THE EXPANSION AND INTERNATIONALIZATION OF MANDATORY DISCLOSURE RULES

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Abstract

The Panama Papers, the Paradise Papers, and most recently the Pandora Papers have exposed the role of tax advisors, lawyers, financial institutions, and other intermediaries in enabling cross-border tax avoidance and evasion. In response, mandatory disclosure rules (MDRs), which require that intermediaries report their clients' tax schemes, are becoming prominent tools in the international fight against tax avoidance and evasion. This Article analyzes the development of MDRs over the past four decades as a global phenomenon with three distinct phases beginning in the 1980s. The analysis reveals several trends: expansion in the types of schemes that are reportable, extension of reporting obligations to a great diversity of intermediaries, and increasing multilateralism in the effort to curb intermediary-enabled tax avoidance and evasion. This Article shows how developments in international tax policy have affected, and will likely continue to affect, the expansion and internationalization of MDRs.

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INTRODUCTION

When Nigerian mega-preacher David Oyedepo decided to set up an offshore company, he turned to the Bible for inspiration. Oyedepo, the owner of a fortune valued at $150 million by Forbes magazine, named his British Virgin Islands company "Zadok Investments Limited," after King David's loyal priest Zadok who helped suppress rebellion and restore peace in the kingdom.[1] Modern "kings" no longer rely on the services of priestly advisors; a new class of professional advisors have taken their place. Oyedepo, like others in the global economic elite, turned instead to financial and legal professionals to help maintain his assets under an offshore structure, raising concerns of tax avoidance and evasion.[2] The relationship of Oyedepo and others with these intermediaries was revealed in the Pandora Papers, the most recent of a series of leaks over the past decade.[3] These revelations have highlighted the continuing role of intermediaries in enabling tax avoidance and evasion that has been successively brought to light in the Panama Papers, the Paradise Papers, and now the Pandora Papers.[4]

To combat intermediary-enabled tax avoidance and evasion, many governments have adopted or are in the process of adopting mandatory disclosure rules (MDRs) as deterrence and information-gathering tools. In general, MDRs require the disclosure of certain schemes that may facilitate tax avoidance and evasion.[5] The reporting obligations typically apply to the promoters of reportable schemes and other intermediaries who assist with the design and implementation of such schemes.[6] MDRs are designed to deter intermediaries from developing and implementing schemes that could facilitate tax avoidance and evasion, identify the

[1] Nicholas Ibekwe, *Pandora Papers: How Bishop David Oyedepo Set Up Family Offshore Company in Tax Haven*, PREMIUM TIMES, Oct. 10, 2021, https://www.premiumtimesng.com/news/headlines/489110-pandora-papers-how-bishop-david-oyedepo-set-up-family-offshore-company-in-tax-haven.html [https://perma.cc/X2DK-HU8B]; Mfonobong Nsehe, *The Five Richest Pastors in Nigeria*, FORBES, June 2, 2011, https://www.forbes.com/sites/mfonobongnsehe/2011/06/07/the-five-richest-pastors-in-nigeria [https://perma.cc/8F68-N32W].

[2] *See id.*

[3] *See id.*; Greg Miller et al., *Billions Hidden Beyond Reach*, WASH. POST, Oct. 3, 2021, https://www.washingtonpost.com/business/interactive/2021/pandora-papers-offshore-finance [https://perma.cc/NUF4-5Q3L].

[4] For further discussion, *see* BASTION OBERMAYER & FREDERIK OBERMAIER, THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH AND POWERFUL HIDE THEIR MONEY (2016); Lawrence J. Trautman, *Following the Money: Lessons from the Panama Papers: Part 1: Tip of the Iceberg*, 121 PENN ST. L. REV. 807 (2017); Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532 (2018); James O'Donovan et al., *The Value of Offshore Secrets: Evidence from the Panama Papers*, 32 REV. FIN. STUD. 4117 (2019); International Consortium of Investigative Journalists, *Pandora Papers*, https://www.icij.org/investigations/pandora-papers [https://perma.cc/PB3G-QZ5V] (last visited Oct. 13, 2021).

[5] As discussed below, many MDRs target tax avoidance schemes. Certain MDRs, such as the CRS MDRs discussed in *infra* Part III.B., target arrangements that raise concerns of tax evasion. *See infra* note 190 for further discussion on tax avoidance and evasion in this context.

[6] As discussed below, this Article focuses on MDRs that impose reporting obligations on parties other than the taxpayers themselves (i.e., third-party reporting by intermediaries). Reporting obligations that only apply to the taxpayers are outside the scope of this Article.

users of such schemes, and alert tax authorities of weaknesses in the tax system.[7]

MDRs have developed from targeted domestic measures against promoters of mass-marketed tax shelters into substantially broader reporting standards that constitute a major component of a coordinated international campaign against tax avoidance and evasion.[8] From humble origins, MDRs have taken the world by storm in recent years with the implementation of the EU Council Directive 2018/822 (DAC 6) and the publication of the OECD Model MDRs for Common Reporting Standard avoidance (CRS MDRs).[9] Over 30 jurisdictions have adopted new forms of MDRs since 2018 alone, and there are indications that more countries will follow suit.[10] These developments are part of broader trends in international tax policy and enforcement that have increased efforts to curb tax avoidance and evasion, shift the spotlight to the enablers of tax avoidance and evasion, and adopt a multilateral approach to tax norm-setting and enforcement.[11]

This Article is the first publication to thoroughly explore the development of MDRs over time in different jurisdictions. While there exists literature discussing specific regimes, this is the first publication to identify and analyze trends across the full temporal and geographic breadth of MDRs.[12] The analysis of the development of MDRs exposes trends in the evolution, maturation, and implementation of MDRs over time with a cross-jurisdictional lens. This Article shows how the trends in the evolution of MDRs fit into broader movements in international tax policy.

The evolution of MDRs can be divided into three distinct generations: the tax shelter registration rules of the 1980s, which were limited in scope and purpose; the reportable transaction disclosure regimes of the 2000s, which expanded reporting requirements and made some inroads into the international taxation sphere; and finally, the multilateral MDRs of the past six years, which extend reporting requirements to a great diversity of intermediaries, focus on cross-border arrangements, and create information exchange systems.

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[7] *See* Michael Schler, *Effects of Anti-Tax-Shelter Rules on Nonshelter Tax Practice,* 109 TAX NOTES 915, 917 (2005). See also the discussion in Parts I and II for the reasons countries have adopted MDRs.

[8] *See infra* Parts I-III (showing how the development and adoption of MDRs in different countries have built upon the experience of other countries' earlier MDRs).

[9] Council Directive 2018/822, 2018 O.J. (L 139) [hereinafter DAC 6]; OECD, *Model Mandatory Disclosure Rules for CRS Avoidance and Opaque Offshore Structures* (2018) [hereinafter CRS MDRs]. In general, DAC 6 requires the disclosure of certain schemes and arrangements by intermediaries, such as tax professionals, lawyers, investment advisors, accountants, and other service providers. *See infra* Part III.A. The CRS MDRs require the reporting of schemes that enable the avoidance of CRS reporting. *See infra* Part III.B.

[10] Mexico, Argentina, the United Kingdom, and all 27 Member States of the EU have adopted some form of expanded MDRs since 2018. Guernsey, Jersey, the Isle of Man, and Gibraltar are also in the process of adopting the CRS MDRs. *See infra* Part III. Several countries, including Australia and Japan, are also currently considering adopting MDRs. *See infra* Part V.

[11] *See infra* Part IV; Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353 (2020) (discussing the implications of recent international tax reforms and the changes in the participants, agenda, institutions, and legal instruments of international tax).

[12] Publications on specific regimes are cited throughout this Article.

In the 1980s, the United States and Canada adopted targeted measures requiring the registration of mass-marketed individual tax shelters.[13] These early reporting regimes required the promoters of individual tax shelters to report any tax schemes which matched a set of narrow criteria.[14] Promoters were required to provide information on the schemes to the tax authority which would then issue an identification number for taxpayers to include in their tax returns.[15] In some cases, promoters were required to maintain lists of investors' contact information and provide this information to the tax authorities.[16]

In the 2000s, the United States enacted rules requiring the reporting of certain "reportable transactions" that may be associated with tax avoidance.[17] The new U.S. regime required the reporting of "listed transactions" and other transactions that contained certain identifiable hallmarks.[18] These measures expanded the breadth of the pre-existing tax shelter registration rules to include other tax avoidance schemes, particularly those involving corporate taxpayers. In addition, this regime expanded the reporting obligations beyond organizers of tax shelters to further include any material advisors who provide tax statements with respect to a reportable transaction.[19] Following the United States, the United Kingdom adopted a similar, but structurally different, reportable transaction disclosure regime in 2004.[20] Subsequently, additional countries, including South Africa, Portugal, Ireland, and Canada, adopted regimes modeled after either the United States' or the United Kingdom's MDRs.[21]

The most dramatic expansion of MDRs is now underway. The OECD, as part of the Base Erosion and Profit Shifting (BEPS) project, suggested in 2015 that countries adopt broad MDRs as part of an international effort to curb cross-border tax avoidance.[22] Following this recommendation, the EU adopted in 2018 its own form of MDRs under DAC 6.[23] DAC 6 substantially expands reporting obligations, focuses on cross-border arrangements, includes hallmarks for CRS avoidance, and facilitates the exchange of information between Member States.[24] Furthermore, DAC 6 requires reporting from any intermediary that could reasonably be expected to be aware of a reportable transaction.[25] This expansion is significant because it imposes reporting obligations on various intermediaries even if such parties did not advise or make statements on the tax aspects of the transaction. Such intermediaries

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[13] *See infra* Part I.
[14] *See infra* notes 58, 72 and the accompanying text.
[15] *See infra* Part I.
[16] *See infra* notes 56, 74 and the accompanying text.
[17] *See infra* Part II.A.
[18] *Id.*
[19] *See id.*
[20] *See* Finance Act 2004 c.12, §§ 306-19 (UK) https://www.legislation.gov.uk/ukpga/2004/12/contents [https://perma.cc/8PW9-7BYZ] and its implementing regulations. *See also infra* note 110.
[21] *See infra* Part II.C.
[22] *See* OECD, MANDATORY DISCLOSURE RULES, ACTION 12-2015 FINAL REPORT (2015) [hereinafter Action 12].
[23] *See* DAC 6, *supra* note 9.
[24] *See id.*; *see also infra* Part III.A.
[25] *See infra* note 169 and the accompanying text.

may include lawyers, investment advisors, corporate service providers, trustees, and other professionals. In addition, the OECD published in 2018 the CRS MDRs, which provide a system of mandatory disclosure for CRS avoidance arrangements and opaque offshore structures. CRS MDRs, like DAC 6, lay the groundwork for a system of automatic information exchange between jurisdictions.[26] A growing number of countries have adopted or are expected to adopt the CRS MDRs.[27] New MDRs have also emerged in other parts of the world.[28]

Our analysis of the development of MDRs reveals three trends.[29] First, MDRs have gradually expanded from targeted measures against certain specific transactions to comprehensive reporting regimes for different types of aggressive tax planning.[30] Overall, this represents a transition from a narrow rule-based approach targeting specific tax shelters to a broader standard-based approach to counter various forms of tax avoidance and evasion.[31] This standard-based approach is reflected in the extensive use of generic hallmarks and the incorporation of the main benefit test in newer MDRs.[32] This trend is part of an increasing international effort to curb tax avoidance and evasion.[33]

Second, MDRs have expanded the categories of persons obligated to report. The original tax shelter registration rules specifically targeted the promoters and organizers of mass-marketed tax shelters. The most recent MDRs require a broad set of intermediaries to report even if they are not involved with the tax aspects of a transaction or an arrangement. Thus, MDRs have evolved from targeting a small group of tax shelter promoters to regulating a broad set of professional service industries. These changes also align with general trends in tax policymaking and enforcement that target the enablers of tax avoidance and evasion.[34]

Third, MDRs have changed from domestic measures with a domestic focus to multilateral standards addressing cross-border tax avoidance and evasion.[35] The internationalization of MDRs has affected what needs to be reported, who needs to report, and how information is exchanged between jurisdictions. DAC 6 and CRS MDRs are transnational by design. They incorporate hallmarks that target cross-border transactions and arrangements, require both domestic intermediaries and

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[26] *See* OECD, INTERNATIONAL EXCHANGE FRAMEWORK FOR MANDATORY DISCLOSURE RULES ON CRS AVOIDANCE ARRANGEMENTS AND OPAQUE OFFSHORE STRUCTURES (2019).

[27] *See* the discussion in *infra* Parts III.B, V.

[28] *See infra* Part III.C.

[29] *See infra* Part IV.

[30] *See infra* Part IV.A.

[31] *See infra* note 239 and the accompanying text.

[32] *See infra* notes 166, 177-179, 241 and the accompanying text.

[33] Relevant international developments include BEPS, BEPS 2.0, the Foreign Account Tax Compliance Act (FATCA), and the Common Reporting Standard (CRS). In general, BEPS and BEPS 2.0 are coordinated international programs led by the OECD which aim to end tax avoidance, in particular by multinational enterprises. FATCA is a U.S. law that requires the reporting of the overseas financial assets of U.S. citizens and tax residents to the U.S. government. CRS is an international version of FATCA, implemented by more than 112 jurisdictions, which facilitates the automatic exchange of financial account information of foreign tax residents to their jurisdictions of tax residence. *See infra* notes 191-193, 293 and the accompanying text. *See also* the discussion *infra* Part IV.C.

[34] *See infra* Part IV.B.

[35] *See infra* Part IV.C.

intermediaries in other jurisdictions to report, and contain systems for information exchange between countries. This is in line with other recent developments in international taxation, such as CRS, BEPS, and BEPS 2.0, which adopt an international and multilateral approach in the fight against cross-border tax avoidance and evasion.[36]

These expanded models for MDRs may spread to more countries and become new international tax norms.[37] There could be pressure, in the form of EU blacklisting or OECD peer reviews, on jurisdictions across the globe to implement some form of MDRs such as the CRS MDRs. Interestingly, although the United States played a key role in introducing and expanding MDRs in the 1980s and 2000s, U.S. policymakers have not expressed interest in adopting more expansive rules like their European counterparts have. Understanding the development of MDRs can contribute to current policy discussions around the world on whether to adopt MDRs or expand existing MDRs.

