coordination options).

For example, assume that there is a single intermediary A that has sold the same arrangement related to loss transaction to three unrelated taxpayers and that all four parties have reported the MDR arrangements. As the next figure shows:

- **A compiled approach** will result in the tax administration becoming alerted through the filing of the arrangement's ID and the client list that the different filings refer to the same arrangement involving the same intermediary. Such filings would indicate that this arrangement may be becoming a popular arrangement among taxpayers which authorities should monitor and take measures.
- **And independent approach** would not directly show the correlation among the three transactions and may lead the tax authorities to believe that the same arrangement refers to at least three different arrangements, because there is no easy way to link the arrangement to each of the taxpayers (for instance, the taxpayers could have called the arrangement in different ways and described it in different ways: "Loss acquisition, loss transaction, loss carryforward, asset acquisition, etc.).

Figure: Compiled approach and independent approach



Source: Apex Consulting

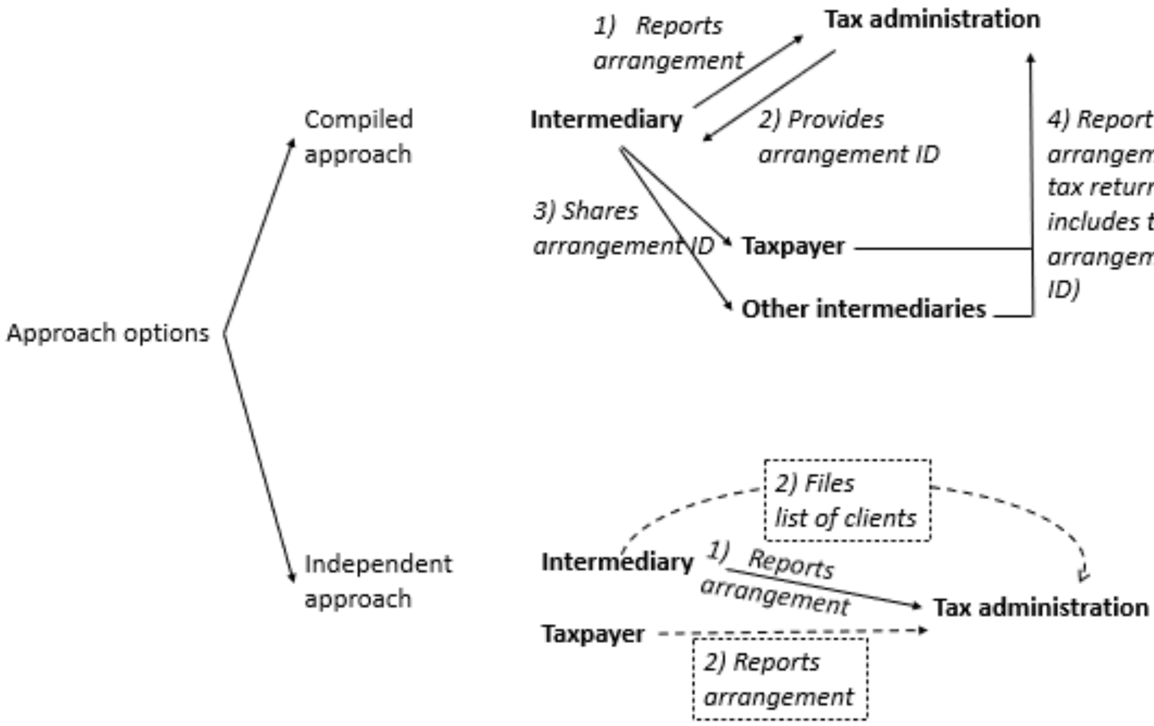
6.6.2.1 Independent approach

From the perspective of the intermediaries and the taxpayer, an independent approach is much simpler than the compiled approach. It may be that only the intermediary files the information, which could include (or not) the list of clients to allow the tax administration to know which taxpayers have been using the arrangement. It could also be the case that instead of filing the list of clients, the taxpayer must also file all details on the arrangement (the same information as the intermediary). This Independent approach, especially when no client list is provided, creates a risk for the tax administration because the arrangement could be named or described differently by each filer. The tax administration may believe that many different arrangements are taking place, when in fact they all relate to the same issue and /or the same intermediary.

This approach is applied by the 2018 OECD MMDR and DAC 6 (however, given that DAC 6 is the minimum standard, the EU member states may impose more stringent requirements).

6.6.2.2 Compiled approach

Figure: Process example of compiled and independent approach processes[405]



Source: Apex Consulting

The way the process works, its complexity and the suitability of information for the tax administration will depend not only on choosing the compiled or an independent approach, but also on the number of parties that must file the arrangement, whether they must include a list of clients and finally the timing of each reporting obligation.

As the figure above shows, the compiled approach between the intermediary and the taxpayer (or other intermediaries) is more complex. If the **arrangement ID** is required by the MDR regime, first the main intermediary files the full arrangement details. Then, it receives an acknowledgement of receipt plus an ID for the arrangement from the tax administration. Following this, the intermediary must share the arrangement ID with the taxpayer (assuming they must also file the full arrangement or at least include the arrangement ID in their tax returns) and with other intermediaries (assuming they must also file any information, including a nil return to confirm that they need not file information because someone else has). This process creates more burden and bureaucracy for the intermediaries and taxpayers, but it alleviates the work for the tax administration because it will be able to reduce the number of reports or at least to ensure that all reports about the same arrangement are properly identified and all relations are acknowledged.

The allocation of an arrangement ID number does not indicate that a tax authority accepts the efficacy of the disclosed arrangement or the completeness of disclosure. Both the United States and the United

[405] Note that the actual processes differ from one MDR country to another. This summary is provided for illustrative purposes only

Kingdom are explicit in this regard. The US instructions make it clear that receipt of a reportable transaction number does not indicate that the IRS has reviewed, examined, or approved the transaction[406]. The UK guidance also states that the allocation or notification of a scheme reference number does not indicate that the UK tax administration accepts that the scheme achieves, or is capable of achieving, any purported tax advantage[407]. Nor does it indicate acceptance that the disclosure is complete.

However, there is also a risk that the intermediaries fraudulently promote the arrangements and advise the taxpayers that the arrangement ID number indicates that the tax administration has explicitly approved the arrangement. To prevent this risk, Canada's tax shelter (TS) regime requires intermediaries to disclose their brochures and that they "include on every written statement that refers to the identification number of the tax shelter the following statement: 'The identification number issued for this tax shelter shall be included in any income tax return filed by the investor. Issuance of the identification number is for administrative purposes only and does not in any way confirm the entitlement of an investor to claim any tax benefits associated with the tax shelter[408].'"

Table 38 Independent and compiled approaches used by the MDR countries

	Independent approach				**Compiled reporting**
Countries	**Portugal**	**Germany**	**Canada (TS)** **Mexico** **UK**	**Argentina** **South Africa**	**US**
Who reports	IMY[409]	IMY (Taxpayer **only** includes **arrangement ID** in tax return)	IMY (Taxpayer **only** includes **arrangement ID** in tax return)	IMY & Taxpayer (**full disclosure by both**)	IMY & Taxpayer (**full disclosure by both**)
When does each report	*1st IMY (within 30 days from the tigger event)*	*1st IMY (within 30 days from the tigger event)* 2nd Taxpayer (in tax return next fiscal year)	*1st IMY (within 30 days from the tigger event)* 2nd Taxpayer (in tax return next fiscal year)	Both at the same time	*1st IMY (within 30 days from the tigger event)* 2nd Taxpayer (in tax return next fiscal year)
Client list and/or Arrangement ID	-	*Arrangement ID (by taxpayer in tax return)*	*Client list (by IMY)* ***&***	-	*Client list (**Upon Request**)* ***&***

[406] Section 6111.3.(d). (2) of the Internal Revenue Code: Reportable transaction number. The IRS will issue to a material advisor a reportable transaction number with respect to the disclosed reportable transaction. Receipt of a reportable transaction number does not indicate that the disclosure statement is complete, nor does it indicate that the transaction has been reviewed, examined, or approved by the IRS.", available in: https://www.law.cornell.edu/cfr/text/26/301.6111-3

[407] Sec. 13.2 of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

[408] Section 9 of the Guidance: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic89-4/tax-shelter-reporting.html

[409] IMY means intermediary

	Arrangement ID (by taxpayer in tax return)	*Arrangement ID (by taxpayer in tax return)*

Source: Apex Consulting

As the table above shows, MDR countries could use a wide variety of approaches throughout the spectrum, from the least information being disclosed by the least number of parties without any disclosure of an arrangement ID or a client list (e.g., Portugal), all the way up to a full disclosure by all parties including both the client list and the arrangement ID (no country currently).

The closest case of fully compiled approach is the US because it requires both the intermediary and the taxpayer to report all the details on the arrangement (in addition to the arrangement ID obtained by the intermediary), but the client list must only be filed upon request from the tax authorities[410].

A less coordinated approach is used by Argentina[411] and South Africa[412]. Argentina also requires the intermediary and the taxpayer to disclose full details of the arrangement, but there is no use of arrangement IDs or client lists that would help authorities ensure that the arrangements are related to each other, or to cross-check whether all taxpayers indeed reported the arrangement. Although South Africa issues an arrangement ID it is not clear if it must be included in the tax return[413].

Canada (for the Tax Shelter regime)[414], Mexico[415] and the UK[416] also use compiled approach and require the intermediary to file all the arrangement's details and obtain an arrangement ID to be shared with the taxpayer. Although the taxpayers must include the arrangement ID in their tax returns, the tax returns will only be filed in the next fiscal year, which may prevent tax authorities from acting earlier. For this reason, the intermediary must also file the list of clients (though this may be reported sometime later, or in intervals) so as to alert authorities about the number of taxpayers using or acquiring the arrangement.

Another approach is applied by Germany[417] where the intermediary must first file the full arrangement's details and it then obtains an arrangement ID from the tax administration. The taxpayers must then include this arrangement ID in their tax return. There is no requirement for the intermediary to submit a client list.

[410] Annex E of the OECD 2015 Report. The legal basis includes Secs. 6112, 6708, 6011-4. (a) and (d) of the Internal Revenue Code

[411] Arts. 6 and 11, AFIP Resolution 4838/2020

[412] Although Annex E to the OECD 2015 Report suggests that promoters have to file the arrangement details and taxpayers include the arrangement ID in their tax return, the text of the OECD 2015 Report (p. 34, para 66) and the law of South Africa suggest that both the promoter and the taxpayer must file the arrangement details (Section 37.1 and 34 of the of the Tax Administration Act No. 28 of 2011). Specifically, Section 37.1 puts the obligation on every" participant" and Section 34 defines a "participant" to include the promoter and anyone who will derive a tax benefit

[413] Although Annex E and paragraph 66 of the OECD 2015 Report describe that the arrangement ID must be included in the tax return, there is no provision in the law suggesting this. Section 39 only states that" SARS must, after receipt of the information contemplated in section 38, issue a 'reportable arrangement' reference number to each 'participant' for administrative purposes only."