This Article is divided into five parts. Part I discusses the targeted U.S. and Canadian tax shelter registration rules of the 1980s. Part II analyzes the reportable transaction regimes of the 2000s and early 2010s, which significantly expanded in scope, but largely remained domestically focused. Part III evaluates the major expansion and internationalization of the scope and focus of MDRs since 2015. Part IV reveals trends across the three generations and contextualizes them within broader movements in international tax policy. Part V provides observations and comments regarding the possible directions of MDRs in the future.

I. FIRST GENERATION: 1980S

The first rules that imposed obligations on intermediaries to report tax schemes were the tax shelter registration rules of the 1980s. Tax shelter registration rules were first introduced in the United States in 1984 and then in Canada in 1988.[38] The scope and aim of these rules were much narrower than those of the MDRs adopted in later decades, as discussed in the next parts. These rules targeted certain types of *individual* tax shelters that had proliferated in the United States and Canada in the 1970s and early 1980s.[39] Unlike the regimes of later decades, these rules lacked a list of general hallmarks that flag transactions for reporting.[40] Furthermore, these rules did not address corporate tax shelters which would eventually pose significant tax avoidance challenges.[41]

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[36] *See infra* Part IV.C.

[37] *See infra* Part V.

[38] For the United States, *see* Deficit Reduction Act of 1984 §§ 141-144 Pub. L. 98-369 (1984) [hereinafter DEFRA], which first introduced the provisions requiring "organizers" of tax shelters to register "tax shelters" and to maintain investor lists for each tax shelter, and penalties for non-compliance, in I.R.C. §§ 6111, 6112, 6707, 6708 (of 1986) (it has been replaced by the U.S. reportable transaction disclosure rules, discussed *infra* Part II.A). For Canada, *see* Income Tax Act, R.S.C. 1985 (Can.) [hereinafter Canadian ITA], c.1, s 237.1 (of 1988) (it has since been amended by Canada's subsequent MDRs as discussed in Part II.B).

[39] *See* Mortimer Caplin, *Tax Shelter Disputes and Litigation with the Internal Revenue Service - 1987 Style*, 6 VA. TAX REV. 709, 709 (1987).

[40] *See infra* Part II.

[41] *See id.*

A. United States

The United States adopted its tax shelter registration rules in 1984 in response to a proliferation of mass-marketed tax shelters.[42] The use of such tax shelters had been increasing steadily since the 1960s, which contributed to the mounting federal deficit in the 1980s.[43] Although Congress had enacted various forms of legislation to combat such tax shelters,[44] these measures did little to curb the growing use of such schemes.[45] In 1982, recognizing that the problem largely stemmed from promoters of tax shelters, who had been marketing shelters based on false representations, gross valuation overstatements, and unsupported positions, Congress introduced promoter penalty provisions, as well as provisions allowing for injunctive relief to be sought against promoters, to tackle the issue "at [its] source."[46]

However, abusive tax shelters continued to proliferate.[47] This led to concerns that promoters were profiting from the U.S. Treasury's dearth of information on the tax shelter market and that the IRS was unable to "examine effectively every return" to detect participation in tax shelters.[48] As a result, Congress introduced tax shelter registration rules in 1984.[49] The purpose of these rules was to facilitate the IRS' ability to identify abusive tax shelters early and to make "better informed judgments" when deciding whether or not to audit a scheme.[50] These rules were part of a larger package of changes implemented in the Deficit Reduction Act of 1984.[51] Congress was concerned that tax shelters exacerbated the deficit, undermined public trust in the tax system, and inhibited economic growth by diverting funds away from more profitable investments.[52]

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[42] *See* J. COMM. ON TAX'N, 98TH CONGRESS, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, JCS-41-84, at 7 (1984) ("Congress believed that the proliferation of tax shelters had seriously eroded the tax base . . . The increase in tax shelter activity had aggrevated [sic] the nation's deficit problem.").

[43] *See id.*; *see also* S. COMM. ON FINANCE, 98TH CONG., DEFICIT REDUCTION ACT OF 1984 – EXPLANATION OF PROVISIONS APPROVED BY THE COMMITTEE ON MARCH 21, 1984, at 81, 83 (Comm. Print 1984); DEP'T TREASURY, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH – THE TREASURY DEPARTMENT REPORT TO THE PRESIDENT 6, 7, 138, 139, 140 (1984).

[44] *See* Tax Reform Act of 1969, Pub. L. No. 91-172 (1969); Tax Reform Act of 1976, Pub. L. No. 94-455 (1976); Revenue Act of 1978, Pub. L. No. 95-600 (1978); Economic Recovery Tax Act of 1981, Pub. L. No. 97-34 (1981).

[45] *See* J. COMM. ON TAXATION, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, JCS-38-82, at 210-11 (1982).

[46] This is an early example of the tax authorities targeting the enablers of tax avoidance as opposed to the taxpayers themselves. The provisions were introduced under the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248 (1982) [hereinafter TEFRA]. *See id.* at 210-13 for the legislative background of TEFRA.

[47] *See* J. COMM. ON TAX'N, *supra* note 42.

[48] *Id.* at 475; Marilyn A. Wethekam, *A Critique of Current State Tax Shelter Laws, The State and Local Tax Lawyer*, 11 STATE & LOC. TAX L. 37 (2006).

[49] *See* DEFRA §§ 141-44.

[50] *See* J. COMM. ON TAX'N, *supra* note 42, at 476.

[51] DEFRA, *supra* note 49.

[52] *See* J. COMM. ON TAX'N, *supra* note 42, at 5-8.

To address these concerns, the Deficit Reduction Act of 1984 required tax shelter organizers to register no later than the first day on which their interest was offered for sale.[53] Organizers would then receive a registration number which investors were required to include in their personal tax returns.[54] Registration required the disclosure of information about the tax shelter to the IRS.[55] Additionally, any organizers of "potentially abusive tax shelters" were required to maintain lists of investors with their respective personal information.[56] Upon request, organizers were required to provide these lists to the IRS.[57]

The Deficit Reduction Act defined a tax shelter based on a formula. A tax shelter was defined as any investment that "any person could reasonably infer" the ratio of deductions and 200 percent of credits to the cash invested, the so-called "tax shelter ratio," was greater than two to one as of the close of any of the first five years of the investment.[58] However, this definition proved too broad and required the registration of a significant number of investments with no tax avoidance motives.[59] Not only did this place unnecessary burden on promoters and investors in legitimate investment schemes, but would also complicate the IRS' ability to identify and investigate abusive tax shelters.[60] In August 1984, the U.S. Treasury exempted from reporting certain types of investments that posed a lower risk of being considered as abusive.[61]

The early registration requirement imposed on organizers provided the IRS with a tool to identify abusive tax shelters before any government revenue was lost. By requiring tax shelters to register on the day they first sell their products, the IRS

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[53] The tax shelter organizer was "the person principally responsible for organizing the tax shelter." DEFRA § 141. The promoter of the scheme generally qualified as the organizer. *See* J. COMM. ON TAX'N, *supra* note 42, at 476. Promoters are understood in this Article to mean those who market and sell tax products.

[54] *See* DEFRA § 141; see also J. COMM. ON TAX'N, *supra* note 42, at 476 for a further discussion on this provision and others.

[55] DEFRA required the following to be included in the registration, "(A) information identifying and describing the tax shelter, (B) information describing the tax benefits of the tax shelter represented (or to be represented) to investors, and (C) such other information as the Secretary may prescribe." DEFRA § 141.

[56] The law defined a potentially abusive tax shelter as "(1) any tax shelter (as defined in section 6111) with respect to which registration is required under section 6111, and (2) any entity, investment plan or arrangement, or other plan or arrangement which is of a type which the Secretary determines by regulations as having a potential for tax avoidance or evasion." DEFRA § 142.

[57] *See id.*

[58] For example, suppose a partnership purchases an office building and is subject to annual interest payments of $1,000,000 on a mortgage. Other expenses total $400,000. The partnership has 100 investors who invest $2,000 each in the first year for a total investment of $200,000. In this case the tax shelter ratio would be $\frac{\$1{,}400{,}000+200*0}{\$200{,}000} = 7$. For a more detailed breakdown of a similar example, see Stephen Saporta, *Tax Shelter Registration: An Alternative Proposal That Leads to the Efficient Identification of Abusive Tax Shelters*, 20 VAL. U. L. REV. 489, 521-25 (1986). The tax shelter ratio was later changed to 350% of credits in the Tax Reform Act of 1986 to account for altered tax rates. *See* Tax Reform Act of 1986 § 1531, 26 U.S.C. § 1 (1986).

[59] *See* Saporta, *supra* note 58, at 512, 517.

[60] *See id.* at 517.

[61] This exception applied to what was referred to as "projected income investments." Temp. Treas. Reg. § 301.6111-1T, Q&A 57A, 57B (1985).

could begin investigating potentially abusive tax shelters earlier than before. The IRS could then send pre-filing notification letters to investors to warn them of an abusive tax shelter scheme before any investors had actually used the shelter to deny the government its due revenue.[62] Previously, taxpayers investing in these shelters could play the audit lottery and hope that the IRS' lack of comprehensive data would shield them from consequences.[63] The information obtained also allowed the U.S. Treasury to identify the legislative loopholes commonly exploited in tax shelter arrangements, which eventually led Congress to enact the Tax Reform Act of 1986. The Tax Reform Act of 1986 raised penalties for failing to comply with many of the requirements of the 1984 act including a failure to register as a tax shelter.[64] The 1986 tax reform also implemented other tax measures that reduced the attractiveness of tax shelters.[65] These measures in combination with the anti-tax shelter changes of 1984 were effective in suppressing the mass-marketed individual tax shelter industry.[66]

The number of individual tax shelters declined after 1986.[67] It is not entirely clear how much of this decline resulted directly from the tax shelter registration rules. A Government Accountability Office (GAO) report from 1988 found that the tax shelter registration program could be improved.[68] Some analysts have argued

[62] *See* Michael J. Bradley, *Registration of Tax Shelters*, 63 TAXES 563, 565 (1985) ("The IRS decided that the only way to stop the proliferation was to identify potentially abusive tax shelters and warn gullible investors before the investments were sold, rather than attacking the transactions retrospectively . . . . This is done by issuing 'pre-filing notification letters' to investors, warning them of the potential pitfalls."). For further information on pre-filing notifications, see Rev. Proc. 83-78, 1983-2 C.B. 595; Rev. Proc. 84-84, 1984-2 C.B. 782; Caplin, *supra* note 39, at 734; Allan Karnes & Roger Lively, *Striking Back at the IRS: Using Internal Revenue Code Provisions to Redress Unauthorized Disclosures of Tax Returns or Return Information*, 23 SETON HALL L. REV. 924 (1993).

[63] For further discussion, see J. COMM. ON TAX'N, *supra* note 45, at 216, wherein the problem of the audit lottery is lamented and the reasons for its persistence at the time are elaborated. For a general discussion on the audit lottery problems, see Yoram Keinan, *Playing the Audit Lottery: The Role of Penalties in the U.S. Tax Law in the Aftermath of Long Term Capital Holdings v. United States,* 3 BERKELEY BUS. L.J. 381 (2006); Matthew C. Ames, *Formal Opinion 352: Professional Integrity and the Tax Audit Lottery*, 1 GEO. J. LEGAL ETHICS 411 (1987); Elena Eracleous, *Losing the Audit Lottery: Corporate Tax Shelters and Judicial Doctrine*, 5 FORDHAM J. CORP. & FIN. L. 205 (2000); Joel S. Newman, *The Audit Lottery: Don't Ask, Don't Tell?*, 40 TAX NOTES 1438 (1988).

[64] *See* Tax Reform Act of 1986, *supra* note 58, at §§ 1532-1534 (amending I.R.C. §§ 6707-6708).

[65] These measures included the passive activity loss rules (PAL) which required that passive losses could only be used to offset other passive income. *See* Tax Reform Act of 1986, *supra* note 58, at § 501 (amending I.R.C. § 469).

[66] *See* DEP'T TREASURY, THE PROBLEM OF CORPORATE TAX SHELTERS – DISCUSSION, ANALYSIS AND LEGISLATIVE PROPOSALS 27, 60, 64 (July 1999); J. COMM. ON TAX'N, *supra* note 42, at 426.

[67] See George K. Yin, *Getting Serious about Corporate Tax Shelters: Taking a Lesson from History*, 54 SMU L. REV. 209, 211 (2001), for a detailed quantitative analysis of the decline in tax shelters post-1986.

[68] U.S. GOV'T ACCOUNTABILITY OFF., GAO-88-69, TAX ADMINISTRATION: IRS' ABUSIVE TAX SHELTER EFFORTS NEED IMPROVEMENT 3, 15-16, 19 (1988). The report found that in the three districts visited by the GAO not a single registered tax shelter had been penalized for abusive

that other tax measures introduced in the 1986 tax reform played a substantial role in eliminating the tax shelter problem.[69] The decline in individual tax shelters after 1986 may be the result of the combined effect of the tax shelter registration rules and other tax measures. Also, the implementation of tax shelter registration rules in the United States prompted another country, Canada, to adopt similar rules just a few years later.

B. Canada

Canada introduced similar tax shelter registration rules in 1988 as part of a comprehensive package of reforms to curtail the "accelerating proliferation of tax avoidance schemes."[70] These new rules were inspired by the recent tax changes in the United States.[71] Canada's tax shelter registration rules were generally similar to the rules in the United States.

Under Canada's tax shelter registration rules, a scheme was classified as a "tax shelter" based on a formula.[72] Promoters were required to register a tax shelter

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behavior between October 1984 and July 1986, despite 20 completed investigations. IRS personnel reported that this was due to a lack of relevant information reported in the registration process. The personnel argued that obtaining a tax shelter's prospectus and offering documents at the time of registration would make it easier for them to get information on the shelter's income projections, its asset acquisition and financing, and the types of deductions or credits it used. This would have helped the IRS determine the extent to which the investment is tax-motivated and allow them to verify the accuracy of the registration information.

[69] *See* Yin, *supra* note 67, at 219; Calvin H. Johnson, *Why Have Anti-Tax Shelter Legislation? A Response to Professor Zelenak*, 67 TEX. L. REV. 591, 625 (1989); Calvin H. Johnson, *What's a Tax Shelter?,* 68 TAX NOTES 879, 879-80 (1995); Stanley A. Koppelman, *At-Risk and Passive Activity Limitations: Can Complexity Be Reduced?*, 45 TAX L. REV. 97, 105 (1989); Jerome Kurtz, *The Interest Deduction Under Our Hybrid Tax System: Muddling Toward Accommodation*, 50 TAX L. REV. 153 (1995); Cecily W. Rock & Daniel N. Shaviro, *Passive Losses and the Improvement of Net Income Measurement*, 7 VA. TAX REV. 1 (1987).

[70] DEP'T FINANCE CANADA, THE WHITE PAPER – TAX REFORM 1987, at 8 (1987).

[71] *See House of Commons Debates*, 33-2, vol 1 (23 October 1986) at 642 (Can.) ("We have made progress, but in considering the further progress we wish to make, and in light of the recent changes in the United States, we decided that a broader approach to tax reform in Canada is required.").

[72] "Tax shelter" was initially 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 . . . will exceed the cost of the interest in the property (less prescribed benefits) to the purchaser." *See* Canada Revenue Agency, Information Circular IC-89-4, "Tax Shelter Reporting" (14 August 2002). In Maege v. The Queen, 2006 D.T.C. 3193 and Baxter v. The Queen, 2007 F.C.A. 172, this definition was summarized in the equation $A > (B - C)$ where A represents the aggregate of deductions against income, B represents the investment or cost, and C represents the prescribed benefits or tax credits received. For example, in December 1990, Lazar Jevremovic invested CAD 10,000 in an agricultural research company named Botanical Technologies. He then claimed a net business loss of CAD 10,000, an investment tax credit of CAD 1,480, and a Quebec tax credit of CAD 3,614. The court found that this did indeed meet the mathematical requirement for a tax shelter given that $10{,}000 > (10{,}000 - 5{,}094)$. For a more detailed breakdown of Mr. Jevremovic's case, *see* Maege v. The Queen. *Id.* Several changes were made to these laws in subsequent years. For example, amendments in 1995 and 2003 expanded the scope of these rules to cover additional schemes. *See* Canadian ITA §§ 143.2, 237.1 (of 1995 and 2003, respectively).

and distribute its identification number, as assigned by the Canadian Revenue Authority (CRA), to all investors in the tax shelter.[73] Investors would then include this identification number in their own income tax returns. The promoters were required to obtain their identification numbers before they began selling or issuing the tax shelter scheme. They also needed to provide the CRA with a list of investors in their scheme along with their respective contact information, Social Insurance Numbers, and the amount paid by each investor.[74] Promoters were defined as "any person who in the course of a business sells, issues or promotes the sale, issuance or acquisition of an interest in a tax shelter or who acts as an agent or advisor in respect of such activities."[75] Penalties were imposed on promoters who failed to register.[76] Investors who participated in a tax shelter scheme without a registration number were denied any potential tax benefits of the shelter.[77]

Thus, similar to the United States, Canada's tax shelter registration regime targeted the proliferation of individual tax shelters by imposing registration and reporting obligations. This narrow scope would ultimately prove inadequate to address the growth of corporate tax shelters. Nevertheless, these rules laid the groundwork for the expansion of Canada's reporting regime, discussed in the next part.

II. SECOND GENERATION: 2000S AND EARLY 2010S

With the decline of the individual tax shelter industry, the attention of tax authorities shifted to countering tax avoidance schemes for *corporate* taxpayers.[78] While the U.S. and Canadian tax shelter registration rules were too narrow to capture these schemes, they did provide a model for a reporting regime that would prove useful in addressing other forms of tax avoidance. In the 2000s, the United States, followed by several countries including the United Kingdom, South Africa, Portugal, Ireland, and Canada, adopted a new type of reporting regime that was broad enough to capture the various tax avoidance schemes of corporations, individuals, trusts, and other taxpayers.[79] While different countries name their

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[73] *See* Canadian ITA (of 1988) § 237.1.

[74] *See id.*

[75] Canada Revenue Agency, *supra* note 72.

[76] *See id.*

[77] *See* Rosemarie Wertschek & James R. Wilson, *Shelter from the Storm: The Current State of the Tax Shelter Rules in Section 237.1*, 56 CAN. TAX J. 285, 287 (2008)

[78] *See* Elaine Church & Corina Trainer, *Reportable Transactions: A Comprehensive Disclosure Regime to Combat Tax Shelters*, 57 MAJOR TAX PLAN 12-1, at 12-2 to -3 (2005) ("During the late 1990's, market activity shifted from individual to corporate tax shelters. Few of these emerging corporate transactions appeared to be affected by the regulations that had been developed to address the very different issues involved in shelter investments by individuals. Typically, these corporate tax shelters were not 'investment type' transactions. . . . By 1999, when Treasury launched its study of corporate tax shelters, Treasury had become convinced that additional rules were needed."). *See also* DEP'T TREASURY, THE PROBLEM OF CORPORATE TAX SHELTERS: DISCUSSION, ANALYSIS AND LEGISLATIVE PROPOSALS (1999); James S. Eustice, *Abusive Corporate Tax Shelters: Old "Brine" in New Bottles*, 55 TAX L. REV. 135 (2002).

[79] At present, the U.S. and South African regimes are still in place. However, Portugal and Ireland have also adopted DAC 6, the United Kingdom has expanded its regime to implement the CRS MDRs. Canada is considering expanding its MDRs. *See infra* Part III.

reporting regimes differently, we generally refer to these rules as MDRs.[80]

Although modeled similarly, these MDRs differ from their tax shelter registration antecedents in that they provide a list of example transactions that are required to be reported. These MDRs also list various "hallmarks," or identifiable characteristics associated with tax avoidance schemes. These changes greatly widened the scope of reporting requirements, and thereby channeled more information to tax authorities. While all of the new MDRs share basic characteristics with each other, each regime is adapted to local conditions and differs from the others in a number of ways. Each country lists different types of transactions that need to be reported. Moreover, different parties are required to report in different countries. In the United Kingdom, South Africa, Portugal, and Ireland, the promoters of a reportable transaction are required to report, while taxpayers need only report when there is no promoter or the promoter fails to report.[81] In the United States, both the taxpayers and material advisors must report.[82] In Canada, there are parallel reporting requirements on every beneficiary, scheme user, and advisor or promoter entitled to a fee in respect of the transaction.[83]

A. United States

By the late 1990s, it was estimated that corporate tax shelters had cost the U.S. Treasury 10 billion dollars annually and that this figure was "growing dramatically."[84] Although Congress, again, sought to tackle the issue by developing targeted responses to specific schemes, such an *ad hoc* approach was ineffective to curb corporate tax avoidance.[85] It was therefore proposed that a generic approach, based on identified characteristics common to many corporate tax avoidance practices, was needed.[86]

In February 2000, the U.S. Treasury introduced temporary regulations imposing a requirement on *corporate* taxpayers participating in a "reportable transaction" to disclose certain specified information in relation to the transaction in a disclosure statement to be attached to their tax returns for each taxable year in

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[80] Action 12, *supra* note 22, follows a similar approach. Annet Wanyana Oguttu and Ann Kavis-Kumar also refer to the disclosure rules of the 2000s and early 2010s as MDRs. Notably, these authors also consider (as we do) the U.S. and Canadian tax shelter registration rules of the 1980s a version of MDRs. *See* Annet Wanyana Oguttu & Ann Kayis-Kumar, *Curtailing Aggressive Tax Planning: The Case for Introducing Mandatory Disclosure Rules in Australia (Part 1)*, 17 EJOURNAL TAX RES. 83, 85 (2019).

[81] *See* Finance Act 2004, c. 12, §§ 309-10 (UK), https://www.legislation.gov.uk/ukpga/2004/12/contents [https://perma.cc/8PW9-7BYZ] [hereinafter Finance Act 2004]; Tax Administration Act 28 of 2011 [hereinafter TAA] § 34 (S. Afr.); Decreto-Lei n.˚1 29/2008, de 25 de fevereiro [Decree-Law no. 29/2008], arts. 8, 10, https://dre.pt/dre/detalhe/decreto-lei/29-2008-247717 [https://perma.cc/K6VP-5TB5] (Port.); Taxes Consolidation Act 1997 (Act No. 39/1997) (Ir.), https://www.irishstatutebook.ie/eli/1997/act/39/enacted/en/html [https://perma.cc/QQR9-RYXL] [hereinafter TCA] § 817E.

[82] *See infra* note 95 and the accompanying text.

[83] *See* Canadian ITA § 237.3.

[84] DEP'T TREASURY, *supra* note 66, at 31.

[85] *See id.* at 2-6, 11-12, 31, 77-78.

[86] *See id.*

which their income tax liability is affected by the transaction.[87] Reportable transactions would include transactions identified by the IRS in published guidance as tax avoidance transactions, i.e.,.,., listed transactions and transactions exceeding certain monetary thresholds which had certain hallmarks commonly associated with corporate tax shelters.[88]

From August 2000 to October 2002, the temporary rules underwent four rounds of revision, during which time the disclosure requirement was extended to non-corporate taxpayers including individuals, trusts and partnerships.[89] These amendments were made because "potentially abusive tax avoidance transactions are increasingly being used by high net-worth individuals" and that "both corporations and individuals often employ partnerships and trusts to achieve unintended tax results."[90] The final regulations were issued in February 2003,[91] and clarified which transactions are reportable.[92] Reportable transactions include those offered to a taxpayer by an advisor on a condition of confidentiality, those resulting in the taxpayer claiming a loss exceeding specified monetary thresholds, those in which the taxpayer can be refunded fees if the intended tax benefits are not obtained, and those that are the same as or are substantially similar to transactions identified by the IRS in published guidance as being "of interest."[93]

In 2004, the reportable transaction rules were amended once again under the American Jobs Creation Act of 2004 (AJCA).[94] Notably, this change imposed a parallel reporting requirement and list maintenance requirements on material advisors of reportable transactions.[95] A material advisor is defined as any person who provides a tax statement[96] with respect to a reportable transaction and receives

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[87]Temp. Treas. Reg. § 1.6011-4T. It is important to mention that the U.S. had first required the registration of corporate tax shelters under the Taxpayer Relief Act of 1997. These rules expanded those set forth in the Deficit Reduction Act of 1984 and required corporate tax shelter promoters to register if their tax shelter was offered under "conditions of confidentiality." However, this law lacked a comprehensive set of listed transactions or hallmarks that the later regime would include. *See* Taxpayer Relief Act of 1997 § 1028, Pub. L. No. 105-34 (1997) (amending I.R.C. § 6111(d)).

[88] *See* Temp. Treas. Reg. § 1.6011-4T *supra* note 87.

[89] These revisions took place in August 2000, August 2001, June 2002, and October 2002. See 65 Fed. Reg. 49909, 66 Fed. Reg. 41133, 67 Fed. Reg. 41324, 67 Fed. Reg. 64799, 67 Fed. Reg. 64807, for the amendments in Federal Registers.

[90]*Corporate Tax Shelters: Looking Under the Roof: Hearing Before the S. Comm. on Fin.,* 117th Cong. 90 (Mar. 21, 2002).

[91] *See* Treas. Reg. §§ 1.6011-4, 20.6011-4, 25.6011-4, 31.6011-4, 53.6011-4, 54.6011-4, 56.6011-4. The regulations were published in 68 Fed. Reg. 10161.

[92] *See* Treas. Reg. § 1.6011-4(b) for the definition of "reportable transactions." The lists of current "listed transactions" and "transactions of interest" are available on the IRS website. *Recognized Abusive and Listed Transactions*, IRS, https://www.irs.gov/businesses/corporations/listed-transactions [https://perma.cc/2V38-VLP5] (last visited Mar. 9, 2022); *Transactions of Interest*, IRS, https://www.irs.gov/businesses/corporations/transactions-of-interest [https://perma.cc/29TT-MSU6] (last visited Mar. 9, 2022).

[93] Treas. Reg. § 1.6011-4.

[94] *See* American Jobs Creation Act [hereinafter AJCA] §§ 815-820, Pub. L. No. 108-357 (2004) (amending I.R.C. §§ 6111, 6112, 6700, 6662, 6664, 6694, 6707, 6708, 7408).

[95] *See* AJCA § 815 (codified at I.R.C. §§ 6111, 6112).

[96] In general, a tax statement is "any statement . . ... oral or written, that relates to a tax aspect of a transaction that causes the transaction to be a reportable transaction." IRS, INSTRUCTIONS FOR IRS FORM 8918, at 1 (rev. Nov. 2021).

income above a certain threshold in respect of that transaction.[97] The definition of material advisors is substantially broader than the organizer definition under the tax shelter registration rules and could include lawyers, brokers, accountants and other advisors that were not previously required to register with the IRS under the tax shelter registration rules.[98] Furthermore, the AJCA repealed the tax shelter registration rules, thereby bringing all disclosure obligations under one regime.[99] The AJCA also increased the penalties for failure to comply with the rules.[100]

Thus, under the current U.S. reportable transactions regime, all taxpayers who have participated in a reportable transaction and all material advisors with respect to that transaction must concurrently disclose the transaction on forms specified by the IRS for this purpose.[101] Parallel reporting requirements were intended to ensure that no tax shelter abusers avoided IRS detection.[102] Material advisors must also prepare and maintain for seven years a client list for every class of reportable transactions.[103] Material advisors must provide the assigned reportable transaction number to the relevant taxpayers so that it can be reported in their respective tax returns.[104]

The reportable transaction disclosure regime in the United States has been credited for playing a critical role in the government's crackdown on corporate tax shelters and various tax avoidance practices.[105] This has led one lawyer to exclaim,

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[97] AJCA § 815 (codified at I.R.C. §§ 6111, 6112).

[98] *See* Bruce L. Ashton & Robin C. Gilden, *New Tax Shelter Rules Under AJCA: Advisors Beware,* ASPPA ASAP, Nov. 23, 2004, at 1 ("Lawyers and CPAs would almost certainly be material advisors, as would brokers and investment advisors."). *See also supra* text accompanying note 53. The role of tax advisors in tax compliance had been previously studied in Steven Klepper & Daniel Nagin, *The Role of Tax Preparers in Tax Compliance*, 22 POL'Y SCI. 167 (1989).

[99] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-493, ABUSIVE TAX AVOIDANCE TRANSACTIONS: IRS NEEDS BETTER DATA TO INFORM DECISIONS ABOUT TRANSACTIONS, (2011).

[100] *See* I.R.C. §§ 301.6707, 301.6707A.