[414] Arts. 4, 8, 12 and 17 of the Guidance: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic89-4/tax-shelter-reporting.html

[415] Arts. 197.8 and 202 (paragraphs 1 and 2) of the Fiscal Code

[416] Annex E of the OECD 2015 Report. Legal basis: DOTAS Guidance 2.3.2., Section 19; DOTAS Sec. 14.5 and DOTAS Guidance 2.3.2. DOTAS guidance: HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated 16 June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

[417] Sections 138f and 138k of the of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, page 2875 on 30 December 2019 (BGBl. I no. 52/2019, at 2875)

6.6.3 Pros, cons, best practices, and recommendations

Table 39 Pros, cons, best practices, and recommendations

	Pros	Cons	Best practices and recommendations
Independent approach	➢ Relatively simple regime that requires singular reporting. ➢ Preserves resources and costs. ➢ If a hallmark is narrowly tailored, it could be sufficient to group similar arrangements. ➢ Information about the other participants and the type of arrangement is typically included in the report, hence can be analyzed, and acted upon by using data analytics.	➢ If the country asks only for a singular reporting (i.e., only by the intermediary, or taxpayer), there is a greater risk that the arrangement may not be reported (weaker deterrence effect). ➢ There are no alternative sources to cross-check filings. ➢ Challenge to identify common arrangements, taxpayers, and intermediaries if transactions are not described in similar terms. ➢ More resources are needed to detect patterns, and assess underlying risks, therefore potentially larger revenue loss risk.	➢ Set forth by the 2018 OECD MMDR and DAC 6. ➢ If this approach is chosen, MDR countries should consider undertaking data analysis for the obtained information in order to identify common arrangements, taxpayers, and intermediaries. ➢ If the hallmarks are drafted narrowly, then it could be sufficient to capture the same type of arrangements.
Compiled approach	➢ Compiling information from multiple sources allows cross-check reporting and links the intermediary and the taxpayers participating in the arrangement. ➢ Requiring the intermediary to provide a client list helps to identify all taxpayers that participated in the arrangement, validate if they had filed, and deal with them simultaneously.	➢ Complex regime ➢ Implementation is costly for both - the tax authority and the intermediaries / taxpayers.	➢ A combination of various compiling tools is used by the majority of the MDR countries. ➢ If the resources of the developing countries permit, they should consider including one or more of the following options: ○ Require the main intermediary to first obtain an arrangement ID to be shared with the taxpayer and/or

	Pros	Cons	Best practices and recommendations
	➢ Arrangement ID helps the tax administration to identify all identical arrangements, their intermediaries, and taxpayers, and thus quantify the risks and the extent of any revenue loss early. ➢ Dual reporting by the intermediary and the taxpayer allows to compare the two filings for inconsistencies. ➢ Stronger deterrence effect - if the taxpayer knows that it will be identified through a client list or needs to disclose the arrangement id on the tax return.		other intermediaries; ○ Require the intermediary to file a list of clients at the time of filing the arrangement and to update it upon any new client, or regularly (e.g., monthly); or ○ Require the taxpayer to file the full details of the arrangement including the arrangement ID, or just the arrangement ID.

6.7 What information must be reported?

6.7.1 Overview and recommendations

An effective MDR system must include sufficient information for the tax administration to understand and analyze the reported arrangements, and to take measures. The MDR regimes and countries ask for various types of information to be reported.

There are two main points that the information to be reported must include:

- **details of parties involved (**intermediary, taxpayers that use it, and other participants (including, if required, a client list, etc.)), and
- **details of the arrangement** (e.g., explanation, involved parties, applicable and circumvented laws, size of the transaction, value of tax benefits, etc.).

For each element, there is:

- **mandatory information** to be requested which is the **minimum** information required to enable the tax authorities to identify the participants and understand the arrangement (which is used by all MDR countries and regimes); and
- **optional information** (if selected, it would become mandatory in the MDR country) – additional information requested (is used by some MDR regimes) which developing countries may

consider requesting. In making this determination, developing countries should consider the resources available and compliance burden on the taxpayers.

To address the challenge that the domestic taxpayer may not have a full view on the arrangement, developing country may consider imposing an **obligation** on a domestic taxpayer at the time they enter into a material transaction with a group member **to make reasonable enquiries** as to whether the arrangement that gave rise to the transaction incorporates a cross-border outcome, and **to notify the tax administration** if:

- the group member does not provide relevant information on the arrangement;
- the information on the arrangement is inadequate or incomplete; or
- there is an unreasonable delay in providing such information.

It is strongly recommended that the developing countries **issue MDR reporting guidance** indicating precisely what information (and format) needs to be submitted for each required data point, for example, for the addresses to include street, city, province, zip code, country.

The main goal of the MDR is that sufficient information is available to the tax administration to understand and analyze the arrangement, identify all involved parties, and to take measures. For this purpose, the following information should be available to authorities:

- **Details of the participants** - intermediary, taxpayers that use it, and other participants (including, if required, a client list); and
- **Details of the arrangement** (e.g., explanation, involved parties, applicable and circumvented laws, size of the transaction, value of tax benefits, etc.)

As per the table below, the MDR regimes and countries ask for various types of information to be reported.

Table 40 Types of information to be reported

Item	2018 OECD Report	DAC 6	Argentina	UK	Guernsey	Portugal	South Africa	Germany	Canada	USA	Mexico
Types of information to	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Identification of promoters and scheme users	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Hallmarks met	Y	Y	N*	Y	Y	Y	N*	Y	Y	N*	Y
Description of the arrangement	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Legal basis of the tax advantage	N	Y	Y	Y	N	Y	N	Y	N	Y	Y
Tax advantage gained	N	Y	Y	Y	N	Y	Y	Y	Y	Y	Y
Value of tax benefit	N	N	Y	Y	N	N	Y	N	Y	Y	Y
List of clients	N	N	N	Y	N	N	N	N	Y	Y	Y

N indicates that the country does not require to report which hallmark is met, and it is assumed that such information can be deducted from the detailed description of the arrangement.*

Source: Apex Consulting

It is strongly recommended that the developing countries issue MDR reporting guidance on the technical interpretation of the domestic law and the practical aspects of compliance and reporting, indicating precisely what information (and format) needs to be submitted for each required data point (e.g., for the addresses to include street, city, province, zip code, country).

6.7.2 Details of the participants (intermediary, taxpayers, etc.)

6.7.2.1 Intermediary and taxpayer (user)

As per the table above, based on the available laws (although guidance or the actual registration forms may require more data) all analyzed MDR countries and regimes require the identification of the intermediary and taxpayer. In the case of Argentina, although this is not expressly stated in the law, given that both the intermediary and the taxpayer must report, authorities would know the identity of them.

Sufficient information should allow authorities to identify with certainty each party as well as contact them via their email or telephone number in case more information needs to be gathered. To facilitate identification, the use of identifiers such as tax identification number (TIN) is especially relevant.

Below is the information that is recommended to be requested for reporting:

- **Mandatory** – is the minimum standard required and is used by all MDR countries and regimes.
- **Optional** – is used by some MDR regimes, developing countries should consider whether such information is useful, and balance the resources available and burden on the taxpayers.

Parties for which information is to be identified:

Mandatory	Optional
➢ Each intermediary involved ➢ Each taxpayer (user) involved ➢ Beneficial owners (Secrecy hallmarks)	➢ Any client of intermediary[418] ➢ Related /associated entities of the taxpayers that are entities[419] ➢ Identification of any other person likely to be affected by the reportable cross-border arrangement, indicating to which countries such person is linked[420] ➢ Name and TIN of intermediaries released from the obligation to disclose (legal professional privilege)[421]

Based on the above, **for each person that needs to be reported, the following information is to be identified**:

Mandatory	Optional
➢ Full name ➢ Address	➢ For individuals - place of birth

[418] Sec.1. Rule 1.4. (d) of the 2018 OECD MMDR defines "Client", in respect of an Intermediary, as any person who requests an intermediary to, or on whose behalf, or for whose benefit, the Intermediary: (i) make(s) a CRS avoidance arrangement or opaque offshore structure available for implementation; or (ii) provide(s) Relevant Services in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure

[419] Sec. Art. 8ab.14 of DAC6

[420] Art. 8ab.14. Of DAC 6

[421] Required in Mexico, Art. 200 of the Fiscal Code

- Email & Telephone number
- Date of birth
- Tax residence
- National ID Number (if any)
- Tax identification number
- For entities – all associated enterprises to the relevant taxpayer

Source: Apex Consulting

Note that each filing person needs to disclose this information for each other party that is required to be disclosed, to allow the tax authorities to link the intermediaries and the taxpayers.

6.7.2.2 Client list

The client list is only required to be disclosed by the UK, Mexico, and Canada's tax shelter regime. In the US, intermediaries would have to disclose it upon request from authorities.

6.7.3 Details of the arrangement

Considering the cross-border nature of reportable arrangements, as discussed earlier, it may be challenging for the local taxpayer to have a full view of the details of the arrangement. Nevertheless, while taxpayers should only be required to disclose information that is within their knowledge, possession, or control, they can be expected to request information on the operation and effect of an intra-group scheme from other group members[422].

To address this challenge, the 2015 OECD Report[423] suggests that the MDR country considers imposing an obligation on a domestic taxpayer at the time they enter into a material transaction with a group member to:

- Make reasonable enquiries as to whether the arrangement that gave rise to the transaction incorporates a cross-border outcome; and
- Notify the tax administration if:
  - the group member does not provide relevant information on the arrangement;
  - the information on the arrangement is inadequate or incomplete; or
  - there is an unreasonable delay in providing such information.

The following information is strongly recommended or optional to be included in the reporting requirements:

Mandatory	Optional
➢ All hallmarks met; ➢ Description of the arrangement; ➢ Arrangement ID (if the MDR country requires such); ➢ Legal basis of the arrangement (local and foreign law); and ➢ The value of the arrangement.	➢ The name by which the arrangement is known; ➢ The date on which the first step in implementing the reportable cross-border arrangement has been made or will be made or the date of the other trigger event; ➢ The value of the tax benefit; ➢ Any other jurisdiction where the arrangement or structure has been made available for implementation; and

[422] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para 235

[423] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para 236

	➢ Proof that the other intermediary / taxpayer has reported the arrangement.

6.7.3.1 Hallmarks met

Most MDR regimes require that the details of all of the hallmarks met that make the arrangement reportable are identified in the report. This helps to group the arrangements by types, and, if the hallmarks are narrowly worded, in fact could serve as a good replacement for the arrangement ID.

There are several MDR regimes that do not request this data[424] – Argentina, South Africa, and the US, arguably because they find the description of the arrangement sufficient by itself to identify the type of hallmarks involved.

Proper analysis of the hallmarks would allow authorities to allocate resources and audits appropriately, for instance.

6.7.3.2 Description of the arrangement

All countries explicitly require a description of the arrangement. MDR countries need to be specific as to what needs to be included in the summary.

Under DAC 6, for example, the following information is requested[425]:

- Summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and
- Description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial, or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy.

Tax authorities may wish to:

- Specify that the description needs to include comprehensive information in clear and precise language to fully describe the international tax planning scheme and each element of the transaction[426];
- Require disclosing each step of the transaction[427];
- Request a list of all agreements under the arrangement[428], or brochures and advertising materials[429] and

[424] Based on the review of the MDR laws, it is possible that the actual reporting schemas may request this information

[425] Art. 8ab.14. of DAC 6

[426] Art. 11 of Argentina's Tax administration (AFIP) General Resolution 4838/2020

[427] UK Sec. 11.3 of the DOTAS Guidance that requires that the explanation should be in straightforward terms and should identify the steps involved and the relevant UK tax law. Common technical or legal terms and concepts need not be explained in depth

[428] Required by South Africa, see: Sec. 38 (a) and (d)of the Tax Administration Act NO. 28 of 2011 (GG 35491 of 4 July 2011): https://sars.mylexisnexis.co.za/#

[429] Canada requires brochures to be attached to the form for the TS regime:" The prescribed information required is detailed on form T5001 and includes the name and address of the promoter, location of the books and records, the person to contact for further information, the price per unit and number of units offered for sale. In addition, copies of the sales brochure, prospectus, selling instruments, and other relevant documentation are to be attached to the form" (Section 5 of the Guidance, available in: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic89-4/tax-shelter-reporting.html)

- Request to have a detailed description of stages that make up the plan, project, proposal, advice, instruction, or recommendation to materialize the series of facts or legal acts that give rise to the tax benefit; fiscal years in which the scheme is expected to be or has been implemented[430].

6.7.3.3 Arrangement ID

As for the arrangement's ID, Argentina and Portugal appear not to request it (at least in the law) and Canada only requires this for the tax shelter (TS) regime.

6.7.3.4 Legal basis of the tax advantage

This information explains how the relevant provisions are being applied and how they allow the taxpayer to obtain the desired tax treatment[431]. The legal basis is required to be disclosed by most MDR regimes except for the OECD 2018 MMDR and countries implementing this regime, South Africa, and Canada (RTAT regime, there is a proposal to change that). In particular, the reporting should include a detailed analysis of the applicable local law and, where necessary (given the nature of the cross-border arrangement), also foreign laws and regulations.

This requirement facilitates the tax authority' s understanding of the position of the intermediary and /or the taxpayer, and could, depending on such analysis, clarify the potential loopholes in the tax legislation of the country, or, alternatively, indicate that the transaction is in line with the existing tax law.

6.7.3.5 Value of the tax benefit and /or value of the transaction

The intermediary and/or the taxpayer should be required to describe the tax benefits generated by the arrangements and/or the value of the transaction.

This requirement can broadly be phrased with regard to:

- The value of the arrangement and/or
- The value of the tax benefits.

The countries have used various approaches towards this:

- The value of the reportable cross-border arrangement is required to be reported under DAC 6[432] and the countries adopting it. However, DAC 6 does not define what exactly is "the value of reportable cross-order arrangement"[433]. Argentina requires reporting the value of operation and percentage of gross revenue[434]. UK MDR provides that the value of the reportable arrangement will depend on the

[430] Art. 200.VI and IX of the Mexican Fiscal Code

[431] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para 206

[432] Art. 8ab.14. (f) of DAC 6

[433] For example, Dutch Manual for the web form MDR/DAC6 Filing cross-border arrangements (CBA's) only states that "This element contains the value of the reportable CBA, not being the value of the tax benefit." https://download.belastingdienst.nl/belastingdienst/docs/manual-web-form-mdr-dac6-on2751z1fd.pdf p. 14. Same applies in Belgium, see: FAQ DAC 6, p. 45 https://eservices.minfin.fgov.be/myminfin-web/pages/public/fisconet/document/f1d1bb0c-89ef-4424-8740-50ca28bedef0; The Portuguese Tax Authority (the PTA) guidance (the Guidance) on the application of Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020 of 11 August 2020. https://info.portaldasfinancas.gov.pt/pt/docs/Conteudos_1pagina/Communication_Regime_of_arrangements/Statement_of_communication/Documents/General_Guidelines_cross_border_arrangements.pdf, p. 49

[434] FAQ, question 9 https://www.afip.gob.ar/EspaciosdeDialogoInstitucional/documentos/Acta-Planificaciones-Fiscales.pdf

transaction. Where a transaction is carried out between independent third parties at arm's length, the value of the transaction will be the amount paid. For any other transaction, the value of the transaction should reflect its market value, rather than the amount paid. The value of the transaction should not be the amount brought into account for tax purposes, nor does it mean the amount of any tax advantage.[435]

- The value of the tax benefits is required by the UK[436] and the US[437]. South Africa also requires a detailed description of the assumed "tax benefits" for all "participants", including, but not limited to, tax deductions and deferred income[438]. Similarly, Mexico requires a description of the tax benefit, a selection of the type of benefit (e.g., reduction of tax, elimination of tax or postponement of tax payment), and ways to obtain the tax benefit (e.g., deductions, exemptions, tax base adjustment, etc.), as well as the amount of tax that will be reduced, eliminated, or postponed[439].
- The value of the operations that constitute the reportable arrangement, regardless of the tax advantage expected from the arrangement is required by Portugal[440].

It is advisable that the developing countries include the reference to the value of the arrangement as mandatory requirement. However, the value of tax benefit may be considered as optional, because in many cases it could be difficult, if not impossible, for a taxpayer to accurately calculate the amount of a tax benefit, especially if the reporting takes place before the arrangement is implemented.

6.7.3.6 Other reportable data

While the above elements are used across all MDR regimes, there is also a different type of information that the tax authorities may consider asking:

- Name by which the arrangement is known, if any (DAC 6[441], the UK[442]);
- Date on which the first step in implementing the reportable cross-border arrangement has been made or will be made (DAC 6[443]) or the date of the other trigger event; and
- Other jurisdictions where the arrangement or structure has been made available for implementation, to the extent that such information is within the knowledge, possession, or control of the intermediary (Guernsey[444] and DAC 6[445]).

[435] *IEIM657000 - Information to be reported - HMRC internal manual - GOV.UK*. (n.d.). https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim657000

[436] Sec. 5 of The International Tax Enforcement (Disclosable Arrangements) Regulations 2020

[437] Sec. 301.6112-1(b)(3) of the US Treasury Regulations

[438] Sec. 38 (b) of the Tax Administration Act No. 28 of 2011 (GG 35491 of 4 July 2011)

[439] Art. 8.1-8.5 of the Web-service Guidance available at: http://omawww.sat.gob.mx/EsquemasReportables/Paginas/documentos/Guia_03.pdf

[440] Sec. 15 (1)(f) of Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements

[441] Art. 8ab.14. (c) of DAC 6

[442] Sec. 11.31.1. of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

[443] Art. 8ab.14. (d) of DAC 6

[444] Sec.6 of The Income Tax (Approved International Agreements) (Implementation) (Mandatory Disclosure Rules) Regulations, 2020

[445] Art. 8ab.14. (g) of DAC 6

6.7.4 Pros, cons, best practices and recommendations

The tax authorities need to assess the necessary reporting information. The more information that is required, the higher compliance costs are for the intermediary and taxpayer, and the more information the tax administration will have to process. However, without sufficient information, the tax authorities may find it challenging to properly understand and address risks. Therefore, it is recommended that the developing countries require the mandatory elements listed above to be reported and review the need for the optional data (and resources to process such data).

	Pros	Cons	Best practices and recommendations
Requiring only mandatory (minimum) information	➢ Preserves taxpayer and intermediary resources and costs.	➢ May not disclose a broader view on the arrangement (other related parties, countries, etc.). ➢ May not capture broader risks, detect patterns, therefore potentially could lead to a larger revenue loss risk.	➢ This is the minimum standard required and is used by all MDR countries and regimes, and therefore should be implemented by developing country.
Requiring additional (optional) information	➢ Facilitates fuller identification of taxpayers, intermediaries, arrangements, broader understanding of the arrangements and related risks. ➢ Allows to detect broader patterns, and therefore act on revealed risks.	➢ More costly for taxpayers and intermediaries. For tax authorities, potentially slightly higher set-up costs, and requires resources and procedures to analyse and utilize the obtained information.	➢ This used by some MDR regimes. ➢ Developing countries should consider whether such information is useful and balance the resources available and burden on the taxpayers.
Obligation to make reasonable enquiries	➢ Addresses the challenge that the domestic taxpayer may not have a full view on the arrangement. ➢ Assures that local taxpayers investigate cross-border nature of the arrangement.	➢ Could be very costly and burdensome for taxpayers.	➢ Proposed by the 2015 OECD Report, but not fully implemented by MDR countries. ➢ Developing country may consider imposing this obligation to enquire further information, weighing against taxpayer costs.

6.8 How to file information and other reporting matters

6.8.1 Overview and recommendations

There are many other practical matters MDR countries should consider regarding the reporting, such as:

- How to file the information;
- Use of the collected information; and
- Tax authority's rights to ask for more information.

In addressing the question of **how to file information**, it is strongly recommended that the developing countries **issue MDR reporting guidance** which could cover the following reporting related issues:

- Format of the report;
- Reporting language;
- Filing mechanism;
- Registration requirements where e-filing is used;
- Signature / e-signing requirements;
- Filing extensions;
- Frequency of filing;
- Processes for amended filings, acquiring arrangement IDs, submitting client lists, and submitting proof that another intermediary / taxpayer has reported;
- Data safety measures; and
- Data privacy measures.

Paper based report, filed by mail, email, fax is used in the US, for example. This option should only be used if there are not sufficient resources to launch **e-filing option**. Digital format of the report, filed on the portal/by uploading is implemented by a developing country already, and across all EU Member States. **To the extent resources permit it, developing countries should strive to develop an e-filing infrastructure for the MDR reports.** MDR reporting systems should be easy to use and understand, have a drop-down list of choices where feasible; and have built in safeguards of data privacy and safeguarding, among other.

To have the desired result, the digitalization of tax systems must enlist a broad **coalition of stakeholders** to make the necessary legal reforms, provide the funding, and have solid strategy, vision, implementation, checks and balances in place. For that reason, developing countries could strongly benefit from the work done by the OECD (see the report "Supporting the digitalization of developing country tax administrations"[446]).

It is recommended that the developing countries **action the received and analysed information** through legislative change risk assessment and audit, and/or communication strategies. Tax authorities **right to ask for more information should be embedded in the MDR law**.

There are a few other practical matters MDR countries should consider regarding the reporting, such as:

[446] OECD. (2021). *Supporting the digitalisation of developing country tax administrations*. https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/supporting-the-digitalisation-of-developing-country-tax-administrations.html

- How to file the information;
- Use of the collected information; and
- Tax authority's rights to ask for more information.

6.8.2 How to file the information

In designing the reporting approach, developing countries need to consider numerous reporting-related issues, which are indicated only on the high-level below[447].

6.8.2.1 Reporting issues to consider

It is strongly recommended that the developing countries issue MDR reporting guidance which could cover the following reporting related issues:

Table 41 Reporting issues to consider

Issue	Description
Format of the report	➢ Special tax return (per intermediary / taxpayer or per each arrangement; and may differ whether the form is reported by the intermediary or the taxpayer): ➢ Web-based form; ➢ Paper-based report (filed out by typing or handwriting); ➢ Either of the above; or ➢ Electronic / XML file. ➢ Part of the annual (income) tax return.
Reporting language[448]	➢ Local language; ➢ English language (considering the cross-border arrangements); or ➢ Either / both of the above.
Filing mechanism	➢ Direct entry on the tax authority portal; ➢ Upload to the tax authority portal; ➢ (Secure) e-mail; ➢ Fax; and ➢ Post
Registration requirements where e-filing is used	Yes / No
Signature / e-signing required	Yes / No
Extensions possible	Yes / No
Frequency of filing	➢ One off reporting; or ➢ Quarterly / annual report

[447] As set forth in Sec. 4.2.2. (Scope and Assumptions), detailed analysis of these issues is outside of the scope of this Report

[448] DAC 6 reporting: the reporting language that Estonia, Germany, Italy, Latvia, Poland, Romania, Slovakia, Slovenia, and Spain require is the official language of the jurisdiction in which the report is made. In Cyprus, Gibraltar, Ireland and the United Kingdom, reporting is exclusively in English. There are a number of countries that will allow for a choice between local language and English, and other countries that will require reporting in both local language and English. To the extent that reporting is required in both local language and English, it is likely that the translation will have to be made at the cost of the taxpayer or intermediary. See: EY, *DAC 6 Newsletter: DAC 6 local country status and reporting trends* (2020), p4. https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/tax/ey-dac-6-newsletter-may-2020.pdf

Issue	Description
Processes for	➢ Amended filings; ➢ Acquiring arrangement IDs; ➢ Submitting client lists; ➢ Submitting proof that another intermediary / taxpayer has reported.
Data safety measures	Data safety needs to be assured
Data privacy measures	Data privacy needs to be assured

Source: Apex Consulting

6.8.2.2 Format of the reports

As noted above, tax authorities may design the MDR reports in the following formats:

- Web-based form;
- Paper-based report (filed out by typing or handwriting);
- Either of the above; or
- Electronic / XML file.

And can be submitted by:

- Direct entry on the tax authority portal;
- Upload to the tax authority portal;
- (Secure) e-mail;
- Fax; or
- Post.

If the developing country wants to design a filing approach for MDR and there are no pre-existing e-filing processes for other regimes to leverage, and / or resources to design MDR e-filing, the country may choose to proceed to implement stand-alone forms that can be filed by post, fax, or e-mail in handwritten/typed format (e.g., in the US form 8919 for material advisors (version 2021) cannot be handwritten, but it can be sent by post or by fax[449]). While this option involves fewer costs for the tax administration for setting it up, it makes it extremely hard to effectively process and use the information received. It may take several staff members just to be able to read and classify information contained in these forms.

There are many risks inherent in this process:

- Relevant forms may not be collected or completed;
- Incorrect information may be submitted by the intermediary / taxpayer;
- The reviewer may type the information into their system incorrectly;
- Subsequent manual review process may also be carried out incorrectly; and
- These processes could require a high degree of resources, be time-consuming and costly.

Therefore, to the extent resources permit it, developing countries should strive to develop an e-filing infrastructure for the MDR reports, that allows them to properly validate, analyze and use the information. Such an approach has already been implemented by several developing countries. For instance, Mexico's tax

[449] For example, the IRS writes:" For electronic fax (only to be used for Form 8918 and related attachments; other items will not be processed): please fax to: 1-844-253-5607 (this is toll-free). The fax cover sheet should include the following (...) If you do not have access to electronic fax, mail your completed Form 8918 to: Internal Revenue Service - OTSA Mail Stop 4915 - 1973 Rulon White Blvd. Ogden, Utah 84201" (https://www.irs.gov/instructions/i8918#en_US_202111_publink100044673)

administration developed internally a web-based form that allows for automated analysis (e.g., the most common hallmarks)[450]. Argentina also uses a web-based service to report the arrangements[451].