[101] *See* Treas. Reg. §§ 1.6011-4, 301.6111-3. The relevant forms are Form 8886 for taxpayers, and Form 8918 for material advisors. For taxpayers, the disclosure must be made by attaching Form 8886 to the tax returns, for each taxable year for which the taxpayer participates in the reportable transaction, whilst for material advisors, the disclosure must be made by filing Form 8918 by the "last day of the month that follows the end of the calendar quarter in which the advisor became a material advisor with respect to the transaction." *See* Treas. Reg. §§ 1.6011-4(e), 301.6111-3(e). For the disclosure to be considered complete, the information provided on the form must: (i) identify and describe the transaction in sufficient detail for the IRS to be able to understand the tax structure of the transaction; (ii) identify all parties involved in the transaction (for taxpayers) or any material advisor(s) whom the material advisor knows or has reason to know acted as a material advisor with respect to the transaction (for material advisors); (iii) describe the expected tax treatment and all potential tax benefits expected to result from the transaction; and (iv) describe any tax result protection with respect to the transaction.

[102] *See* U.S. DEP'T TREASURY, THE TREASURY DEPARTMENT'S ENFORCEMENT PROPOSALS FOR ABUSIVE TAX AVOIDANCE TRANSACTIONS 2 (2002).

[103] *See* Treas. Reg. § 301.6112-1. In this list, the following details for each client must be retained: (i) the date the reportable transaction was entered into; (ii) the amount invested; (iii) the tax treatment intended or expected to be derived from participation in the transaction; and (iv) the identity of other material advisors to the transaction. Copies of any tax analyses or opinions provided to one or more clients or prospective clients must also be attached to the client list.

[104] *See* Treas. Reg. § 301.6111-3(d).

[105] *See* Joshua D. Blank, *United States National Report on Mandatory Disclosure Rules,*

"*the tax shelter war is over. The government won*."[106] In particular, after the introduction of these rules, the United States saw fewer marketed tax products while companies dedicated measurably more time to tax reporting instead of tax planning.[107] The government was also able to reclaim some lost revenue.[108] However, while the reportable transaction disclosure regime has helped the IRS to detect and deter various tax avoidance practices, it has not fully eliminated corporate tax avoidance and aggressive tax planning, especially by multinational enterprises (MNEs) engaged in cross-border transactions, as further discussed in the next part.[109]

B. United Kingdom

In 2004, the United Kingdom adopted reporting requirements similar to the U.S. reportable transactions regime. The Disclosure of Tax Avoidance Schemes (DOTAS) regime[110] was adopted to "introduce transparency in relation to the

MANDATORY DISCLOSURE RULES (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3890935 [https://perma.cc/TQ8F-99RF] ("Government officials and academics in the US have widely praised the reportable transaction disclosure regime as an effective response to the tax shelter problem.").

[106] Pamela F. Olson, *Now That You've Caught the Bus, What Are You Going to Do with It - Observations from the Frontlines, the Sidelines, and between the Lines, So to Speak*, 60 TAX LAW. 567, 567-81 (2007).

[107] *See id.* at 567-68 ("[T]ax departments were spending 23% of their time on tax financial reporting requirements in 2006, compared to 9% in 2004. During the same period, the time spent on tax planning decreased from 28% to 20%.").

[108] For example, in 2004 the IRS allowed taxpayers who had participated in so-called "Son of Boss" tax shelters, one of the listed transactions, to voluntarily come forward and close out their tax disputes by paying the owed tax and certain penalties. Over one-thousand taxpayers responded and the IRS was able to obtain over $3.2 billion in unpaid taxes and penalties. For more, *see id.* at 569; I.R.S. Notice 2000-44, 2000-2 C.B. 255; I.R.S. Announcement 2004-46, I.R.B. 2004-21.

[109] There were some indications that schemes moved overseas in order to avoid U.S. reporting. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 99 ("One theme that emerged from GAO's discussions with these experts is that [abusive tax avoidance transactions] marketed by promoters to corporations and wealthy individuals have declined in recent years, although the experts had different views on the extent of the decline. They also said that [abusive tax avoidance transactions] have become more international in nature."). *See also infra* Part III. For further discussion on the current state of the U.S. reportable transactions regime and some proposals for reform, *see* Joshua D. Blank & Ari Glogower, *The Trouble with Targeting Tax Shelters*, 74 ADMIN. L. REV. (forthcoming 2022).

[110] As contained in Part 7 of the Finance Act 2004, and its implementing regulations: (i) The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006, SI 2006/1543 (as amended by SI 2009/2033, SI 2010/2834, SI 2013/2595, SI 2016/99, and SI 2017/1171) [hereinafter Arrangement Regulations]; (ii) The Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004, SI 2004/1865 (as amended by SI 2004/2613 and SI 2015/945) [hereinafter Promoter Regulations]; (iii) The Tax Avoidance Schemes (Information) Regulations 2012, SI 2012/1836 (as amended by SI 2013/2592, SI 2015/948, and SI 2017/1171) [hereinafter Information Regulations]; and (iv) The Finance Act 2014 (High-Risk Promoters Prescribed Information) Regulations 2015, SI 2015/549. *Also compare* Taxes Management Act 1970, c. 9 § 98C (UK), which sets out the penalties for persons who fail to provide the information required by Part 7, with the level of penalties set out in The Tax Avoidance Schemes (Penalty)

marketing and use of tax avoidance schemes" and close down such schemes more quickly.[111] The DOTAS regime was preferred over other means of obtaining enhanced information, such as establishing a pre-transaction ruling mechanism or increasing the disclosure requirements in tax returns because it would provide real-time information and easier identification of the schemes by the tax authority.[112]

Under the DOTAS regime, promoters[113] of "notifiable arrangements or proposals" must disclose specified details of the schemes to HMRC within the stated time period, with taxpayers only residually subject to the disclosure obligation where there is no promoter in respect of the arrangement, where the promoter is resident outside of the United Kingdom and does not make a disclosure, or where the promoter is prevented by legal professional privilege (LPP) from making a disclosure.[114]

An arrangement or proposal is notifiable if three conditions are met. The first condition is that the arrangement will or might be expected to enable a person to obtain a UK tax advantage.[115] The second condition is that obtaining that advantage is or might be expected to be one of the main benefits of the arrangement.[116] The third condition is that the arrangement bears one or more of the hallmarks applicable to the type of scheme in question.[117] Similar to the U.S. rules, the DOTAS regime contains confidentiality[118] and loss-scheme hallmarks.[119] However, the hallmarks in the U.S. and UK regimes are not identical. For example, in the UK these hallmarks employ an "informed observer test" under which a hypothetical informed observer must determine whether a scheme is primarily designed to procure tax advantages through losses.[120] In addition to the confidentiality and loss-scheme hallmarks, the DOTAS regime also contains

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Regulations 2007, SI 2007/3104 (as amended by SI 2010/2743), *and* HM REVENUE & CUSTOMS, *Disclosure of Tax Avoidance Schemes: Guidance*, GOV.UK, https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes [https://perma.cc/ 2WND-A4D2] (Feb. 1, 2022).

[111] *See* DEPARTMENT OF INLAND REVENUE, REGULATORY IMPACT ASSESSMENT: TACKLING TAX AVOIDANCE – DISCLOSURE REQUIREMENTS, 2004, at 1-2 (UK).

[112] *See id.*

[113] A "promoter" is defined as any person, who, in the course of a business involving the provision of services relating to tax or a business carried on by a bank or securities house, (a) is to any extent responsible for the design of a scheme (unless he/she passes one of the "benign," "non-advisor" or "ignorance" tests set out in Reg. 4 of the Promoter Regulations); (b) organizes or manages the implementation of a scheme; (c) makes a firm approach to another person with a view to making a scheme available for implementation by that person or others; or (d) makes a scheme available for implementation by others. HM REVENUE & CUSTOMS, *supra* note 110. *See also* Finance Act of 2004 § 307.

[114] Finance Act of 2004 §§ 309-10. There are also special rules when there is more than one promoter. *See* HM REVENUE & CUSTOMS, *supra* note 110; Finance Act of 2004 § 308.

[115] *See* Finance Act of 2004 § 306.

[116] *See id.*

[117] *See id.*

[118] *See* HM REVENUE & CUSTOMS, *supra* note 110. *See also* SI 2006/1543, Reg. 6 (as amended by SI 2013/2595).

[119] *See* HM REVENUE & CUSTOMS, *supra* note 110, § 7.7; SI 2006/1543, Reg. 12. The hallmark was later amended by SI 2016/99.

[120] SI 2006/1543, Reg. 12, *supra* note 110. The informed observer test is also applied to the standardized tax products hallmark. SI 2006/1543, Reg. 10 (as amended by SI 2016/99).

several other hallmarks including those relating to the payment of a premium fee to a promoter,[121] the sale of a standardized tax product,[122] leasing arrangements,[123] employment income,[124] and when a tax advantage is from the inclusion of a financial product in an arrangement.[125]

A reportable arrangement must be reported by the promoter within five business days beginning with the day after the promoter makes the scheme available for implementation or becomes aware of a transaction forming part of the scheme, whichever is earlier.[126] Where the disclosure obligation falls upon the taxpayer, disclosure must be made within 30 days of the taxpayer entering into the first transaction that is part of the reportable scheme.[127] The DOTAS regime also imposes similar client list and scheme reference number (SRN) requirements found in the U.S. rules, but with additional obligations on promoters to provide the lists to HMRC on a quarterly basis, and on clients to pass on the SRN to any other person who may reasonably be expected to benefit from the scheme.[128]

In addition to the differences already mentioned, the UK regime differs from the U.S. regime in that it takes a *promoter-based* approach while the U.S. regime takes a *transaction-based* approach.[129] In a promoter-based approach, the language of the law focuses more on the role played by the promoter in the transaction.[130] In contrast, a transaction-based approach focuses more closely on identifying problematic transactions than problematic promoters.[131] These differences manifest themselves in who has an obligation to report and what types of hallmarks are relied upon in the law.[132] In a transaction-based approach, reporting obligations may fall on both promoters and taxpayers, whereas in a promoter-based approach the obligation mainly falls on the promoter.[133] Moreover,

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[121] *See* HM REVENUE & CUSTOMS, *supra* note 110, § 7.5; SI 2006/1543.

[122] *See* HM REVENUE & CUSTOMS, *supra* note 110, § 7.6; SI 2006/1543, Reg. 10 (as amended by SI 20162016/99).

[123] *See* HM REVENUE & CUSTOMS, *supra* note 110, § 7.8; SI 2006/1543, Reg. 13-17.

[124] *See* HM REVENUE & CUSTOMS, *supra* note 110, § 7.9; SI 2006/1543, Reg. 18.

[125] *See* HM REVENUE & CUSTOMS, *supra* note 110, § 7.10; SI 2006/1543, Reg. 19 (as amended by SI 2016/99). *See also* Arrangement Regulations (more details on all of the UK hallmarks).

[126] *See* Information Regulations; HM REVENUE & CUSTOMS, *supra* note 110.

[127] See Finance Act of 2004 §§ 308, 310; Information Regulations, Reg. 5. Similar to the U.S. rules, under the DOTAS regime, the disclosure must include "sufficient information as might reasonably be expected to enable an officer of the HMRC to comprehend the manner in which the proposal or arrangement is intended to operate," including (i) the promoter's and co-promoters' (for notification by promoter), or the scheme user's and the promoter's (for notification by scheme user) name and address; (ii) details of the provision by virtue of which the arrangements are notifiable; (iii) a summary of the arrangements and the name (if any) by which they are known; (iv) information explaining each element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained under the arrangements arises; and (v) the statutory provisions, relating to any of the prescribed taxes, on which the tax advantage is based. *See* Information Regulations, Reg. 4.

[128] *See* Finance Act of 2004 §§ 312, 313, 316; Information Regulations, Reg. 6, 8B.

[129] *See* Action 12, *supra* note 22, at 32.

[130] *See id.*

[131] *See id.*

[132] *See id.*

[133] This is reflected in the differences between the U.S. and UK regimes. *See supra* notes 95, 113 and the accompanying text.

a promoter-based regime uses generic hallmarks that focus on whether there is an intended tax benefit.[134] A transaction-based approach, on the other hand, would instead rely more on specific hallmarks.[135] Thus, the UK regime, following a promoter-based approach, lists generic hallmarks which indicate reportability by the promoter only if the main outcome of the arrangements is a tax benefit. Despite these differences, there does not appear to be a significant difference in the efficacy of each approach.[136]

C. Other Countries

Similar reporting regimes were adopted in other countries, including South Africa in 2005, Portugal in 2008, Ireland in 2011, and Canada in 2013.[137] These countries adopted reporting regimes to better detect and address tax avoidance practices.[138] Various sources indicate that earlier regimes influenced the adoption of these new regimes.[139] Additionally, during this period, several other countries

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[134] *See* Action 12, *supra* note 22, at 32.

[135] *See id.* It should be noted that the United States, despite employing a transaction-based approach, does use generic hallmarks. Thus, the differences between a transaction-based approach and a promoter-based approach exist on a spectrum.

[136] The OECD has noted that both promoter-based approaches and transaction-based approaches are generally equally effective. *See* Action 12, *supra* note 22, at 32. *See also* ANTONY SEELY, HOUSE OF COMMONS, TAX AVOIDANCE: A GENERAL ANTI-AVOIDANCE RULE – BACKGROUND HISTORY (1997-2010), Briefing Paper No. 2956 (2020).

[137] *See* the Revenue Laws Amendment Act 45 of 2003, which introduced MDRs in a new § 76A of the Income Tax Act 58 of 1962 (South African ITA) that came into effect in 2005 (the MDRs were subsequently transferred to §§ 80M-80T of the South African ITA in 2008, and to §§ 34 to 39 of the TAA in 2012) (for South Africa); the Decreto-Lei n.º 29/2008 de 25 de Fevereiro [Decree-Law no. 29/2008], https://dre.pt/dre/detalhe/decreto-lei/29-2008-247717, which came into effect in May 2008 (for Portugal); Chapter 3 of Part 33 of the Taxes Consolidation Act 1997 (Act No. 39/1997), https://www.irishstatutebook.ie/eli/1997/act/39/enacted/en/html (comprising §§ 817D-817O), which came into effect in January 2011 (for Ireland); Income Tax Act, R.S.C. 1985, c C-1 § 237.3, which came into effect in June 2013 (for Canada).