To enable the exchanges under the 2018 OECD MMDR, in 2019 OECD released the legal and technical information exchange infrastructure that is needed for the exchange of the information collected by tax administrations under the MDR[452]. This reporting framework can be used by the countries adopting the 2018 OECD MMDR.

Similarly, as under DAC 6[453] contemplates, the EU Commission had to develop and provide with technical and logistical support a secure Member State central directory where information on MDR can be communicated to allow for the automatic exchange among EU countries of the relevant MDR received in each country.

The 2015 OECD Report also mentions the Joint International Tax Shelter Information and Collaboration Network (JITSIC Network), which is an international platform open on a voluntary basis to tax administrations that enables bi-lateral and multi-lateral co-operation and collaboration, including to spontaneously exchange early information on emerging tax risks that may be foreseeably relevant to network members[454].

While the tax authorities would, no doubt, have greater set-up costs, the "business as usual" costs could be then substantially lower, and the are many other benefits of digitalized reporting, such as:

- It allows tax authorities to simplify procedures;
- It reduces the compliance burden on taxpayers. Research shows that in South Korea, for example, digitalization (overall, not MDR specific) has reduced compliance costs by as much as 19% in the 2011-2016 period[455];
- It allows to optimize the selection of intermediaries / taxpayers for audit, typically resulting in reduced cost and increased revenue; and
- One of the most significant benefits from data analytics and digitalization stem from its function as enabling other opportunities: by joining data sources and analyzing the combined data sets, the administration may uncover insights that can be used to achieve an entire range of objectives[456].

Despite all the benefits, this transformation may be up against major challenges. Research shows that most tax digital transformation initiatives do not succeed. Of the $1.3 trillion spent in 2018, an estimated $900 billion was wasted. Therefore, to have the desired result, the digitalization of tax systems must enlist a broad

[450] Described during the presentation by Mexico at the CIAT event" V Meeting of the Tax Network" on September 6th, 2022. Mexico's Guidance on the web-based forms is available here: http://omawww.sat.gob.mx/EsquemasReportables/Paginas/di_guias_llenado.html

[451] Art. 12 of AFIP Resolution 4838/2020. More details on the web-service are available here: https://www.afip.gob.ar/planificaciones-fiscales/regimen-informacion/procedimiento.asp

[452] OECD (2019), International Exchange Framework for Mandatory Disclosure Rules on CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/international-exchange-framework-for-mandatory-disclosure-rules-on-crsavoidance-arrangements-and-opaque-offshore-structure.pdf

[453] Art. 21 of DAC 6

[454] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, p. 81

[455] Estevão, M., *Why tax administrations are embracing digital transformation.* (2021). https://blogs.worldbank.org/voices/why-tax-administrations-are-embracing-digital-transformation

[456] OECD. (2021). *Supporting the digitalisation of developing country tax administrations*. https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/supporting-the-digitalisation-of-developing-country-tax-administrations.html, p. 116

coalition of stakeholders to make the necessary legal reforms, provide the funding, and have solid strategy, vision, implementation, checks and balances in place[457]. For that reason, developing countries could strongly benefit from the work done by the OECD.

It is recommended to read the OECD's report "Tax Administration 3.0 (TA 3.0– – Digital Transformation of Tax Administrations[458]". The OECD states that for many developing countries many of the elements of Tax Administration 3.0 are at the aspirational side of the digital maturity spectrum, as the digitalization journey may be at an earlier stage. Nevertheless, further digitalization can bring significant benefits and prepare the ground for future digital transformation. The action is set within the Tax Administration 3.0 set of projects to emphasize the value of considering digitalization in the context of potential future digital transformation. This is particularly relevant given potential opportunities for leap-frogging due to new technology tools and, in some cases, a lower likelihood of obstacles arising from hard-to-change legacy systems[459]. Finally, the developing countries may find the following report "Supporting the digitalization of developing country tax administrations" published at the FTA 2021 Plenary useful. This report has been developed in collaboration with ATAF and under the guidance of the Action 6 ADG, consisting of tax administration officials from Chile, Colombia, Georgia, Italy, Kenya (co-Chair), Malaysia, Sweden, and the UK (co-Chair), supported by the OECD.[460]

6.8.2.3 Validation of information submitted

If the information that the tax authorities receive is incorrect, incomplete, intentionally, or unintentionally false, it would make it much harder to detect the tax risks and make the necessary steps to curb tax avoidance and evasion. Hence, the **data quality** is essential to ensure the success of the MDR regime.

With digital submission the MDR system can offer reporting intermediaries and taxpayers a set list of answers, clear instructions of how to format the data which can be validated by the system in real time and any issues flagged up and resolved immediately. This proscriptive approach significantly drives up accuracy rates and completeness of information and would also unlock significant efficiencies for the tax authorities, which no longer will have to devote substantial resources to a review of the information received, and a potentially lengthy data remediation cycle. Both sides would benefit.

To understand the seriousness of the risk of incomplete, incorrect and /or false reporting, one example is the UK's experience with beneficial ownership registration for companies. Although statutory penalties for non-compliance with beneficial ownership registration entailed even up to two years of imprisonment (much harsher than the penalties available in most MDR – see Section 6.9.3 below), a civil society organization called Global Witness was able to analyze the registered beneficial ownership data because the UK offers a public online register available in open data format. After downloading the information, the NGO found several grave inconsistencies, including 500 different ways to write the nationality "British", circular ownership structures, companies declaring not to have beneficial owners, etc.[461] While some of these

[457] Estevão, M., *Why tax administrations are embracing digital transformation.* (2021). https://blogs.worldbank.org/voices/why-tax-administrations-are-embracing-digital-transformation

[458] OECD (2022), Tax Administration 3.0 – Action Plan Update, OECD, Paris. https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/tax-administration-3-0-action-plan-update.pdf

[459] OECD (2022), Tax Administration 3.0 – Action Plan Update, OECD, Paris. https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/tax-administration-3-0-action-plan-update.pdf

[460] OECD. (2021). *Supporting the digitalisation of developing country tax administrations*. https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/supporting-the-digitalisation-of-developing-country-tax-administrations.html

[461] *What does the UK beneficial ownership data show us?* (2016). Global Witness. https://www.globalwitness.org/en/blog/what-does-uk-beneficial-ownership-data-show-us/

examples may refer to honest mistakes (like when a bank employee may choose "Antarctica" instead of another country when selecting the residence of the account holder), other researchers found situations which indicate deliberate attempt to avoid reporting, such as when names are written as "XXX YYY[462]".

To prevent similar cases of incomplete or inaccurate information, if a developing country has a MDR submission portal that has online validation feature, it would be able to:

- Ensure all relevant fields have been properly completed or otherwise reject the submission;
- Validate TIN / other identification numbers / date of birth against those available in the tax authority systems already; and
- Validate the format of TINs for non-resident taxpayer the system could allow at least basic validation, such as checking that the TIN of a certain country corresponds to a valid structure, leveraging on the work done by the OECD (which publishes this data, showing for instance that in country A the TIN is composed of a nine-digit number)[463].

This approach significantly drives up accuracy rates and completeness of information. In order to achieve this, MDR reporting systems should be, among other:

- Easy to use and understand;
- Include tailored questions to make them as straightforward as possible, as well as built-in explanations on how to fill in the fields;
- Have a drop-down list of choices for various fields where possible (to allow structure data easier), e.g.:
    a. Countries (for nationality or residence) should be chosen from a list (to prevent the 500 different ways of writing one nationality). At the same time, this list could be connected to the national list of tax havens so that instead of asking intermediaries whether the arrangement involves any tax haven or non-cooperative jurisdiction, the system could deduct this information by itself;
    b. Reportable hallmarks, etc.;
- Have built in safeguards of data privacy and safeguarding.

6.8.3 Use of the collected information

Once the information is collected, the tax authorities should have processes for:

- **Domestic actions** - see below.
- **Cross-border actions** (if desired or necessary) - exchanging information, launching coordinated cross-border audits, collaborating with other countries that are indicated as the residence countries of the participants or countries that may be impacted by the reported arrangements. To the extent that a developing country has adopted the 2018 OECD MMDR, it may benefit from the exchange of reportable data with the other jurisdictions that have implemented this regime.

[462] Bullough, O. (2022, January 26). *How Britain can help you get away with stealing millions: a five-step guide*. The Guardian. https://www.theguardian.com/world/2019/jul/05/how-britain-can-help-you-get-away-with-stealing-millions-a-five-step-guide

[463] OECD. *Tax identification numbers (TINs) - Organisation for Economic Co-operation and Development*. (n.d.). https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-identification-numbers/

6.8.3.1 Analysis of the collected information

There are three main factors determining tax collection and tax fraud that combat process efficiency - explicit legislation, modern and flexible administration, and quality data analytics[464]. This is very much true for the MDR regimes.

Considering enhanced sophisticated methods of tax fraud conducted and the number of taxpayers involved in tax fraud with an international dimension, it requires the quality processing of huge volumes of data and their interconnection, and so it is inevitable to ensure the effective legal rules implementation, which can only be achieved with well-adjusted software tools[465]. For example, the Slovak experience shows that the introduction of new analytical tools and follow-up measures (not MDR, but VAT and other tax compliance) implemented since 2012 resulted in EUR 600 million of additional taxes collected. The indirect effect of a comprehensive approach to combat fraud in the public finance field represents an increase in GDP of 0.9% when comparing 2015 and 2012. The total assets gained since 2012 exceed EUR 2.1 billion[466].

If the MDR reporting framework is structured through e-filing, MDR country could analyze the obtained structure data by using advanced analytics and artificial intelligence. This may involve higher costs for developing countries. The system would also need to be trained and have human supervision, requiring an upfront investment in time and resources.

Table 42 Examples of potential use of structured data

Element	Use
TIN of intermediary	➢ Identify with certainty the identity of the intermediary, enabling that to lead to: ➢ Calculation of how many arrangements the intermediary is offering, to how many clients, in which volumes, etc.; ➢ Proceed with reviewing the taxpayers solicited by the intermediary; ➢ Detect situations where a taxpayer has declared a TIN of the intermediary, but that intermediary failed to disclose the arrangement; and ➢ Cross-check with filings where there are several intermediaries involved in the arrangement.
Intermediary's residence	➢ Assess the distribution of domestic or foreign intermediaries to take appropriate measures; and ➢ Engage with the country of residence of the intermediary to take appropriate measures.
TIN of the taxpayer (user)	➢ Identify with certainty the identity of the taxpayer, which allows to: ➢ Detect situations where an intermediary declaring the TINs of taxpayers in the list of clients, but those clients have not declared the arrangement or the arrangement's ID; and

464 František Imrecze (President, Financial Administration, Slovak Republic). Data Analytics as a Tool to Tackle Tax Fraud. IOTA. Data-Driven Tax Administrations. 2016, p.12. https://www.iota-tax.org/sites/default/files/pub/data_driven_tax_administration.pdf

465 František Imrecze (President, Financial Administration, Slovak Republic). Data Analytics as a Tool to Tackle Tax Fraud. IOTA. Data-Driven Tax Administrations. 2016, p.12. https://www.iota-tax.org/sites/default/files/pub/data_driven_tax_administration.pdf

466 František Imrecze (President, Financial Administration, Slovak Republic). Data Analytics as a Tool to Tackle Tax Fraud. IOTA. Data-Driven Tax Administrations. 2016, p.12. https://www.iota-tax.org/sites/default/files/pub/data_driven_tax_administration.pdf

Element	Use
	➢ Link to other tax operations of the taxpayer, and compare the size of the arrangement against to totality of the operations, tax positions taken in the past, etc.
Residence of the taxpayers (users)	➢ Alert or exchange information with the country of residence of the taxpayers.
ID of the arrangement	➢ Estimate how many intermediaries are offering the arrangement or how many taxpayers are using it (to cross-check the above information); and ➢ Compile the total financial value of such arrangements and hence potential risks to tax revenues.
List of applicable hallmarks	➢ Identify the most common types of arrangements (e.g., premium fee, loss acquisition, etc.) to prioritize resources and audit, and / or take other measures (change the tax legislation, etc.); and ➢ Adjust hallmark list in the future (where certain hallmarks are not used)
Description of the arrangement	➢ Detect contradictory information; ➢ Detect anomalies with other tax filings, years, volumes, industries, etc.; and ➢ Compare with the taxpayers using similar arrangements.
List of involved jurisdictions	➢ Check whether any listed jurisdiction is included in the national or international list of tax haven/non-cooperative jurisdictions; ➢ Analyze the need to sign exchange of information agreements with these countries or to renegotiate/terminate double tax agreements and their applicable withholding taxes, residence or allocation rules; ➢ Reach out to the jurisdictions to collaborate on cross-border audits; and ➢ Exchange reportable information concerning the other country.
Full group description	➢ Compare it to the information available in the country-by-country report to identify other potential aggressive tax planning arrangements; ➢ Compare it to other group structures to propose measures (e.g., if one multinational entity has a much more complex structure than other companies in the same industry).
Value of the arrangement / tax benefit	➢ Prioritize arrangements, taxpayers (users) and intermediaries by value of the tax risk exposure.

Note: The list is not complete and is included as a high-level summary only.
Source: Apex Consulting

6.8.3.2 Acting on the information

Once the information is analyzed, there are numerous ways that the tax authorities can use the information collected to change behavior and to counteract tax avoidance arrangements. These include[467]:

- **Legislative change**:
  - The early detection of tax avoidance arrangements enables tax authorities to make changes to tax law more quickly;
  - Quick legislative change is dependent on a country's legislative system but also requires a country to set up a process that analyses and risk assesses new arrangements quickly.
- **Risk assessment and audit**:
  - Analyzed information may help to assess the tax risks involved and to prioritize which taxpayers and intermediaries need to be audited;

[467] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para 212

- Tax authorities may engage in concurrent audit of similar arrangements with various taxpayers, using the same trained resources and approach;
- Tax authorities need to have dedicated teams and resources for this purpose, and to coordinate action with other tax administration teams; and
- Given the international nature of the cross-border arrangements, tax authorities may desire to coordinate tax audits with other involved countries, and exchange information and support as needed.

➢ **Communication strategy**:
- Tax authorities may issue publications to taxpayers as a way of providing an early warning that they have detected an arrangement in the marketplace and are currently considering its tax implications, or what the position of the tax authority on these arrangements are; and
- Such communications may keep intermediaries and taxpayers informed and to potentially deter them from undertaking certain transactions.

6.8.4 Tax authority's rights to ask for more information

To the extent that the information received is not complete, correct, or clear enough to understand the details of the arrangements, it is important that the tax authorities have a right to ask for further clarifying information. Such requests could also include inquiries into the reasons for a failure to disclose and inquiries into the identity of taxpayers and intermediaries.

Although tax authorities may have general powers to request information from taxpayers as part of the tax administration or determination of applicable taxes, it may be easier (and less subject to legal challenges) that the MDR framework contemplates the possibility for tax authorities to request additional information. The frameworks of Argentina[468], Mexico[469], Portugal[470], the UK[471] and the US[472] allow tax authorities to obtain additional information.

[468] Argentina's law does not explicitly contemplate this possibility, but the tax administration clarified in the FAQs that they could request additional information based on their general powers to verify and audit information: https://www.afip.gob.ar/EspaciosdeDialogoInstitucional/documentos/Acta-Planificaciones-Fiscales.pdf

[469] Additional information (or a declaration that they do not have the additional data) must be filed within 30 days (Art. 201 of the Fiscal Code). It also includes supporting documentation (Art. 202, para. 4 of the Fiscal Code)

[470] Sec. 15.2 Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements (DAC 6 or the Directive). https://dre.pt/dre/legislacao-consolidada/lei/2020-138516384

[471] DOTAS regime, HMRC may require additional information if certain conditions are met. (Sec. 20 of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction). DAC 6: In order to determine whether or not the obligations arising under these Regulations have been complied with, an officer of Revenue and Customs may require a person who the officer reasonably suspects is a UK intermediary or UK relevant taxpayer to provide such information or documents as the officer reasonably requires as specified by written notice. (The International Tax Enforcement (Disclosable Arrangements) Regulations 2020, Section 11)

[472] The IRS may request tax accrual workpapers for any return that claims a tax benefit from a listed transaction. If the transaction was properly disclosed, the IRS routinely requests only the workpapers pertaining to the listed transaction. If the transaction was not properly disclosed, the IRS routinely will request all tax accrual workpapers, even those that do not pertain to the listed transaction. The IRS generally limits its tax accrual workpaper request the workpapers for the years under examination but may also request the workpapers for other years if directly relevant to the years under examination (Chief Counsel Notice 2003-012).

6.8.5 Pros, cons, best practices, and recommendations

Table 43 Pros, cons, best practices, and recommendations (6.8)

	Pros	Cons	Best practices and recommendations
Paper based report, filed by mail, email, fax	➢ Relatively inexpensive to set up. ➢ Aligns with existing processes (no learning curve).	➢ The relevant forms may not be collected or completed fully or completely. ➢ Wrong information may be submitted by the intermediary or taxpayer. ➢ The reviewer may type the information into their system incorrectly. ➢ The subsequent manual review process may also be carried out incorrectly. ➢ These processes could require a lot of resources, be time-consuming and costly. ➢ This is not environmentally friendly solution.	➢ Used in the US, for example. ➢ To be used only if there are not sufficient resources to launch e-filing option.
Digital format of the report, filed on the portal/ by uploading	➢ Once implemented, lower costs for business as usual. ➢ Allows to properly validate, analyze and use the information. ➢ Allows tax authorities to simplify. procedures. ➢ Reduces the compliance burden on taxpayers. ➢ Allows to optimize the selection of intermediaries / taxpayers for audit, typically resulting in reduced cost and increased revenue. ➢ Enables other opportunities - by	➢ Expensive to set up. ➢ Training and awareness sessions needed for all parties involved. ➢ Risk that it fails despite investment.	➢ Implemented by Mexico and Argentina. Used across all EU member states. ➢ To the extent resources permit it, developing countries should strive to develop an e-filing infrastructure for the MDR reports. ➢ To have the desired result, the digitalization of tax systems must enlist a broad coalition of stakeholders to make the necessary legal reforms, provide the funding, and have

	Pros	Cons	Best practices and recommendations
	joining data sources and analyzing the combined data sets, the administration may uncover insights that can be used to achieve a whole range of objectives. ➢ Significantly improves received data, which drives up accuracy rates and completeness of information, and helps to save resources for all parties. ➢ Collected data could be analyzed by using advanced analytics and artificial intelligence.		solid strategy, vision, implementation, checks and balances in place. ➢ For that reason, developing countries could strongly benefit from the work done by the OECD (see the report "Supporting the digitalization of developing country tax administrations."[473] ➢ MDR reporting systems should be: ○ Easy to use and understand; ○ Have a drop-down list of choices where feasible; ○ Have built in safeguards of data privacy and safeguarding, among other.
Actioning the information through legislative change risk assessment and audit, and /or communication strategies	➢ Changes in the legislation allow to close tax revenue leakage. ➢ Analyzed information may help to assess the tax risks involved and to prioritize which taxpayers and intermediaries need to be audited. ➢ Tax authorities may engage in concurrent audit of similar arrangements with various taxpayers,	➢ Quick legislative change may be challenging if the legislative process is cumbersome (to counteract that, tax authorities may implement new hallmarks through listed transactions, see hallmark section). ➢ Tax authorities need to have dedicated teams and resources for these purposes.	➢ It is recommended that developing countries action on the received and analyzed information through legislative change risk assessment and audit, and /or communication strategies.

[473] OECD. (2021). *Supporting the digitalisation of developing country tax administrations*. https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/supporting-the-digitalisation-of-developing-country-tax-administrations.html

	Pros	Cons	Best practices and recommendations
	using the same trained resources and approach. ➢ Tax authority publications can provide early warning to the intermediaries and taxpayers, and set forth tax authority position, potentially deterring intermediaries, and taxpayers from undertaking certain arrangements.		
Tax authorities' right to ask for more information embedded in the MDR law	➢ Provides legal basis and enables tax authorities to have a right to ask for further clarifying information to the extent that the initial information received is not complete, correct, or clear enough to understand the details of the arrangements.	➢ Potential additional compliance burden on the intermediaries / taxpayers.	➢ The frameworks of Argentina, Mexico, Portugal, the UK, and the US allow tax authorities to obtain additional information. ➢ Recommended to be included in the MDR legal framework.

Source: Apex Consulting

6.9 Consequences of compliance and non-compliance

6.9.1 Overview and recommendations

For an MDR to be effective, the following needs to be considered:

- **Effects of compliance and whether it entails or requires approval of the arrangement;**
- **Penalties for non-compliance, both for the intermediary and the taxpayer; and**
- **Other measures to promote compliance.**

The MDR should clarify the **consequences of compliance**, and that the disclosure does not imply any acceptance of the validity, or tax treatment, of the arrangement by the tax authority.

MDR countries need to have **clearly defined penalties** that are **effective, proportionate, and dissuasive** (see below) addressing MDR noncompliance; and **ensure** that such penalties are enforced. Penalties should include **monetary and non-monetary penalties**.

Monetary penalties should be relative to the tax advantage or fees (to prevent low fixed sums from being considered a low cost to engage in aggressive tax planning or secrecy), while establishing minimum (and if necessary, maximum) fixed value. Monetary penalties could be structured as one-off and/or as ongoing (e.g., monthly) fines to encourage prompt compliance. Such penalties should address non-filing as well as deliberate attempts to file wrong or incorrect information (to prevent receipt of low-quality data).

There are numerous **non-monetary penalties** that can be used for MDR enforcement, such as, for example:

- Naming and shaming - publishing the lists of intermediaries;
- Prohibition of selling a specific arrangement;
- Extension of normal reassessment period;
- Disallowance of any tax benefits stemming from the arrangement;
- Impossibility to undertake (unrelated) procedures with the tax administration, for instance in relation to registration and/or permanence in the relevant registers, obtaining certificates of tax credit and/or tax or social security status;
- Labeling as a higher risk taxpayer for audit purpose;
- Impact on tax refunds; and
- Loss of professional license to operate by intermediaries.

Non-monetary penalties may be more effective and dissuasive than monetary penalties, especially naming and shaming, tax disclosures in financial statements, or penalties affecting the economic life of non-compliant parties (e.g., loss or suspension of professional license for intermediaries, prison sentence etc.).

If aligned with the tax system of the developing country, **criminal sanctions** can also be envisaged.

Developing countries may consider **other measures to strengthen compliance**, such as:

- Tax disclosures of the reportable arrangements in the financial statements;
- Guidance and awareness campaigns;
- Feedback on received reports;
- Whistle-blower programs with rewards based on applied penalties;
- Mystery shopper or attending (undercover) seminars by tax advisors or online searches;
- Require intermediaries to include noticeable labels or disclosures that the arrangement has not been approved by the tax administration and their use may result in heavy penalties; and
- Invest in technology to allow for advanced analytics, validations, and checks of the reported information (it may be impossible to do it manually).

For an MDR to be effective, the following needs to be considered:

- Effects of compliance (no approval of the arrangement);
- Penalties for non-compliance, both for the intermediary and the taxpayer; and
- Other measures to promote compliance.

6.9.2 Consequences of compliance

The MDR should clearly clarify the consequences of compliance.

If the tax administration had to approve or disapprove reported arrangements through tax rulings, it would bring certainty to the legitimacy of each arrangement. However, many countries explicitly exclude avoidance transactions from their clearance or rulings process[474]. Furthermore, even if permissible, such an approach is not sustainable. This would involve an enormous amount of resources and time for all parties involved,

[474] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para 174

delays in process (no early warning), increased tax revenue leakage risks, and may produce variable results, which may impact other countries as well, and may lead to scandals like the Luxleaks[475], where the Luxembourg tax administration approved rulings that caused tax consequences in other countries.

Therefore, most[476] MDR countries (Argentina[477], Canada[478], Germany[479], Mexico[480], Portugal[481], the UK[482], and the US[483]) include provisions indicating that the filing of the arrangement and the acknowledgement of receipt (or silence) by the tax administration is **not an indication of approval of the arrangement**. In other words, the disclosure does not imply any acceptance of the validity, or tax treatment, of the arrangement by the tax authority[484].

From the intermediary and taxpayer perspective:

- Generally, the fact that an arrangement is reportable does not mean that it involves tax avoidance or evasion;
- The disclosure of a tax arrangement has no effect on the tax position of any person who uses the tax arrangement[485]; and
- To the extent that tax avoidance is not a criminal offense, the reporting should **not be considered as self-incrimination[486]**. For countries that impose criminal liabilities on taxpayers for undertaking certain tax avoidance arrangements, it may be possible to simply exclude those arrangements from the scope of the disclosure regime without substantially curtailing the scope of the regime[487].