[138] For South Africa, *see* National Treasury, *Explanatory Memorandum on the Revenue Laws Amendment Bill*, at 75 (2003) ("It is proposed that special reporting rules for transactions that contain indicators of potential tax avoidance be introduced. The purpose of this reporting system is to uncover 'innovative' corporate tax products that effectively cost the tax system hundreds of millions (and perhaps even billions) of Rand annually."). For Ireland, *see* Committee Stage Debates on the Finance Bill in the Houses of the Oireachtas § 141 (Feb. 24, 2010) ("The primary purpose of the new disclosure regime is to constitute what can be regarded as an effective early warning system by obtaining information on aggressive tax avoidance schemes at an early stage before a loss of taxation becomes apparent. The Government can decide, if appropriate, to close such schemes down before they can do significant damage to tax revenues. Mandatory disclosure will provide the Revenue Commissioners with an important instrument to tackle tax avoidance schemes that are leading to a significant loss of taxation revenue"). For Portugal, *see* the introduction to Decree-Law 29/2008. For Canada, *see* Dep't of Finance Canada, *Background and Description of the Proposals* (May 7, 2010); Dep't of Finance Canada, *Explanatory Notes in Respect of Legislative Proposals Relating to the Income Tax Act and Related Acts and Regulations*, at 208 (Sept. 2010); Dep't of Finance Canada, *Explanatory Notes Relating to the Income Tax Act, the Excise Tax Act and Related Legislation*, at 446 (Oct. 2012).

[139] In South Africa, the guidance issued by the government in 2005 describes at the beginning

adopted reportable transaction disclosure regimes that apply solely to the taxpayers and not to promoters or other intermediaries.[140]

Despite the common origins and aims of the reporting regimes adopted between 2005 and 2013 in South Africa, Portugal, Ireland, and Canada, the substance of the rules differs, primarily on three fronts: the persons subject to the disclosure obligations, the transactions required to be disclosed, and the time when disclosure must be made. Below we outline the key features of the MDRs in each of these countries.

South Africa adopted its "reportable arrangements" regime in 2005.[141] Under this regime, the primary disclosure obligation is on the promoter of the arrangement.[142] If there is no resident promoter, then other "participants" of the arrangement are subject to the disclosure obligations.[143] Transactions that are regarded as reportable include listed arrangements and arrangements expected to

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of the guide the disclosure requirements in the United Kingdom, the United States, and Canada. *See* South African Revenue Service, *Reportable Arrangement Guide* 2 (Mar. 1, 2005). For Ireland, see Committee Stage Debates on the Finance Bill in the Houses of the Oireachtas § 141 (Feb. 24, 2010) ("Other jurisdictions such as the United Kingdom, South Africa, New Zealand, Australia, and the United States all have running through their legislation a common purpose, namely, the need to know as early as possible the details of schemes they may not consider acceptable. Timely information is crucial to combating tax avoidance. It is only where schemes are known that they can be challenged and, where appropriate, existing legislation amended or new legislation introduced to deal with them. The earlier in the life cycle of a scheme that the tax authorities learn about it, the more effectively it can be closed down before it inflicts significant fiscal damage."). In Portugal, the introduction to Decree-Law 29/2008 cites the disclosure regimes of the United States, Canada, and United Kingdom as influences. In Canada, several publications mentioned the U.S. and UK regimes as a model for Canada's regime. *See* Gilles N. Larin & Robert Duong, *Effective Responses to Aggressive Tax Planning What Canada Can Learn from Other Jurisdictions Instalment 4: United Kingdom - Disclosure Rules,* RSCH. CHAIR TAX'N & PUB. FIN. (July 2009); Gilles Larin*, Some Thoughts on Disclosure Rules in Canada: A Peek into the Future*, 61 CAN. TAX J. 209 (2013).

[140] For example, Israel adopted in 2007 a reporting requirement for taxpayers participating in certain reportable transactions. *See* Income Tax Regulations (Reportable Tax Planning) 5767-2006; VAT Regulations (Reportable Tax Planning) 5767-2006. Australia introduced in 2011 a Reportable Tax Position regime which requires corporate taxpayers to report certain tax position. *See* Michael Walpole & David Salter, *Regulation of Tax Agents in Australia*, 12 eJTR 335, 355-56 (2014). As these regimes do not impose reporting obligations on intermediaries, they are outside the scope of this Article.

[141] South Africa initially imposed the disclosure obligation on corporate and trust taxpayers only, and only in respect of listed transactions (essentially, those involving hybrid instruments), and transactions that provide for a variation of interest, fees, etc. if the actual tax benefits differed from the anticipated tax benefits. However, the number of disclosures proved disappointing. It was noted that taxpayers "raised technical points to avoid reporting or restructured their transactions to avoid the triggers for reporting." The MDRs were therefore substantially amended, to impose the primary disclosure obligation on promoters, and to widen the scope of the arrangements subject to the reporting requirement, with a catch-all "hallmark" linked to the GAAR. *See* SARS, *Explanatory Memorandum on the Revenue Laws Amendment Bill 2006*, at 61-66 (2006). *See also* SARS, *Media Release – New Reportable Arrangements Legislation Takes Effect* (Apr. 9, 2008).

[142] "Promoter" is defined under TAA § 34 as "[the person] principally responsible for organising, designing, selling, financing or managing the… arrangement."

[143] TAA § 37. *See* TAA § 34 which states that a "'participant', in relation to an 'arrangement', means— (a) a 'promoter'; or (b) a company or trust which directly or indirectly derives or assumes that it derives a 'tax benefit' or 'financial benefit' by virtue of an 'arrangement.'"

give rise to a tax benefit if they have certain hallmarks.[144] A reportable transaction must be disclosed within 45 business days after an amount is first received, paid or incurred by a participant.[145]

Portugal adopted its reporting regime for abusive tax planning arrangements in 2008. Under this regime, the primary disclosure requirement is on promoters of the scheme, and scheme users are only subject to the disclosure obligation if there is no resident promoter.[146] Transactions that must be reported include those aimed at obtaining, solely or as its main purpose, a tax advantage[147] by a taxable person and that have certain hallmarks.[148] These schemes must be disclosed within 20 days following the end of the month in which the scheme was made available to clients or in which the scheme was implemented.[149]

Ireland adopted its mandatory disclosure regime in 2011.[150] Under this regime, the primary disclosure obligation is on the promoters of the transaction.[151] Transactions that must be reported include those which fall within a set of specified categories, those that are expected to enable a tax advantage, and those for which one of the main benefits is expected to be a tax advantage.[152] The disclosure must be made within five business days.[153]

Canada adopted its reportable transaction disclosure regime in 2013.[154] Under this regime, there are parallel disclosure obligations on every beneficiary, scheme user, and advisor or promoter entitled to a fee in respect of the transaction.[155] Transactions that must be disclosed include those that are undertaken to obtain a tax benefit[156] and bear at least two of three hallmarks.[157] Disclosures must be made "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."[158]

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[144] *See* TAA § 35 for the specified hallmarks.

[145] *See* TAA § 37(4).

[146] *See* Decreto-Lei n.º 29/2008 de 25 de Fevereiro [Decree-Law no. 29/2008 of 25 February], arts. 8-10, https://dre.pt/dre/detalhe/decreto-lei/29-2008-247717.

[147] *See id.* art. 3.

[148] *See id.* art. 4 for the specified hallmarks.

[149] *See id.* art. 7.

[150] *See* Chapter 3 of Part 33 of the Taxes Consolidation Act 1997 (TCA) (comprising §§ 817D to 817O), which came into effect in January 2011. Ireland's MDRs were modeled on, and are thus substantially similar to the UK DOTAS regime, although additional triggers for reporting can be found in the Irish MDRs.

[151] Scheme users are subject to the disclosure obligation if there is no resident promoter, the promoter is outside of the state or the promoter asserts that LPP prevents the disclosure from being made. *See* TCA §§ 817E-817H.

[152] *See* TCA § 817D. *See also Mandatory Disclosure of Certain Transactions Regulations 2011,* SI No. 7 (2011), as amended by *The Mandatory Disclosure of Certain Transactions (Amendment) Regulations 2015*, SI No. 28 (2015).

[153] *See* TCA §§ 817E.

[154] *See* Income Tax Act, R.S.C. 1985, c C-1 § 237.3, which came into effect in June 2013.

[155] *See id.* § 237.3(2).

[156] *See id.* § 237.3.

[157] *See id.* § 237.3(1) for the hallmarks.

[158] *Id.* § 237.3(5).

III. THIRD GENERATION: 2015-PRESENT

Following their demonstrated success across multiple jurisdictions in the 2000s and early 2010s, MDRs have begun proliferating globally at a much-accelerated pace since 2015. This is primarily due to the work of the OECD and the EU. While their diffusion had once proceeded gradually on a country-by-country basis, MDRs are now being adopted simultaneously across different jurisdictions. The new MDRs, and in particular DAC 6 and CRS MDRs, are substantially different from their predecessors. For example, DAC 6 adopts much broader reporting requirements, expands the reportability of cross-border hallmarks, and imposes significant reporting obligations on a wide set of intermediaries.

A. DAC 6

No jurisdiction has adopted MDRs as expansively as the EU Member States. In 2018, the EU adopted Council Directive 2018/822 (DAC 6).[159] DAC 6 requires all EU Member States to implement domestic MDRs for cross-border transactions based on certain mandatory provisions adopted by the EU.[160] At present, all 27 Member States have transposed DAC 6 into their national laws.[161]

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[159] *See* Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements 2018 O.J. (L 139). *See also* European Commission, *Questions and Answers on new tax transparency rules for intermediaries* (June 21, 2017); European Commission, Directorate General for Taxation and Customs Union, *Summary Report Responses received on disincentives for advisors and intermediaries for potentially aggressive tax planning schemes* (June 2017), which provides important information on pre-DAC 6 perspectives on MDRs from various stakeholders in the EU including trade/business associations, national/regional parliaments, law firms, tax consultancies, financial institutions, academic institutions, private citizens, NGOs, and others. Among those surveyed 69% believed that MDRs for intermediaries would change aggressive tax planning schemes and 44% believed that there was a need for MDRs compared to 23% who believed there was no need. Among the NGOs surveyed 93% believed there was a need for MDRs while only 17% of tax consultancies and advisors shared that opinion.

[160] *See* DAC 6, *supra* note 9, art. 2. As a Directive, DAC 6 requires Member States to take necessary measures to implement its mandatory provisions by Dec. 31, 2019, and to apply their implementing provisions starting July 1, 2020.

[161] For detailed information on the status of each Member State's individual DAC 6 regime, *see Mandatory Disclosure Requirements – Updates*, KPMG (June 4, 2021). *See also* Anna Vilke & Gunta Linde, *Latvia – DAC 6 Domestic Implementation*, BAKER TILLY, https://www.bakertilly.global/media/7978/latvia.pdf [https://perma.cc/ 64QE-CC92] (for Latvia); *Lithuania Publishes Law to Implement EU Directive on Reportable Cross-Border Arrangements*, Orbitax (Aug. 27, 2019), https://www.orbitax.com/news/archive.php/ Lithuania-Publishes-Law-to-Imp-3950027 [https://perma.cc/7LCG-GZV7] (for Lithuania); *Spain: Transposition of EU directive (DAC 6) completed*, KPMG (May 5, 2021), https://home.kpmg/us/en/home/insights/2021/05/tnf-spain-transposition-eu-directive-dac6-completed.html [https://perma.cc/N6LV-FEYN] (for Spain); Andra Casu & Alexandra Ovedenie, *Mandatory Disclosure Regime - MDR*, 2019 TAX MAG. 190 (2019) (for Romania); Baker McKenzie Luxembourg, Diego Duarte de Oliveira & Olivier dal Farra, *Mandatory disclosure rules (DAC6): A look at private equity investment in Luxembourg*, INT'L TAX REV. (2020) (for Luxembourg); Flavia Vespasiani & Bognandi Stefano, *DAC 6 and Hallmarks Addressing TP in Italy*, INT'L TAX REV. (, 2021) (for Italy). Most Member States have closely aligned their tax policy to DAC 6 (i.e., cross-border arrangement reporting and obligatory

DAC 6 is significant since it not only adopts the best practices recommended by the OECD but goes further.[162] Given that the EU often sets an example for other countries to follow and that its rules apply to 27 countries, DAC 6's impact could be far-reaching.

DAC 6 builds upon BEPS Action 12.[163] The OECD's BEPS project aimed to address weaknesses in the international tax system.[164] Of the 15 action reports, published in October 2015, Action 12 called on countries to adopt and implement MDRs.[165] Action 12 includes a comprehensive set of recommendations for the design and implementation of MDRs.[166] While most MDRs at the time were

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intermediary reporting). However, Poland has extended its regime to cover domestic arrangements in addition to cross-border arrangements. This is also true in Portugal and Ireland where the new DAC 6 rules have built upon existing MDRs.

[162] For a discussion of the components of DAC 6 while it was still in development, *see* Franklin Cachia, *Tax Transparency for Intermediaries: The Mandatory Disclosure Rules and Its EU Impact*, 27 EC TAX REV. 206 (2018). *See also* Dimitar Hristov & Anna Zeitlinger, *The Impact of the Proposed EU Directive on Tax Intermediaries on the Austrian Foundation as Tax Planning Tool,* 24 TRUSTS & TRUSTEES 526 (2018) for a discussion on the projected impact of DAC 6 on Austrian intermediaries.

[163] *See* Carole Hein, Eric Centi & Julien Lamotte, *DAC 6: One Directive, Several Applications,* INT'L TAX REV. (2020) ("The European Union (EU) Directive on the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (commonly known as DAC6) comes from the BEPS initiative, notably from the BEPS Action 12 report on the mandatory disclosure rules (MDR).").

[164] For further background about the BEPS project, see OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, EXPLANATORY STATEMENT: 2015 FINAL REPORTS, at 4 (2015), https://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf [https://perma. cc/X5T7-5TDS]. For extensive literature on the BEPS project, *see, e.g.*, Reuven S. Avi-Yonah & Haiyan Xu, *Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight*, 6 HARV. BUS. L. REV. 185 (2016); Rifat Azam, *Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS*, 50 SUFFOLK U. L. REV. 517 (2017); Yariv Brauner, *Treaties in the Aftermath of BEPS*, 41 BROOK. J. INT'L L. 973 (2016); Irene Burgers & Irma Mosquera, *Corporate Taxation and BEPS: A Fair Slice for Developing Countries?*, 10 ERASMUS L. REV. 29 (2017); Allison Christians, *BEPS and the New International Tax Order*, 2016 BYU L. REV. 1603 (2016); Arthur J. Cockfield, *Shaping International Tax Law and Policy in Challenging Times*, 54 STAN. J. INT'L L. 223 (2018); Mindy Herzfeld, *The Case Against BEPS: Lessons for Tax Coordination*, 21 FLA. TAX REV. 1 (2017); WU INST. FOR AUSTRIAN & INT'L TAX L., IMPLEMENTING KEY BEPS ACTIONS: WHERE DO WE STAND? (Michael Lang et al. eds., 2019).

[165] Note that prior to the BEPS project in 2013-2015, the OECD had already noted the importance of timely, targeted, and comprehensive information to counter aggressive tax planning and the existence of MDRs in certain OECD countries in its report, TACKLING AGGRESSIVE TAX PLANNING THROUGH IMPROVED TRANSPARENCY AND DISCLOSURE – REPORT ON DISCLOSURE INITIATIVES (Feb. 2011). However, it was not until the BEPS initiative that the OECD proposed a set of comprehensive measures to tackle these issues. For further discussion on aggressive tax planning and harmful tax competition in the context of BEPS and various actions taken by the European Union, *see* Ana Paula Dourado, *Aggressive Tax Planning and Harmful Tax Competition, in* RESEARCH HANDBOOK ON EUROPEAN UNION TAXATION LAW 390 (Christiana HJI Panayi, Werner Haslehner & Edoardo Traversa eds., 2020). *See also* Tatjana Svažič, *Anti-BEPS Measures and Their Impact on Business Performance of Multinational Enterprises*, 65 NAŠE GOSPODARSTVO/ OUR ECON. 99 (2019) for an explanation and prediction of the consequences of BEPS (including Action 12) on the tax and profits of MNEs.

[166] *See* Action 12, *supra* note 22. The recommendations are largely uncontroversial: imposing a parallel or primary disclosure obligation on promoters and taxpayers; establishing a mechanism to

focused on domestic transactions, the Action 12 recommendations specifically called for a comprehensive set of cross-border hallmarks and a system for the exchange of information.[167] At first, Action 12 had little impact on the global tax environment because it was not included in the BEPS project's minimum standards; it is considered as non-binding "soft law."[168] This changed in 2018 when the EU adopted DAC 6. Though DAC 6 incorporates many of the Action 12 recommendations and adopts the same basic structure as other MDRs, it is more extensive in scope in three significant respects: the persons subject to the reporting obligations, the transactions subject to reporting, and the information exchange requirements.

First, regarding who needs to report, the primary disclosure obligation under DAC 6 rests not only on promoters but also on all intermediaries of the arrangement. Intermediaries under DAC 6 means both promoters and "any person that . . . 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."[169] Save for a nexus requirement, the definition is not subject to any qualification, such as a materiality threshold.[170] Any service providers, including lawyers and accountants, who provide *any* "aid, assistance or advice" on the design, marketing or

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track disclosures and to link disclosures to scheme users; linking the timing of disclosure to when the scheme is first made available for implementation or when the scheme is first implemented; introducing penalties to ensure compliance; and having a mix of generic and specific hallmarks to target both known schemes and general areas of concern. Recommended generic hallmarks include the following: confidentiality, premium fee, contractual protection, and standardized tax product hallmarks. While Action 12 recognizes that different combinations of hallmarks may be suitable for different countries, it does provide a list of specific hallmarks including those for loss schemes (inspired by the MDRs in the United States, the United Kingdom, Canada, Ireland, and Portugal), leasing arrangements (inspired by the United Kingdom), employment schemes (inspired by Ireland), converting income schemes (inspired by Ireland and Portugal), schemes with entities in low tax jurisdictions (inspired by Portugal), arrangements involving hybrid instruments (inspired by South Africa), transactions with significant book-tax differences (inspired by the United States), listed transactions (inspired by the United States), and transactions of interest (inspired by the United States).

[167] Some of the recommended cross-border hallmarks include the following: multiple claims of deductions for depreciation or amortization in respect of the same asset; multiple claims of relief from double taxation in respect of the same item of income; the making of deductible cross-border payments to associated enterprises that are not resident for tax purposes in any jurisdiction or that are resident in a jurisdiction that does not impose income tax; transfers of assets where there is a material difference in the amount being treated as payable, in consideration for the assets involved. *See* Action 12, *supra* note 22, at 68-69.

[168] OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT: 2015 FINAL REPORTS: FREQUENTLY ASKED QUESTIONS, at 5 (2015).

[169] DAC 6, *supra* note 9, art. 1(1). The focus of Action 12 is on promoters and taxpayers, not other intermediaries and especially not those without any material connection to the tax aspects of the transaction. *See* Action 12, *supra* note 22, at 33-36, 74.

[170] For intermediaries to be subject to the reporting obligation, they must either be tax-resident, incorporated or registered with a professional association related to legal, tax or consultation services, or have a permanent establishment (PE), in a Member State. *See* DAC 6, *supra* note 9, art. 1(1).

implementation of a reportable scheme would therefore be subject to the primary reporting obligations.[171] This is substantially different than the U.S. regime which only applies to material advisors who give tax statements to their clients.[172] Under DAC 6 there is no such requirement for the intermediary to give any tax-related statements or services. Thus, DAC 6 applies to a much larger set of intermediaries than the U.S. regime.

Some have asserted that this broad definition might jeopardize the functioning of the overall tax system, promote harmful over-disclosure, and possibly infringe on the rights of taxpayers.[173] Others have worried about the effects of DAC 6 on legal professional privilege.[174] Given these concerns, the constitutional courts of several EU Member States are currently evaluating the consistency of DAC 6 with both EU law and the laws of Member States.[175] Such resistance is unsurprising given that DAC 6, in some sense, represents a reinvention of how tax administrations, taxpayers and intermediaries approach tax policy and transparency in the EU.[176]

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[171] DAC 6, *supra* note 9, art. 1(2).

[172] *See* Treas. Reg. § 301.6111-3. *See also supra* note 97.

[173] For further discussion on the possible complications associated with DAC 6, *see* Daniel W. Blum & Andreas Langer, *At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 1,* EUR. TAX'N 282 (2019); Daniel W. Blum & Andreas Langer, *At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 2,* EUR. TAX'N 313 (2019); Andrea Ballancin & Francesco Cannas, *The 'DAC 6' and Its Compatibility with Some of the Founding Principles of the European Legal System(s)*, 29 EC TAX REV. 117 (2020); Arthur Bianco, *DAC 6 and the Challenges Arising from Its Disclosure Obligation*, 30 EC TAX REV. 8 (2021); Bart Peeters & Lars Vanneste, *DAC 6: An Additional Common EU Reporting Standard?* 12 WORLD TAX J. (2020); Bernhard Fiedler & Tino Duttiné, *DAC 6: Developing a Common Notification Platform*, *in* LIQUID LEGAL 493 (Kai Jacob, Dierk Schindler & Roger Strathausen eds., 2020); Rohit Reddy Muddasani, "Dual Citizenship and the Directive on Administrative Cooperation (DAC6) of the European Union," Master's thesis, (Norwegian School of Economics, 2021); Danilo Penetrante Ventajar, "Aggressive Measures for Aggressive Schemes: Human Rights Perspectives," Master's thesis, (Lund University, 2018); Nevia Čičin-Šain, *New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?*, 11 WORLD TAX J. 77 (2019). Čičin-Šain, *id*., argues that the new intermediary reporting requirements may infringe on the right of a taxpayer to receive legal advice. Čičin-Šain also argues that the pace of DAC 6's implementation frustrates the right to legal certainty and that when the taxpayer is required to report his/her right to not self-incriminate may be violated. For a discussion on alternatives to DAC 6, *see* Ola Nilsson, "Sweden's implementation of DAC 6: A proportionate measure to prevent tax avoidance and evasion in the form of aggressive tax planning," Master's thesis, (Lund University, 2020).

[174] *See* Bianco, *supra* note 173; Rayssa Gutterres Costa, "Is there a collision between the EU Charter and the obligation to notify that intermediaries with legal professional privilege have under DAC 6?," Master's thesis, (Lund University, 2021); Elke Schwar, "Tipping of Justitia's Scale: The Compatibility of Mandatory Disclosure for Intermediaries with the Right against Self-Incrimination and the Right to Confidentiality," Master's thesis, (Lund University, 2018); Edward-Hector Spiteri, *The Maltese Implementation of DAC-6*, NOVITA FISCALI (June 2021); David Russell & Toby Graham, *The deep state and the assault on confidentiality,* 25 TRUSTS & TRUSTEES 173 (Mar. 2019).

[175] *See* Izabela Andrzejewska-Czernek et al., *How Do You Do It? MDR in Different EU Member States,* 61 EUR. TAX'N 1, 25 (Aug. 30, 2021); Danish Mehboob, *CJEU receives its first DAC6 case from Belgium high court*, INT'L TAX REV. (Feb. 22, 2021).

[176] *See, e.g.*, Tim Clappers & Philip Mac-Lean, *Tax Avoidance in the Spotlight: The EU*

Second, regarding which transactions and arrangements are reportable, DAC 6 contains a substantial number of cross-border hallmarks. DAC 6 contains many of the generic and specific hallmarks commonly found in the MDRs of other jurisdictions.[177] These include hallmarks for confidential arrangements, arrangements with fees contingent on the tax advantage, arrangements with standardized structures, and others.[178] DAC 6 also includes a main benefit test for some, but not all, hallmarks.[179] Importantly, however, DAC 6, following the Action 12 recommendations, incorporates the cross-border hallmarks listed as examples in Action 12.[180] While some of the MDRs predating DAC 6 contained cross-border features, none of them have adopted a regime as comprehensive as the ones in DAC 6.[181] Additionally, DAC 6 introduces categories of hallmarks that are targeted at arrangements that might be used to facilitate *tax evasion* by adopting the CRS MDRs described in the next part.[182] DAC 6 also introduces hallmarks targeted at arrangements that bear transfer pricing risks.[183]

Third, DAC 6 provides for a multilateral information exchange mechanism by requiring tax authorities of Member States to communicate any information

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Mandatory Disclosure Rules and Their Impact on Asset Managers and Private Equity, 21 FINANCE AND CAPITAL MARKETS 1, 9 (June 3, 2019) (discussing the impact of DAC 6 on the private equity industry).

[177] *See* DAC 6, *supra* note 9, Annex IV for a full list. Under DAC 6, only "cross-border arrangements" are reportable. However, the term "cross-border arrangement" is very broadly defined: any arrangement that has one or more participants that is resident in another jurisdiction, that is simultaneously resident for tax purposes in more than one jurisdiction, that carries on business in another jurisdiction through a permanent establishment (PE) situated therein (provided that the arrangement forms part of the business of the PE), or that carries on an activity in another jurisdiction without being resident for tax purposes or without creating a PE in that jurisdiction, and any arrangement that has a possible impact on the AEOI or the identification of beneficial ownership, would be covered. *See* the definition of "cross-border arrangements" in DAC 6, *supra* note 9, art. 1(1).

[178] *See* DAC 6, *supra* note 9, Annex IV.

[179] *See id.*

[180] The cross-border hallmarks in DAC 6 include "1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs: (a) the recipient is not resident for tax purposes in any tax jurisdiction; (b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either: (i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or (ii) is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative; (c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes; (d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes; 2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction. 3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction. 4. There is 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." DAC 6, *supra* note 9, Annex IV.C.

[181] The U.S., UK, South African, and Portuguese MDRs have had some cross-border elements. *See, e.g.*, IRS Notice 2003-22 in which a cross-border transaction entitled Offshore Deferred Compensation Agreements is characterized as a listed transaction. However, many cross-border schemes are unlikely to be caught under these MDRs. *See* Action 12, *supra* note 22, at 68-69.

[182] *See* DAC 6, *supra* note 9, Annex IV.D.

[183] *See* DAC 6, *supra* note 9, Annex IV.E.

obtained under their DAC 6 MDRs to the tax authorities of all other Member States. This is done by way of recording the information in a central repository within one month of the end of the quarter in which the information was filed.[184] The information required to be exchanged includes the taxpayer's personal and contact information, their TIN, the details of the tax transaction, information on the hallmarks involved in the transaction, and other additional information.[185]

Therefore, DAC 6 has greatly expanded what should be reported, who should report, and how tax information should be shared between countries. It is possible that DAC 6 is too broad, and that the cross-border hallmarks, the transfer pricing hallmarks, and the CRS MDRs implemented in DAC 6 are capturing too many legitimate transactions and arrangements. The compliance burden is also likely to be significant,[186] and is complicated by the fact that each Member State has implemented slightly different MDRs to comply with DAC 6.[187] As such, EU tax advisors will need to navigate 27 slightly different MDRs, whereas U.S. tax advisors, for example, only need to understand one regime when working on domestic U.S. tax schemes.[188] Ultimately, MDRs with the scope and reach of DAC 6 have never been tested before, and it remains to be seen whether they effectively detect and deter the arrangements they seek to target. The limited data we currently have on the effects of DAC 6 indicates that DAC 6 is likely deterring tax avoidance but at a high cost.[189]

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[184] *See* DAC 6, *supra* note 9, art. 1.

[185] *See* DAC 6, *supra* note 9, art. 1(2).

[186] For further discussion on the compliance burden of DAC 6, *see* Christian Kaeser, Mark Orlic & Arne Schnitger, *DAC 6 Reporting Requirements Cause Compliance Headaches*, 29 INT'L TAX REV. 22 (2018) (discussing the compliance burdens arising from DAC 6, especially in the years 2018-2020 during which intermediaries and taxpayers faced significant reporting uncertainty as EU Member States worked out national MDRs to implement DAC 6).

[187] For a detailed breakdown of the differences between each EU Member State's implementation of DAC 6, *see* Elisa Casi-Eberhard et al., *One Directive, Several Transpositions: A Cross-Country Evaluation of the National Implementation of DAC6*, 13 WORLD TAX J. 63 (2021) (proposing to reduce the compliance costs of 27 different DAC 6 regimes by creating a unified reporting schema for the whole of the EU as opposed to allowing each country develop its own reporting schema).

[188] For a further breakdown of the differences between U.S. MDRs and DAC 6, *see* Patricia A. Brown et al., *Combating Aggressive Tax Planning through Disclosure: A Comparison of U.S. and EU Rules Applicable to Tax Advisors*, 38 ABA TAX TIMES 10 (2019).