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[475] *Luxembourg Leaks: Global Companies' Secrets Exposed*. (2020, June 12). ICIJ. https://www.icij.org/investigations/luxembourg-leaks/

[476] South Africa MDR legislation does not directly appear to have this language, albeit para 177 of the 2015 OECD Report mentions that South Africa follows this approach as well

[477] Art. 16, AFIP Resolution 4838/2020

[478] Art. 9 of the Guidelines, available in: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic89-4/tax-shelter-reporting.html

[479] Bundesministerium der Finanzen. (2021). *Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*. https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steuerthemen/Abgabenordnung/2021-03-29-Anwendung-Vorschriften-Pflicht-Mitteilung-grenzueberschreitende-Steuergestaltungen.pdf?__blob=publicationFile&v=3, Section 138j.4 of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, page 2875 on 30 December 2019 (BGBl. I no. 52/2019, at 2875) and Guidelines, part II, Art.2

[480] Art. 201, para. 1 of the Federal Fiscal Code

[481] Art. 18 of Law 26/2020: https://dre.pt/dre/detalhe/lei/26-2020-138461836

[482] Art. 13.2 of the Guidance:" The issue of a SRN does not indicate that HMRC accept that the scheme achieves or is capable of achieving any purported tax advantage nor that the disclosure is complete." available in: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#thirteen-scheme-reference-number

[483] Sec. 6111-3. (d).2 of the Internal Revenue Code

[484] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para 174

[485] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, paras 174 and 176

[486] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, Annex B

[487] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para 179

6.9.3 Consequences of non-compliance

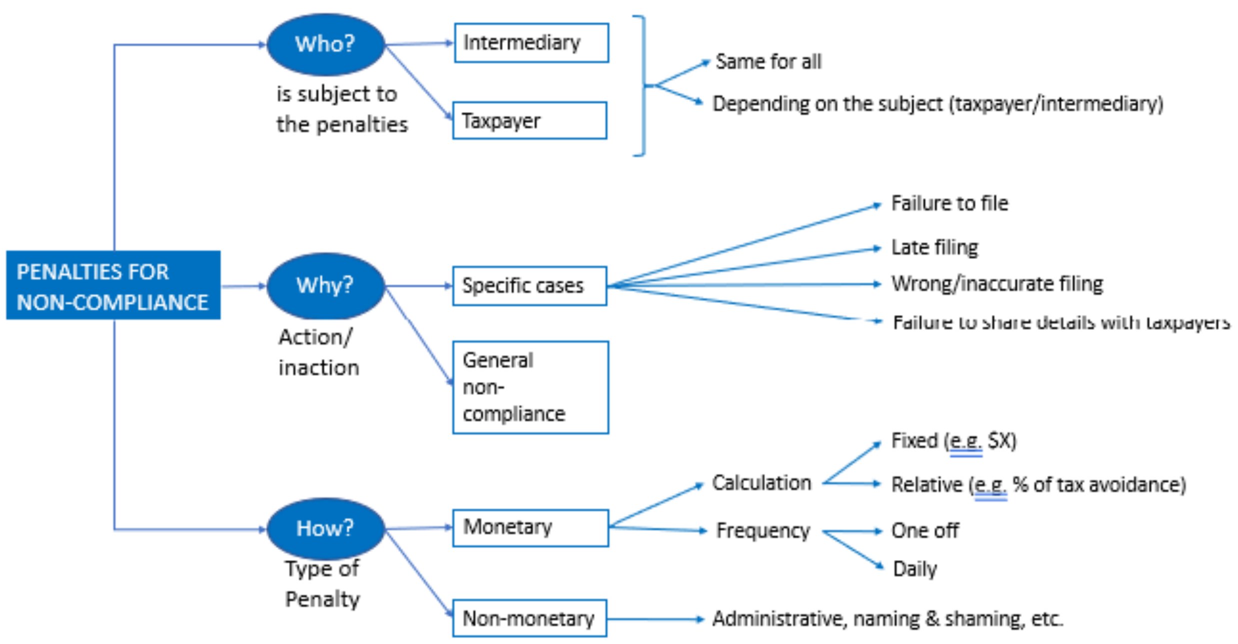
An MDR regime will not be effective unless intermediaries and taxpayers fully comply with the reporting requirement. To achieve that MDR countries need to:

- Have **clearly defined penalties that are effective, proportionate, and dissuasive** (see below); and
- ensure that such penalties are **enforced.** In other words, if intermediaries or taxpayers are not penalized for their failure to comply, there will be no deterrence from entering into the reportable arrangement.

As the next figure shows, when determining the penalties for non-compliance, there are three main issues to consider:

- **WHO? - the subjects to penalty - taxpayer and intermediary:** whether they will be subject to the same penalties or whether different penalties will apply for each participant, possibly depending also on the size and type of the taxpayer (e.g., individual, or corporate);
- **WHY? - the action / failure to act that is subject to penalties**: which could entail a general penalty for non-compliance, or different penalties based the particular non-compliance: failure to report, late reporting, inaccurate, incomplete or erroneous reporting, failure to comply with other requirements, such as sharing the ID of the arrangement with the taxpayer, taxpayer failing to include it in its tax return, or failing to provide additional information requested by the tax administration; and
- **HOW? - the type of penalty which could be monetary or non-monetary.** Non-monetary penalties include, among others, administrative penalties such as those affecting processes with the tax administration, prohibition to sell the arrangement, naming, and shaming. In the case of monetary penalties, these are either fixed or scaled to the size and type of the taxpayer, arrangement (i.e., value of the arrangement or tax advantage) or the taxpayer's fee, as well as a lump sum or daily fines. MDR countries may apply also criminal sanctions.

Figure: Key elements for MDR penalty design.



Source: Apex Consulting

6.9.3.1 Monetary penalties

As the next table shows, the MDR countries have taken various approaches toward imposing monetary penalties for noncompliance.

Table 44 Approach to monetary penalties

Design options	Comparison
Intermediary v. taxpayer penalties	➢ Half the MDR countries apply different penalties for taxpayers versus intermediaries (Canada is also proposing to establish different penalties depending on the participant[488]). ➢ In recognition that MDR rules are primarily targeted at the intermediaries, in most of these countries, intermediaries get harsher penalties, except for the US where the same maximum penalty of USD 200,000 applies both to intermediaries and taxpayers[489]. ➢ Imposing penalties on the taxpayer where there are offshore intermediaries, or where legal privilege is invoked helps ensure that there is no advantage to be gained from a disclosure perspective by using intermediaries that are outside the scope of MDR[490].
General non-compliance v. specific non-compliance penalties	➢ Most countries establish penalties for general non-compliance (or only for failure to file or disclose an arrangement). ➢ Portugal[491], the UK, the US, and Mexico establish penalties depending on the type of non-compliance.

[488] Canada proposal: "Taxpayer Penalty: With respect to persons who enter into reportable or notifiable transactions, or for whom a tax benefit results from a reportable or notifiable transaction, these proposals include a penalty of $500 per week for each failure to report a reportable transaction or a notifiable transaction, up to the greater of $25,000 and 25 per cent of the tax benefit; or for corporations that have assets that have a total carrying value of $50 million or more, $2,000 per week, up to the greater of $100,000 and 25 per cent of the tax benefit; Promoter Penalty: With respect to advisors and promoters of reportable or notifiable transactions, as well as with respect to persons who do not deal at arm's length with them and who are entitled to a fee with respect to the transactions, a penalty would be imposed for each failure to report equal to the total of: 100 per cent of the fees charged by that person to a person for whom a tax benefit results; $10,000; and $1,000 for each day during which the failure to report continues, up to a maximum of $100,000. In order to avoid imposing two sets of penalties upon a person who both 1) enters into a reportable or notifiable transaction for the benefit of another person, and 2) is a person who does not deal at arm's length with an advisor or promoter in respect of the reportable or notifiable transaction and is entitled to a fee, the proposals provide that such a person would be subject only to the greater of these two penalties." available in: https://www.canada.ca/en/department-finance/news/2022/02/mandatory-disclosure-rules.html

[489] Section 6707.b.2.A and Section 6707A.b.2.a of the Internal Revenue Code

[490] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para 93 of the commentary

[491] Section 19 of the law differentiates between failure or late reporting versus incomplete or incorrect reporting

Design options	Comparison
	➢ The UK[492] and the US[493] differentiate between non-filing the arrangement as well for failing to disclose the list of clients. The UK also imposes penalties on the taxpayers for failure by a scheme user to report a scheme reference number to HMRC[494], UK, the UK intermediaries' obligation to make a return of new reportable information, UK intermediaries' obligation to notify where legal professional privilege exclusion applies[495]. ➢ Mexico establishes specific penalties for many situations including failure to file the arrangement, to disclose the arrangement's ID, to update information, to respond to a request for information or failing to disclose the list of clients[496].
Monetary and /or non-monetary penalties	➢ Most countries establish only monetary penalties. ➢ Argentina[497], Canada[498], the US[499], and the UK[500] also establish non-monetary penalties.
Calculation of the monetary penalties	➢ Slightly more than half apply only fixed monetary penalties (a lump sum) although the sum may increase depending on the type or gross revenue of the taxpayer or after repeated non-compliance

[492] UK Guidance:" The penalties for failure to comply with a DOTAS obligation without reasonable excuse are provided for in section 98C Taxes Management Act 1970 and in regulation 22 of SI 2012/1868 in relation to National Insurance contributions). Broadly, DOTAS penalties fall into 3 categories: 1. Disclosure penalties apply to failure to disclose a scheme. There are variations in cases where a tribunal has issued a disclosure order; 2. Information penalties apply to all other failures to comply with DOTAS except for those covered by category 3; 3. User penalties — apply to failure by a scheme user to report a scheme reference number to HMRC." available in: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#penalties

[493] Section 6707 of the Internal Revenue Code refers to Failure to furnish information regarding reportable transactions (USD 50,000 - USD 200,000) while Section 6708 refers to failure to maintain and submit lists of advisees with respect to reportable transactions (USD 10,000 per day)

[494] Sec. 21.1. of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

[495] Sec. 14 of the International Tax Enforcement (Disclosable Arrangements) Regulations 2020

[496] Sections 82A-82B of the Fiscal Code (for intermediaries) and Sections 82C-82D (for taxpayers)

[497] Resolution 4838/2020 establishes the impossibility to make requests, among others, in relation to the incorporation and/or permanence in the different registers, obtaining certificates of tax credit and/or tax or social security status (Art. 13.1); higher risk of being audited based on Risk Perception System (SIPER) (Art. 13.2) and Sanctions according to the tax procedure law, including administrative and judicial processes (Art. 14); Affect tax refunds related to VAT for exports (Art. 12 of AFIP General Resolution 5173/2022)

[498] Extension of the normal reassessment period to no earlier than three years from the date the form is filed (Section 237.3.8 of the Income Tax Act)

[499] Section 7408 of the Internal Revenue Code on Actions to enjoin specified conduct related to tax shelters and reportable transactions. The US publishes a list of injunctions to shut down fraudulent tax return preparers and tax-fraud promoters: https://www.justice.gov/tax/program-shut-down-schemes-and-scams

[500] HMRC is entitled to publish information about schemes to which a SRN has been allocated and about their promoters. In certain circumstances, HMRC is also entitled to publish information identifying suppliers of such schemes. Where a promoter is required to disclose a notifiable scheme to HMRC and has done so, and HMRC allocates the scheme an SRN, HMRC is entitled to name any person who is or has been a promoter of that scheme. This includes publicly naming promoters who are residents outside of the UK. (Sec. 22.1 of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction)

Design options	Comparison
	(e.g., Argentina[501] and the UK[502]), depending on the anticipated tax benefit (e.g., South Africa[503]). ➢ The OECD 2018 MMDR also proposes to differentiate as to whether there is negligence or deliberate non-compliance[504], but such provision would make it harder to impose the penalties. ➢ In contrast, in three countries (Canada[505], Mexico[506], and the US[507]), the amount of the penalty is relative to the fees or the tax benefit, although there is a combination where the relative value is within a range of fixed minimums and maximums, or where the final value is the greater of two alternatives, a relative or a fixed sum. ➢ Finally, all countries include a one-off monetary penalty, except for South Africa[508] which applies monthly penalties for up to one year. The US[509] and UK[510] also apply daily fines in case of failure to close the list of clients.

Source: Apex Consulting

Table 45 Comparison of the monetary penalties applied by MDR countries

	Penalty for taxpayer and intermediary	If different, harsher for:	Non-compliance subject to penalty	Type of penalty	Calculation of monetary penalties	Frequency of monetary penalties
US[511]	Different	Same[512]	Specific	Monetary & Non-monetary	Combination of relative or fixed	One off and daily
Canada[513]	Same (Proposed differences)	-	General	Monetary & Non-monetary	Fixed and Relative	One off (Proposed daily, too)

501 Art. 14 of Tax administration (AFIP) General Resolution 4838/2020 (19/10/2020)

502 Sec. 21.5 of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

503 212 of the Tax Administration Act No. 28 of 2011 (GG 35491 of 4 July 2011)

504 OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, para. 183

505 Sec. 237.1.7.4 and 237.1.7.5 of the Income Tax Act

506 Art. 82A-82D of the Fiscal Code

507 Sec. 6707 and 6707A of the Internal Revenue Code

508 212 of the Tax Administration Act No. 28 of 2011 (GG 35491 of 4 July 2011)

509 Sec. 6708 of the Internal Revenue Code

510 Sec. 21.5 of the HMRC Guidance Disclosure of tax avoidance schemes: guidance, as updated June 2022: https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes#introduction

511 Sections 6707, 6707A, 6708 and 7408 of the Internal Revenue Code

512 The maximum penalty in each case is USD 200k.

513 Sections 237.3.8; 237.1.4 and 237.1.5 of the Income Tax Act; Guidance and Proposal

	Penalty for taxpayer and intermediary	If different, harsher for:	Non-compliance subject to penalty	Type of penalty	Calculation of monetary penalties	Frequency of monetary penalties
Germany [514]	Same	-	General	Monetary	Fixed	One off
Portugal [515]	Same	-	Specific	Monetary	Fixed	One off
UK[516]	Different	Intermediary	Specific	Monetary and Non-monetary	Fixed but daily increases in case of non-compliance	One off & daily
South Africa[517]	Different	Intermediary	General	Monetary	Fixed but monthly increases in case of non-compliance	Monthly
Argentina [518]	Same	-	General	Monetary & Non-monetary	Fixed but increases depending on the type of taxpayer	One off
Mexico[519]	Different	Intermediary	Specific	Monetary	Combination of relative or fixed	One off

Source: Apex Consulting

Regardless of the type of penalty, **consequences should be proportionate and dissuasive to encourage compliance**. Penalties should be set at a level that encourages compliance and maximizes their deterrent

[514] Bundesministerium der Finanzen. (2021). *Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*. https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steuerthemen/Abgabenordnung/2021-03-29-Anwendung-Vorschriften-Pflicht-Mitteilung-grenzueberschreitende-Steuergestaltungen.pdf?__blob=publicationFile&v=3, section 379 (2) and (7) of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, page 2875 on 30 December 2019 (BGBl. I no. 52/2019, at 2875) and Guidelines, Part III, Art. 4

[515] Government of Portugal. (2019). Estabelece a originator de comunicação à Autoridade Tributária e Aduaneira de determinados mecanismos internos ou transfronteiriços com relevância fiscal. In *Law Nr. 26/2020*. https://dre.pt/dre/legislacao-consolidada/lei/2020-138516384, section 19 of Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements (DAC 6 or the Directive).

[516] Queen's Printer of Acts of Parliament. (1970). *Taxes Management Act 1970*. https://www.legislation.gov.uk/ukpga/1970/9/contents/enacted, section 98C

[517] Section 212 of the Tax Administration Act

[518] Sections 13 and 14 of Resolution 4838/2020 and Art. 12 of AFIP General Resolution 5173/2022

[519] Sections 82A – 82D of the Federal Tax Code

value without being overly burdensome or disproportionate[520]. However, penalties should also be proportionate to prevent legal challenges in court as well as opposition by the intermediaries and taxpayers and other government agencies (e.g., ministry of economy) who may be against any red tape that could hinder foreign investment or employment.

As the next table on the maximum or harshest penalties shows, countries apply very different severity in their penalties. In the EU, according to the report on the assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6) Poland[521]EUR 4.7 million[522]. Next in line is the UK with GBP 1 million for non-disclosure[523], Me, Mexico with MXN 20 million (approx. USD 1 million for non-disclosure by an intermediary) South Africa with ZAR 3,600,000[524] (approx. USD 201,600 for the maximum of ZAR 100,000/month for non-disclosure by intermediary to 12 months and tripled in case the anticipated tax benefit exceeds ZAR 10 million), the US with 200,000 (in case of an intermediary failing to disclose a "listed transaction" arrangement or certain taxpayers failing to disclose any type of arrangement[525]), followed by Portugal's EUR 80,000 for non-disclosure[526] and finally, Germany's EUR 25,000 for non-compliance of both the intermediary and taxpayer[527]. Canada does not have a high fixed monetary penalty, although there is a proposal to charge CAN 100,000 (USD 73,000) for failure to report by an intermediary or by certain types of corporate taxpayers[528]. Argentina's penalties are based on the general 'Tax Procedures Law' for failing to comply with information regimes, which was not updated after many years of devaluation, and where the penalty could be up to ARS 45,000 (USD 300). Given that values are extremely low considering inflation and devaluation, Argentina implemented non-monetary penalties[529].

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[520] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 183

[521] Haslehner, W., Pantazatou, K, *Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6)*, Publication for the Subcommittee on tax matters (FISC), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg (2022), p.35

[522] EU Parliament, "Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6)", p.40

[523] Queen's Printer of Acts of Parliament. (1970). *Taxes Management Act 1970*. https://www.legislation.gov.uk/ukpga/1970/9/contents/enacted, Section 98C.2ZC" If the maximum penalty under subsection (1)(a)(i) above appears inappropriately low after taking account of those considerations, the penalty is to be of such amount not exceeding £1 million as appears appropriate having regard to those considerations"

[524] Section 212.1 and 212.2 of the Tax Administration Act

[525] Sec. 6707 and 6707A of the US Internal Revenue Code

[526] Section 19 of Law nr. 26/2020 (the Law), of 21 July 2020, as further amended by Decree-Law nr. 53/2020, of 11 August 2020, which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border arrangements (DAC 6 or the Directive). ("Law") https://dre.pt/dre/legislacao-consolidada/lei/2020-138516384

[527] Bundesministerium der Finanzen. (2021). *Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen*. https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steuerthemen/Abgabenordnung/2021-03-29-Anwendung-Vorschriften-Pflicht-Mitteilung-grenzueberschreitende-Steuergestaltungen.pdf?__blob=publicationFile&v=3, Section 379(2) and (7) of the Law on implementation of an obligation to report cross-border tax arrangements - Official Gazette 2019 Part I, no. 52, page 2875 on 30 December 2019 (BGBl. I no. 52/2019, at 2875), and Guidelines, Part III, Art. 4

[528] Department of Finance Canada. (2022, February 4). *Mandatory Disclosure Rules*. Canada.ca. https://www.canada.ca/en/department-finance/news/2022/02/mandatory-disclosure-rules.html

[529] See Art. 13 of Resolution 4838/2020 and Art. 39 of Law 11,683

Table 46 Monetary penalty amounts by MDR country

Country	Highest / harshest penalty
Poland	EUR 4,700,000
UK	GBP 1,000,000
Mexico	USD 1,000,000 (MXN 20 million)
South Africa	USD 201,600 (ZAR 3,600,000)
US	USD 200,000
Portugal	EUR 80,000
Canada	Proposed USD 73,000 (CAN 100,000)
Germany	EUR 25,000
Guernsey	Up to £3,000[530]
Argentina	USD 300 (ARS 45,000)

Source: Apex Consulting

6.9.3.2 Non-monetary penalties

In addition to monetary penalties, the analyzed MDR countries also have implemented the following non-monetary penalties specifically for non-compliance with the MDR regime:

- Related to the MDR:
  - Naming and shaming - publishing the lists of intermediaries, for example (UK[531]);
  - Extension of normal reassessment period (Canada proposal[532], the US[533]);
  - Disallowance of any tax benefits stemming from the arrangement (Canada[534]); and
  - Prohibition of selling arrangements (US[535]).
- Unrelated to the MDR
  - Impossibility to undertake (unrelated) procedures with the tax administration, for instance in relation to registration and/or permanence in the relevant registers, obtaining certificates of tax credit and/or tax or social security status (Argentina[536]);

[530] *Mandatory Disclosure Rules*. (2021, February 25). Ogier. https://www.ogier.com/publications/mandatory-disclosure-rules

[531] *Disclosure of tax avoidance schemes: guidance*. (2022, June 15). GOV.UK. https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes Sec. 22.1

[532] Department of Finance Canada. (2022, February 4). *Mandatory Disclosure Rules*. Canada.ca. https://www.canada.ca/en/department-finance/news/2022/02/mandatory-disclosure-rules.html
Proposal:" Where a taxpayer has a mandatory disclosure reporting requirement in respect of a transaction relevant to the taxpayer's income tax return for a taxation year, the proposals provide that the normal reassessment period would not commence in respect of the transaction until the taxpayer has complied with the reporting requirement. As a result, if a taxpayer does not comply with a mandatory disclosure reporting requirement for a taxation year in respect of a transaction, a reassessment of the year in respect of the transaction would not become statute-barred"

[533] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, para. 196

[534] Canada Revenue Agency. (n.d.). *Tax Shelter Reporting - Canada.ca*. https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic89-4/tax-shelter-reporting.html, section 17

[535] *Program to Shut Down Schemes and Scams*. (2022, November 9). https://www.justice.gov/tax/program-shut-down-schemes-and-scams, section 7408

[536] Art. 13.1 of AFIP Resolution 4838/2020

- Labeling as a higher risk taxpayer for audit purposes based on Risk Perception System (Argentina[537]);
- Impact on VAT tax refunds for exports (Argentina[538]); and
- Loss of professional license to operate by intermediaries (proposed by the 2018 OECD MMDR[539]).

MDR countries may apply also **criminal sanctions**. For example, Guernsey imposes criminal sanctions, including imprisonment, for obstructing an authorized person from entering a business for the purposes of investigating suspected contraventions of the MDR and for altering, suppressing, or destroying certain business documents identified in a "notice[540]".

Other reporting regimes (not MDR) include several other non-monetary penalties that could be implemented for the failure to comply with the MDR, such as, for example:

- Non recognition of fiscal effects of invoices and shift of burden of proof for the taxpayer to prove that the provision of goods or services actually took place (Mexico, publishes a list of taxpayers suspected of simulation or issuing fake invoices)[541];
- Prison sentence (UK, for non-compliance with the registration of beneficial owners of legal persons with the commercial registry)[542];
- Suspension of tax identification number (TIN), preventing operations in the country (Argentina, for some types of non-compliance with tax law)[543]; and
- Prohibition to engage with an obliged entity such as bank, to either open a bank account or transfer money (North Macedonia, for failing to register beneficial owners)[544].

6.9.4 Other measures to strengthen compliance

It is possible that, despite the existence of the MDR regime and its penalties, the intermediaries and taxpayers are still not disclosing the reportable arrangements. This may be due to various reasons, for example, the fact that some of these arrangements are meant to be hidden from authorities, intermediaries are off-shore, the in-house arrangement is designed off-shore, legal privilege is invoked, MDR rules are not clear, or penalties are either not dissuasive or enforced.

This need is exacerbated by the evidence from countries with existing MDR, given that filings tend to decline with time[545]. Although this could indicate that the MDR is effective and aggressive tax planning is discouraged, another possibility is that taxpayers and intermediaries are not dissuaded by current penalties

[537] Art. 13.2 of AFIP Resolution 4838/2020

[538] Art. 12 of AFIP General Resolution 5173/2022

[539] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris. www.oecd.org/tax/exchange-of-information/ model-mandatorydisclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf, para. 94

[540] *Mandatory Disclosure Rules*. (2021, February 25). Ogier. https://www.ogier.com/publications/mandatory-disclosure-rules

[541] Mexico. (2019). *Federal Fiscal Code*. https://bado.mx/en/Codigo-fiscal-de-la-federacion, Art. 69-B

[542] *People with significant control (PSCs)*. (2022, February 9). GOV.UK. https://www.gov.uk/guidance/people-with-significant-control-pscs

[543] Olveira, D. (2022, September 7). *Inhabilitación de CUIT: por qué la AFIP paraliza la empresa*. iProfesional. https://www.iprofesional.com/impuestos/369026-inhabilitacion-de-cuit-por-que-la-afip-paraliza-la-empresa

[544] Republic of Macedonia, Ministry of Finance. (2008). *LAW ON MONEY LAUNDERING PREVENTION AND OTHER CRIMINAL PROCEEDS AND FINANCING TERRORISM*. Art 39 pt. 2

[545] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en, pp. 27-29

(most likely based on the lack of detection of non-compliance) or are circumventing the definition of a reportable arrangement.