[189] *See* Alexander Edwards et al., *Do Third-Party Cross-Border Tax Transparency Requirements Impact Firm Behavior?* (Rotman School of Management, Working Paper No. 3792342, 2021), https://ssrn.com/abstract=3792342 [https://perma.cc/J7XT-39UE] (documenting empirical evidence showing that DAC 6 has indeed deterred tax avoidance and that firms are now less likely to engage their auditors for tax-related services); Raluca Popa, *DAC 6 Reporting, First Conclusions. What Should Companies Consider Next?*, TAX MAG. 124 (2021) (finding that Romania only received 400 reports of cross-border transactions by Jan. 1, 2021, a number lower than expected). *See also* Andrzejewska-Czernek et al., *supra* note 175, which surveyed tax practitioners in 11 EU Member States for their thoughts on DAC 6 and its recent implementation. The surveyed tax professionals argued that taxpayer obligations under DAC 6 are "disproportionately burdensome," that DAC 6 may violate the nemo tenetur principle and "the principle of equal treatment or the free movement of persons or capital under EU law," that DAC 6 may violate legal professional privilege, and that the reporting requirements of DAC 6 are far too vague.

B. CRS MDRs

For most of their existence, MDRs have been applied mainly as a measure to deter and detect basic forms of *tax avoidance*. However, in 2018 the OECD demonstrated the versatility of MDRs by applying them to CRS avoidance which, in essence, targets potential *tax evasion* by the taxpayers who circumvent CRS reporting.[190]

In general, under CRS, financial institutions (FIs) are required to identify account holders who are foreign tax residents and report their information to the local tax authority.[191] The local tax authority then transfers this information to the tax authority of the account holders' jurisdiction of tax residence.[192] The main purpose of facilitating the automatic exchange of information (AEOI) is to detect and deter tax evasion practices that involve the holding of undisclosed offshore financial assets.[193] While AEOI under CRS is described by the OECD as "the largest exchange of tax information in history,"[194] there are concerns that some tax evaders use loopholes and weaknesses in the CRS regime to circumvent CRS reporting and avoid detection.[195]

The OECD published the CRS MDRs as part of efforts to address these loopholes and weaknesses, following the G7 Finance Ministers' call for the OECD to "discuss possible ways to address arrangements designed to circumvent reporting under [CRS] or aimed at providing beneficial owners with the shelter of non-

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[190] *See* CRS MDRs, *supra* note 9. Tax evasion differs from tax avoidance in that the former typically involves intentionally misreporting or failing to report taxable income, assets or schemes to the authorities. Tax evasion is generally unambiguously illegal. Tax avoidance typically involves the exploitation of loopholes in tax requirements to minimize the tax burden without any falsified or inaccurate information submitted to the authorities. For further discussion, *see* Erich Kirchler et al., *Everyday representations of tax avoidance, tax evasion, and tax flight: Do legal differences matter?*, 24 J. ECON. PSYCHOL. 535 (2003); Paul Merks, *Tax Evasion, Tax Avoidance and Tax Planning*, 34 INTERTAX 272 (2006); Joel Slemrod, *Tax Compliance and Enforcement*, 57 J. ECON. LIT. 904 (2019) (providing a survey of recent empirical literature on tax evasion and tax compliance).

[191] *See* OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS (2014) [hereinafter CRS].

[192] For further background about CRS, *see* OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS 9–10 (2d ed. 2017); *see also* WILLIAM H. BYRNES, LEXISNEXIS GUIDE TO FATCA & CRS COMPLIANCE (2020).

[193] *See* Markus Meinzer, *Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History*, *in* AUTOMATIC EXCHANGE OF INFORMATION AND PROSPECTS OF TURKISH-GERMAN COOPERATION (Leyla ATEŞ & Joachim ENGLISCH ed., 2017).

[194] OECD, *Implementation of tax transparency initiative delivering concrete and impressive results,* June 7, 2019, https://www.oecd.org/newsroom/implementation-of-tax-transparency-initiative-delivering-concrete-and-impressive-results.htm, [https://perma.cc/729N-UKUA].

[195] *See, e.g.,* Peter A. Cotorceanu, *Hiding in Plain Sight: How Non-U.S. Persons Can Legally Avoid Reporting Under Both FATCA and GATCA*, TRUSTS & TRUSTEES 21: 1050–63 (2015); Andres Knobel & Markus Meinzer, "THE END OF BANK SECRECY"? BRIDGING THE GAP TO EFFECTIVE AUTOMATIC INFORMATION EXCHANGE: AN EVALUATION OF OECD'S COMMON REPORTING STANDARD, TAX JUST. NETWORK (2014); Andres Knobel & Frederik Heitmüller, CITIZENSHIP AND RESIDENCY BY INVESTMENT SCHEMES: POTENTIAL TO AVOID THE COMMON REPORTING STANDARD FOR AUTOMATIC EXCHANGE OF INFORMATION, TAX JUST. NETWORK (2018).

transparent structures" as such arrangements frustrate the fight against tax evasion.[196] CRS MDRs are a model set of rules that can be adopted by countries voluntarily. CRS MDRs adopt a disclosure framework similar to that recommended in Action 12 and by the EU Commission report that led to the drafting of DAC 6.[197]

Under CRS MDRs, "CRS avoidance arrangements" and "opaque offshore structures" are required to be reported. A CRS avoidance arrangement is defined as "any arrangement for which it is reasonable to conclude…is designed to circumvent or is marketed as, or has the effect of, circumventing CRS Legislation or exploiting an absence thereof."[198] An opaque offshore structure "means a Passive Offshore Vehicle that is held through an Opaque Structure."[199] These hallmarks specifically identify arrangements which attempt to avoid CRS reporting or the identification of beneficial ownership.

Similar to DAC 6, under CRS MDRs, "intermediaries" of CRS avoidance arrangements and opaque offshore structures are subject to the primary reporting obligation.[200] An intermediary is defined under CRS MDRs as being promoters ("any person responsible for the design or marketing of a CRS Avoidance Arrangement or an Opaque Offshore Structure") and service providers ("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 reasonably be expected to know that the Arrangement or Structure is a CRS Avoidance Arrangement or an Opaque Offshore Structure.")[201] "Relevant Services" include "assistance or advice with respect to the design, marketing,

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[196] *See* G7 Finance Ministers, *G7 Bari Declaration on Fighting Tax Crimes and Other Illicit Financial Flows* (May 13, 2017) at 2, http://www.g7.utoronto.ca/finance/170513-crime.html, [https://perma.cc/7BRW-8PTZ].

[197] *See* EUROPEAN COMMISSION, COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT ACCOMPANYING THE DOCUMENT PROPOSAL FOR A COUNCIL DIRECTIVE AMENDING DIRECTIVE 2011/16/EU AS REGARDS MANDATORY AUTOMATIC EXCHANGE OF INFORMATION IN THE FIELD OF TAXATION IN RELATION TO REPORTABLE CROSS-BORDER ARRANGEMENTS (June 21, 2017), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= celex:52017SC0236, [https://perma.cc/SVY8-YLFP]. Under the CRS MDRs, the disclosure must include details of the arrangement, details of the users and other intermediaries in respect of the arrangement, and the jurisdictions in which the arrangement is made available for implementation, and must be made within 30 days after the intermediary makes the arrangement available for implementation. *See* CRS MDRs, *supra* note 9, Rules 2.2-2.3. Users are only subject to the disclosure requirement where no intermediary is obligated to make full disclosure in the jurisdiction, whether because the arrangement was developed in-house and no external assistance was sought, or because all intermediaries engaged were either not incorporated, managed or resident in the jurisdiction or were prevented from making full disclosure due to legal professional privilege. *See* CRS MDRs, *supra* note 9, Rules 2.1, 2.4, 2.6.

[198] CRS MDRs, *supra* note 9, Rule 1.1.

[199] CRS MDRs, *supra* note 9, Rule 1.2. ("[A] Passive Offshore Vehicle" means a Legal Person or Legal Arrangement that does not carry on a substantive economic activity supported by adequate staff, equipment, assets, and premises in the jurisdiction where it is established or is tax resident . . . .. An Opaque Structure is a Structure for which it is reasonable to conclude that it 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.").

[200] CRS MDRs, *supra* note 9, Rule 2.1.

[201] CRS MDRs, *supra* note 9, Rule 1.3.

implementation or organisation of that Arrangement or Structure."[202] Thus, the reporting requirements under the CRS MDRs capture a broad set of intermediaries, including service providers who do not provide tax statements or tax-related services.

The OECD outlined a system of automatic exchange of information obtained from intermediaries.[203] This system is structured such that jurisdictions which receive disclosures detailing a CRS avoidance arrangement or an opaque offshore structure would automatically share that information with all other relevant jurisdictions that are also signatories to the CRS MDRs.[204] Like the DAC 6 system of automatic exchange, CRS MDRs provide for the exchange of taxpayer contact information, their TINs, the details of the arrangement, and information on which jurisdictions may be relevant parties to the arrangement.[205] This information is to be shared only with the jurisdictions in which the taxpayer is resident for tax purposes.[206] This differs from the DAC 6 approach where the information is made available to all Member States in a central repository.[207] Importantly, if an intermediary has already disclosed an arrangement to one jurisdiction that has also implemented CRS MDRs and its automatic exchange of information framework, then the intermediary is not obligated to disclose again.[208]

Adoption of CRS MDRs is voluntary at this stage. Countries are free to choose whether to adopt CRS MDRs, and if so, how the rules should be drafted and what penalties to impose. Some jurisdictions, such as the United Kingdom, have adopted CRS MDRs.[209] The United Kingdom had initially adopted DAC 6 in January 2020, but following Brexit decided to opt-out of some sections of DAC 6.[210] According to the EU-UK Trade and Cooperation Agreement signed on December 30 2020, the UK is required only to implement the reporting standards agreed by the OECD.[211] As a result, the United Kingdom has chosen to only require the reporting of hallmarks under Category D of DAC 6, which are the CRS MDRs' hallmarks.[212] While the reasoning for this reversal is not entirely clear, it is possibly related to concerns raised by British tax advisors about the complexities of DAC 6 compliance and the United Kingdom's aspiration to be a taxpayer-friendly jurisdiction.[213]

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[202] CRS MDRs, *supra* note 9, Rule 1.4.

[203] *See* OECD, *supra* note 26.

[204] *See id.* at 5.

[205] *See id.* at 9.

[206] *See id.*

[207] *See supra* note 184 and the accompanying text.

[208] *See* CRS MDRs, *supra* note 9, at Rule 2.5(b) and (c).

[209] *See* Danish Mehboob, *UK opts out of DAC6 to follow OECD rules after Brexit*, 32 INT'L TAX REV. 11 (2021).

[210] *See id.*

[211] *See* EU-UK Trade and Cooperation Agreement, art. 383 (2020). The DOTAS rules continue to be in effect.

[212] *See* International Tax Enforcement (Disclosable Arrangements) Regulations 2020 (SI 2020/25, as amended by SI 2020/713 and SI 2020/1649).

[213] *See* Mehboob, *supra* note 209 ("'There will be many UK tax advisors very pleased to see this change, as the complexities of DAC6 were such that there was a fear many UK advisors with

In addition to the United Kingdom, the Crown Dependencies (Jersey, Guernsey, and the Isle of Man) are in the process of implementing the CRS MDRs.[214] Gibraltar and South Africa have also followed the United Kingdom's lead and adopted the CRS MDRs.[215] Interestingly, each of these jurisdictions chose to adopt the CRS MDRs over the EU's DAC 6. Jersey gave two reasons for this decision. First, "[t]hese Model Rules reflect the international consensus in this area," and second, "[t]he Model Rules are an OECD product. As such, Jersey can take part in discussions as to their future development."[216] Thus, despite the implementation of DAC 6 across all EU Member States, so far no outside jurisdictions have expressed interest in adopting that framework. Moreover, with the adoption of CRS MDRs in the British Crown Dependencies, it may only be a matter of time until other British territories such as the British Virgin Islands, the Cayman Islands, and Bermuda will come under pressure to adopt the CRS MDRs. This may influence other countries and territories to adopt the CRS MDRs as well.

C. Other Countries

The expansion of MDRs in recent years has not been limited to Europe. Mexico[217] and Argentina[218] have each adopted MDRs based on the recommendations of BEPS Action 12. Both of these regimes build upon their OECD and DAC 6 precedents but also introduce some novel features of their own.

The Mexican MDRs came into force on January 1, 2020.[219] These rules

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little international tax compliance experience might struggle to determine whether matters were reportable or not,' he added" quoting Gary Ashford, vice president of the Chartered Institute of Taxation). *See also* George Bull, *What happens to taxes if the UK becomes the Singapore of Europe*, RSM (Jan. 2021) (describing the prospects of Prime Minister Boris Johnson's objective to make Britain into a business-friendly destination with low taxes and light regulation). Nevertheless, the CRS MDRs also create compliance challenges and costs. *See* Paul F. Millen & Peter Cotorceanu, *Forming financial intermediaries into a fifth column: the OECD MDRs for CRS avoidance*, 25 TRUSTS & TRUSTEES 422 (May 2019).

[214] *See Taxation (Implementation) (International Tax Compliance) (Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures) (Jersey) Regulations 2020,* R&O.112/2020 (Sept. 9, 2020) for Jersey; *Income Tax (Mandatory Disclosure Rules) Regulations 2019*, Statutory Doc. No. 2019/0454 (Dec. 10, 2019) for the Isle of Man; *The Income Tax (Approved International Agreements) (Implementation) (Mandatory Disclosure Rules) Regulations, 2020*, Guernsey Statutory Instrument 2020 No. 2 (Mar. 11, 2020) for Guernsey.

[215] *See* Gibraltar Legal Notice No. 78 (2021); Ernst & Young, *South Africa issues new regulations to implement the Common Reporting Standard* (Oct. 16, 2020), https://www.ey.com/en_gl/tax-alerts/south-africa-issues-new-regulations-to-implement-the-common-reporting-standard [https://perma.cc/Q4RF-V4PX].

[216] Government of Jersey, *Consultation on Implementation of Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures*, Ministry of Treasury and Resources (Sept. 23, 2019), at 2.

[217] *See* Código Fiscal de la Federación [CFF], arts. 197-202 (Mex.) [hereinafter Mexico Federal Fiscal Code].

[218] *See* General Resolution No. 4838/2020, Argentina Official Gazette (Oct. 20, 2020), https://www.boletinoficial.gob.ar/detalleAviso/primera/236310/20201020?busqueda=1, [https://perma.cc/S4QG-2KC3].