To promote compliance (and indirectly discourage non-compliance or the proliferation of aggressive arrangements), countries may consider establishing some of the following measures:

- Publish clear MDR guidance, FAQ, etc.
- Raise awareness by organizing talks with associations of tax advisors, lawyers, accounting firms, etc.
- Require that tax disclosures in the financial statements include a disclosure of any reported MDR arrangement and related tax provisions. This would elevate the disclosure to the CFOs and CEOs of the taxpayers and their auditors, as well as make this information publicly available (thus potentially impacting the reputation of the taxpayer). Therefore, it could be a powerful tool for cross-border arrangements, where such disclosures would appear in group financial statements, and hence would become available to also other tax authorities.
- Establish a web-service for the reporting of arrangements to allow for automated analysis, validations (e.g., prevent invalid TINs) and other checks to test the completeness of reports (e.g., disallow filings that have not completed all required fields).
- Establish a whistle-blower program, with economic rewards for any information about an undeclared arrangement.
- Require that all brochures or material marketed by intermediaries must include at the front in red capital letters a legend stating "this arrangement has not been approved by the tax administration. Involvement in this arrangement may result in severe penalties and risks of audit as well as monetary penalties[546]". This legend should also apply to internal communications within a multinational entity for arrangements developed in-house, for example for arrangements proposed by the head of tax to the board.[547]
- Undertake a "mystery shopper" investigation, by contacting professional intermediaries pretending to be a taxpayer interested in a tax arrangement, to see whether the intermediary then reports the transaction (the World Bank and experts sent emails to several enablers all over the world trying to set up companies or open accounts, to check whether they were conducting proper anti-money laundering procedures or rather offering to breach the law[548]).
- Attend (undercover) seminars by tax experts or search online for offers of tax or secrecy arrangements.
- Provide feedback on the reported arrangement.

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[546] For instance, Canada's Tax Shelter (TS) requires: "Every promoter of a tax shelter shall include on every written statement that refers to the identification number of the tax shelter the following statement: "The identification number issued for this tax shelter shall be included in any income tax return filed by the investor. Issuance of the identification number is for administrative purposes only and does not in any way confirm the entitlement of an investor to claim any tax benefits associated with the tax shelter."" (Section 9 of Canada Guidance: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic89-4/tax-shelter-reporting.html)

[547] For instance, a South Dakota legal provision on trust requires that for transfers of marital assets into a trust to be protected (from the other spouse) a person must alert their spouse by sending the following notice (it has to be written in capital letters): YOUR SPOUSE IS CREATING A PERMANENT TRUST INTO WHICH PROPERTY IS BEING TRANSFERRED. YOUR RIGHTS TO THIS PROPERTY MAY BE AFFECTED DURING YOUR MARRIAGE, UPON DIVORCE (INCLUDING THE PAYMENT OF CHILD SUPPORT OR ALIMONY OR A DIVISION OR DISTRIBUTION OF PROPERTY IN A DIVORCE), OR AT THE DEATH OF YOUR SPOUSE. YOU HAVE A VERY LIMITED PERIOD OF TIME TO OBJECT TO THE TRANSFER OF PROPERTY INTO THIS TRUST. YOU MAY, UPON REQUEST TO THE TRUSTEE AT THE ADDRESS BELOW, BE FURNISHED A COPY OF THE TRUST DOCUMENT. IF YOU HAVE ANY QUESTIONS, YOU SHOULD IMMEDIATELY SEEK INDEPENDENT LEGAL ADVICE. IF YOU FAIL TO OBJECT WITHIN THE REQUIRED TIME PERIOD, YOU WILL HAVE CONSENTED TO THE TRANSFER OF PROPERTY INTO THIS TRUST (Section 55-16-15, available at: https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=55-16-15)

[548] World Bank Group, Stolen Asset Recovery Initiative. (2022). *Signatures for Sale: How Nominee Services for Shell Companies Are Abused to Conceal Beneficial Owners*.

6.9.5 Pros, cons, best practices, and recommendations

There is little information on the effectiveness of MDR to test which frameworks have the most dissuasive penalties. Nevertheless, based on a theoretical analysis, the following conclusions could be reached as expressed in the following table.

Table 47 Pros, cons, best practices, and recommendations (6.9)

	Pros	Cons	Best practices and recommendations
Same penalty for taxpayer and intermediary	➢ Clear and easy to implement.	➢ Does not consider different dis-incentives. ➢ For example, for intermediaries, the penalty should aim at removing any economic incentive for the intermediary to promote arrangements and avoid disclosure (hence stripping off (part of) fees is a powerful tool).	➢ Applied by half of MDR countries. ➢ To be considered if simpler regime is preferred.
Different penalty for taxpayer and intermediary	➢ Considers specific circumstances. ➢ Allows to consider the circumstances of each taxpayer or intermediary (Big vs small, individual vs a corporate) and impose progressive penalties.	➢ Makes the regime more complex.	➢ Half the MDR countries apply different penalties for taxpayers versus intermediaries. ➢ Recommended approach.
General non-compliance subject to penalty	➢ Clear and easy to implement.	➢ May lead to unfair situations. ➢ May not be sufficiently dissuasive. ➢ Could be up to the courts to determine the value.	➢ Implemented by most MDR countries. ➢ Simpler regime to apply.
Specific non-compliance subject to penalty	➢ It is possible to discourage more specific situations,	➢ This makes the regime more complex	➢ Implemented by Portugal, the UK, the US, and Mexico.

	Pros	Cons	Best practices and recommendations
	e.g., non-filing, filing wrong information. ➢ Allows to scale the severity of non-compliant actions.	(but could have very clear parameters).	➢ The severity of the penalty depends on the type of non-compliance.
Monetary penalty	➢ Easy to implement and understand.	➢ Not an effective tool if it is not dissuasive, i.e., if it is too low to encourage compliance, or if it is not enforced.	➢ Implemented by all MDR countries. ➢ The consequences should be proportionate and dissuasive to encourage compliance.
Non-monetary penalty	➢ Allows for flexibility and creativity. ➢ Strong deterrence effect.	➢ If too unrelated or too disproportionate, it may lead to legal challenges.	➢ Implemented by Argentina, Canada, the US, and the UK. ➢ Could serve as a powerful tool to deter non-compliance.
Calculation of monetary penalty: Fixed sum	➢ Easy to implement and understand.	➢ Impact depends on how high it is. If too low, will not encourage compliance.	➢ In Poland, Mexico, and the UK the maximum penalty is above USD 1 M. ➢ To be considered by developing countries depending on the tax system and ability to enforce.
Calculation of monetary penalty: Relative amounts	➢ More dissuasive potential.	➢ Harder to enforce and calculate (e.g., if it is referenced to the anticipated value of tax benefit).	➢ Implemented in the US. ➢ To be considered by developing countries depending on the tax system and ability to enforce.
Frequency: one off	➢ Easy to implement and understand.	➢ May not encourage compliance after paying the fine unless it's very high. ➢ In comparison with daily, there is no time sensitivity to comply.	➢ Implemented in several countries (Germany, UK, Argentina, etc.).

	Pros	Cons	Best practices and recommendations
Frequency: daily	➢ Encourages prompt compliance.	➢ Harder to enforce, especially detection of beginning of non-compliance.	➢ The US, for failing to disclose clients list.

Source: Apex Consulting

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8 Tables

9 Annex 1: Executive Summary of the Comparison of 11 MDR Regimes

	OECD 2018 MMDR	DAC 6	Argentina	Canada	Guernsey	Germany	Mexico	USA	UK	Portugal	South Africa
Legal Framework	Model Law	Directive (implemented by local law)	Resolution	Law	Law	Law	Law	Law	Law	Law	Law
Simple / Complex (many rules)	Simple	Simple	Simple	Simple	Simple	Complex	Simple	Simple	Very complex	Simple	Simple
Unique / more than one regime	Unique	Unique	Unique	2 regimes	Unique (OECD 2018 MMDR)	Unique(DAC 6)	Unique	Unique	4 regimes (incuding part of DAC 6)	Unique (DAC 6)	2 regimes (Unique and 2018 OECD MMDR)
Scope											
Any tax benefit/ specific taxes in scope	N/A	Specific	Any	Specific (implied)	Specific	Specific	Any	Specific (implied)	Specific	Specific	Any
Who has to report											
Single reporting (intermediary, if none - taxpayer); or double (both intermediary and taxpayer)	Single	Single	Double	Double	Single	Single	Single	Double	Single	Single	Double
Must the taxpayer declare the arrangement in their tax return? (Relevant if only the intermediary reports)	N/A	N/A	N/A (Taxpayer must report full details)	Yes (TS only)	N	Yes	Yes	N/A (Taxpayer must report full details)	Yes	No	N/A (Taxpayer must report full details)
Prevention of double reporting (if more than one intermediary)	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Legal/professional confidentiality may prevent disclosure by intermediary?	Partially (report non-confidential information)	Yes, based on each country's laws	Yes	Yes	Yes	Partially (report non-confidential information)	No	No	Yes	Partially (subsidiary obligation to report)	No
Reportable arrangements											
Cross-border / Domestic / Both	Both	Cross-border	Both	Both	Both	Cross-border	Both	Both	Both	Both	Both
Narrowing condition (main benefit test; meeting 2 or more hallmarks)	No	Yes	No	Yes	No	Yes	No	No	Yes	Yes	Yes (to avoid exclusions from white list)
Monetary thresholds	No	No	No	No	No	No	Yes	Yes	No	No	Yes

	OECD 2018 MMDR	DAC 6	Argentina	Canada	Guernsey	Germany	Mexico	USA	UK	Portugal	South Africa
Hallmarks based on:											
Generic (intermediary-based) hallmarks (Confidentiality, contingency fees, contractual protection, standardized documentation)	No	Yes	No	Yes	No	Yes	No	Yes	Yes	Yes	Yes
Specific (transaction- based) arrangements (e.g. loss transactions, double deductions, non-cooperative jurisdictions, etc.)	Yes	Yes	Yes	Yes (TS only)	No	Yes	Yes	Yes	Yes	Yes	Yes
Listed transactions? (Black list = risky; Grey list = potentially risky; Whitelist = not risky/excluded from reporting)	No	No	Black list	Grey list (proposed black list)	No	Whitelist	Grey list	Black and Grey list	Black list	No	Black and White list
Avoidance of the CRS	Yes	Yes	No	No	Yes	Yes	Yes	No	Yes	Yes	Yes
Hiding the Beneficial Owner	Yes	Yes	No	No	Yes	Yes	Yes	No	Yes	Yes	Yes
When information is reported											
Trigger event	Ready for implementation or supplies services	First of: available, ready for implementation, or first steps	First steps	Selling arrangement (TS) & become "reportable transaction" (RTAT)	(Same as the 2018 OECD MMDR)	(Same as DAC 6)	First of: marketing, available or first steps	Becomin a "material advisor"	Earlier of: firm approach by intermediary, available, aware of part of a scheme	(Same as DAC 6)	Become "reportable arrangement" or "participant"
When to report after the trigger event (earliest available)	30 days	30 days	10 days	Before selling (TS) & Next fiscal year (RTAT and taxpayers)	(Same as the 2018 OECD MMDR)	(Same as DAC 6)	30 days	Up to 120 days (intermediary) & Next fiscal year (taxpayer)	5 days (30 for taxpayer since first steps)	(Same as DAC 6)	45 days
Details to compile multiple reports											
Arrangement ID	No	No	No	Yes (TS only)	No	Yes	Yes	Yes	Yes	No	Yes
Client list	No	No	No	Yes (TS only)	No	No	Yes	Upon request	Yes	No	No

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