[219] *See* Mexico Federal Fiscal Code, *supra* note 217. *See also* Ernst & Young, *Taxpayers Should be Aware of Mexico's New Reportable Transaction Obligation* (Mar. 20, 2020).

follow the recommendations of the OECD's BEPS Action 12 but stop short of following the DAC 6 model.[220] Unlike DAC 6 and the CRS MDRs, the Mexican MDRs impose reporting obligations only on tax advisors.[221] The schemes reportable in Mexico include "anyone that generates or can generate, directly or indirectly, the obtaining of a tax benefit in Mexico" and possesses any one of fourteen characteristics.[222] Many of these characteristics resemble DAC 6 and Action 12 hallmarks, although some are unique to Mexico.[223] Notably, one characteristic covers structures that circumvent reporting under CRS or FATCA.[224] Once a scheme is found to be reportable, the tax advisor must provide their name and TIN, a description of the reportable scheme, the tax benefit obtained or expected, and other information.[225]

Argentina's MDRs were adopted in October 2020 and follow the recommendations of BEPS Action 12. Under these MDRs, there is a parallel reporting requirement on both taxpayers and tax advisors.[226] These MDRs require the reporting of both domestic and cross-border transactions that result in a tax advantage or benefit and have certain characteristics.[227] In cases where multiple parties could report, all must report.[228] While this reporting obligation is somewhat broader than Mexico's, it also does not include intermediaries other than tax advisors. The disclosure must include the information of the scheme participants, a description of the way in which the tax advantage or any other benefit was created, and the applicable legal and regulatory provisions, including foreign regulations.[229]

The adoption of DAC 6 in the EU, CRS MDRs in several countries, and new MDRs in Mexico and Argentina indicates that MDRs are continuing to find willing and ready policymakers to implement them in different countries around the globe. Moreover, all of these new MDRs contain significant cross-border components in line with the general trend of third-generation MDRs. MDRs seem poised to continually evolve and proliferate across the globe.

IV. TRENDS IN THE DEVELOPMENT OF MDRS

Thus far, we have described the development of MDRs since the 1980s. In this Part, we identify three main trends in the development of MDRs over this period. First, MDRs have evolved from targeting specific tax schemes to covering a large set of tax avoidance arrangements. Second, the group of persons required to

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[220] For a detailed breakdown of the differences between Mexico's MDRs and DAC 6, *see* Kimberly Tan Majure et al., *INSIGHT: Mandatory Disclosure Rules in the European Union and Mexico*, BLOOMBERG TAX (Oct. 2020).

[221] *See id.*

[222] Mexico Federal Fiscal Code, *supra* note 217, art. 199.

[223] *See* Majure et al., *supra* note 220.

[224] *See* Mexico Federal Fiscal Code, *supra* note 217, art. 199.

[225] *See id.* at art. 200.

[226] *See* PricewaterhouseCoopers, *Argentina adopts broad informative regime requiring domestic and international tax planning disclosures* (Oct. 27, 2020); *see also* General Resolution No. 4838/2020, *supra* note 218, art. 6.

[227] *See* General Resolution No. 4838/2020, *supra* note 218, arts. 3-4.

[228] *Id.*

[229] *See id.* at art. 11.

report has similarly expanded to a broad set of intermediaries under recent MDRs. This is part of a larger effort to target the enablers of tax avoidance and evasion. Finally, MDRs have evolved from a domestic measure conceived and implemented by national governments to a multilateral regime designed and promoted by international institutions. The newest MDRs are the product of a coordinated international campaign against cross-border tax avoidance and evasion.

A. Expansion of What Should Be Reported

Since the 1980s, MDRs have changed with respect to *what* needs to be reported. MDRs began in the United States and Canada with a specific purpose: to stymie the proliferation of mass-marketed tax shelters for individuals.[230] Tax shelters were defined using specific formulas and did not extend to corporate taxpayers and other entities.[231] They were not intended to wholly reinvent the government's anti-tax-avoidance methods and create a comprehensive reporting regime for multiple types of tax avoidance by intermediaries.[232]

Over time, the reach of MDRs has expanded. In the early 2000s, listed transactions and hallmarks were introduced, which covered not just tax shelters, but also other forms of tax avoidance and, in particular, corporate tax avoidance.[233] The maintenance of a list of reportable transactions that can be expanded over time has provided governments with a valuable tool to flexibly respond to the creativity of aggressive tax planners and sophisticated intermediaries.[234] It also means that, as each year goes by, more and more transactions have become reportable.[235] Moreover, listed hallmarks ensure that even if a certain type of tax planning transaction is not explicitly identified by the government as reportable, it will still need to be reported if it contains certain characteristics common to tax avoidance schemes.

Nevertheless, the enumerated hallmarks of the early 2000s were far less broad than the hallmarks of more recent MDRs, such as DAC 6.[236] The result is that the newest MDRs capture many different types of transactions that were not reportable under previous MDRs.[237] Additionally, DAC 6 and CRS MDRs are reimagining how MDRs can be applied to tax enforcement. Both regimes contain hallmarks that target CRS avoidance arrangements, which might be associated with

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[230] *See* Joint Comm. on Taxation of the U.S. Congress, *supra* note 42, at 5-8.

[231] *See supra* notes 58, 72 and Part I, *supra.*

[232] *See supra* Part I.

[233] *See supra* Part II.

[234] *See* Joshua D. Blank, *Overcoming Overdisclosure: Toward Tax Shelter Detection*, 56 UCLA L. REV. 1629, 1677 (2008) (noting, with respect to listed transactions, that "[t]he status quo approach…provides the IRS with flexibility to determine what changes, if any, it should make to its original designation of a listed transaction.").

[235] In the United States, for example, of the 36 listed transactions reportable in 2021; only 23 of them were reportable in 2003. Thus, 13 new transactions have become reportable since 2003. *See* https://www.irs.gov/businesses/corporations/listed-transactions [https:// perma.cc/XRH8-C7YZ].

[236] *See supra* Parts II and III.

[237] *See* Bianco*, supra* note 173, at 15 ("Potential intermediaries have indeed been complaining since the publication of [DAC 6] that the hallmarks it contains are conceivably too wide or too vague to work as intended, and may capture structures that are not constitutive of tax avoidance.").

tax evasion, and tax avoidance transactions, which have been the primary focus of MDRs since their inception.[238]

Overall, these changes could be described as a shift away from a rule-based approach, which tries to identify and address specific weaknesses in the tax system (initially by using formulas to determine which tax schemes are reportable), toward a standard-based, anti-avoidance approach.[239] This standard-based approach is reflected in the extensive use of generic hallmarks and the incorporation of the main benefit test in newer MDRs.[240] The CRS MDRs, for example, make direct references to the intended policy of CRS when determining what arrangements must be reported.[241] Thus, MDRs are becoming broad anti-avoidance standards and are imposing reporting obligations on a wide variety of transactions that violate the intent of tax laws. This is consistent with an overall trend of expanding MDRs which has been identified over the past four decades.

The expansion of the scope of MDRs to address various types of tax avoidance and evasion is part of a broader movement in international tax policy. As noted above, the BEPS project and the recent agreement on a global minimum tax under BEPS 2.0 aim to curb corporate tax avoidance.[242] FATCA and CRS aim to detect and deter tax evasion associated with undisclosed offshore financial accounts.[243] It is, therefore, unsurprising that the BEPS project included in Action 12 recommendations for countries to use MDRs more extensively. Similarly, it is unsurprising that DAC 6 and CRS MDRs went beyond the Action 12 recommendations to utilize MDRs in the fight against cross-border tax avoidance and evasion.[244]

B. Expansion of Who Should Report

In addition to expanding the criteria for what needs to be reported, MDRs have broadened the requirements for *who* needs to report. The original tax shelter registration rules narrowly targeted promoters and organizers of tax shelters.[245] In the early 2000s, however, the U.S. expanded reporting obligations to material

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[238] *See supra* Part III.

[239] For further discussion on general anti-avoidance rules, *see* Christophe J. Waerzeggers & Cory Hillier, *Introducing a General Anti-Avoidance Rule (GAAR)*, IMF TECHNICAL NOTE (2016). For a discussion on the policy choice between rules and standards, *see* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557-629 (1992); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J. L. & PUB. POL'Y 101 (1997).

[240] *See supra* notes 166, 177-179, 241 and the accompanying text.

[241] The generic hallmarks under the CRS MDRs provide that 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 polic*y, including by: 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.*" CRS MDRs, *supra* note 9, at 24 (emphasis added).

[242] *See supra* note 33.

[243] *See supra* notes 33, 191-193 and the accompanying text.

[244] *See* Action 12, *supra* note 22, and Parts III.A and III.B, *supra* and the accompanying text.

[245] *See supra* Part I.

advisors,[246] such as lawyers and accountants, thereby capturing a much broader set of professionals who provide tax advice or make tax statements.[247] Finally, the newest MDRs have expanded reporting obligations to a variety of intermediaries that may only play a minor or tangential role in a transaction and do not provide tax-related services or make tax statements.[248] In the case of DAC 6, intermediaries assisting with the implementation of a reportable arrangement must report if they are reasonably expected to know that the arrangement is reportable.[249] This means that lawyers, trustees, investment advisors, corporate service providers, and other intermediaries may be subject to reporting requirements even if they never provide tax services to their clients.[250] They cannot avoid this obligation by turning a blind eye or excluding tax-related services from the scope of services they provide.

These changes in reporting obligations reveal a shifting focus among governments and international organizations toward regulating and deterring the professional service providers that enable tax avoidance and evasion schemes. A requirement to report acts as a dissuasive tool because it consumes intermediaries' time and resources,[251] while simultaneously increasing the likelihood of audits and investigations against the intermediaries and their clients.[252] Underlying this shift is a position that by targeting the enablers, not just the taxpayers, tax authorities can more effectively deter tax avoidance and evasion.[253] The centrality of intermediaries is underscored by literature and recent document leaks which have shown that lawyers, accountants, investment advisors, and other intermediaries form a large network of professional enablers that supply arrangements that could be used for tax avoidance and evasion.[254] Thus, this shift represents an effort on behalf of the tax authorities to simultaneously regulate various industries that could

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[246] A material advisor must play a tangible role in a tax transaction. *See supra* note 96 and the accompanying text.

[247] *See* Part II.A, *supra.*

[248] *See supra* notes 169-170 and the accompanying text.

[249] *See id.*

[250] *See id.*

[251] *See* Schler, *supra* note 7 ("The reporting rules imposed on tax advisers for book-tax and loss transactions impose a considerable burden on tax advisers involved in normal business transactions. Every law firm in the country has been required to make an enormous effort to develop, and ensure ongoing compliance with, procedures relating to those transactions. Given the penalties for noncompliance, that effort usually involves considerable partner time.").

[252] *See* Blank, *supra* note 234, at 1641 ("Mandatory disclosure is thus designed to provide an important 'audit roadmap' to the IRS. For example…under current law a taxpayer is now required to alert the IRS if the taxpayer uses a tax strategy sold by a tax shelter promoter who promised a money-back guarantee in the event of an audit. The required disclosure statement may lead the IRS agent who initially reviews this tax return to select it for audit and quickly issue an information document request to the taxpayer.").

[253] *See* Action 12, *supra* note 22, at 27.

[254] *See* Prem Sikka & Hugh Willmott, *The tax avoidance industry: accounting firms on the make,* 9 CRIT. PERSPECT. INT'L BUS. 415, 431 (2013); James S. Henry, *The price of offshore revisited: new estimates for missing global private wealth income inequality and lost taxes*, TAX JUST. NETWORK (2012); Nicholas J. Lord, Liz J. Campbell & Karin van Wingerde, *Other People's Dirty Money: Professional Intermediaries, Market Dynamics and the Finances of White-collar, Corporate and Organized Crimes*, 59 BRIT. J. CRIMINOLOGY 1217 (2019). For a more detailed analysis of the market for tax avoidance, see Kai A. Conrad, *Dynamics of the Market for Corporate Tax-Avoidance Advice*, 123 SCAND. J. ECON. 267 (2019).

be involved in the design, marketing or implementation of reportable arrangements.

Intermediary reporting and third-party reporting in general also have other advantages in addition to deterring professionals from enabling tax schemes. In general, tax literature in recent years has emphasized the role third parties can play in tax compliance.[255] Third-party reporting ensures that the tax authorities receive a more accurate and complete picture of a tax scheme which allows them to take faster action against abusive schemes.[256] Third-party reporting can help deter taxpayers from demanding tax avoidance and evasion products in the first place, since they know such schemes are now more likely to be detected by the government.[257]

Moreover, the shifting focus of MDRs to a larger set of intermediaries is representative of a broader change in the priorities of tax authorities and international organizations, which are increasingly using an assortment of policy tools to hold the enablers of tax avoidance accountable. The United Kingdom, for example, has implemented penalties and other consequences for intermediaries that enable tax avoidance behavior.[258] Additionally, the OECD has published several reports outlining how intermediaries enable tax avoidance and has proposed various solutions to deter them from engaging in problematic behavior.[259] On the whole,

[255] *See* Paul Carrillo, Dina Pomeranz & Monica Singhal, *Dodging the Taxman: Firm Misreporting and Limits to Tax Enforcement*, 9 AM. ECON. J.: APPLIED ECON. 144 (2017) at 144; Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695 (2007) (describing how third parties help ensure compliance but can, under certain conditions, undermine it); Bibek Adhikari, James Alm & Timothy F. Harris, *Information Reporting and Tax Compliance*, 110 AEA PAPERS & PROC. 2020 162 (2020) (discussing the introduction of third-party reporting and its impacts on a particular area of taxation); James Alm, John A. Deskins & Michael McKee, *Third-Party Income Reporting and Income Tax Compliance*, ANDREW YOUNG SCH. POL'Y STUD. RSCH. PAPER SERIES NO. 06-35 (2006); Henrik Jacobsen Kleven et al., *Unwilling or Unable to Cheat? Evidence from a Tax Audit Experiment in Denmark*, 79 ECONOMETRICA 651 (2011); Dina Pomeranz, *No Taxation without Information: Deterrence and Self-Enforcement in the Value Added Tax*, 105 AM. ECON. REV. 2539 (2015); James Alm, *Measuring, Explaining, and Controlling Tax Evasion: Lessons from Theory, Experiments, and Field Studies*, TUL. ECON. WORKING PAPER SERIES (July 2012).

[256] *See* Action 12, *supra* note 22, at 22; Mark D. Phillips, *Individual Tax Compliance and Information Reporting: What do the U.S. Data Show?*, 67 NAT'L TAX J. 531 (2014) (showing that third-party reporting deters taxpayers from underreporting their income).

[257] *See* Action 12, *supra* note 22, at 27; Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted*, 78 FORDHAM L. REV. 1733, 1738-39 (2010); Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 BYU L. REV. 1515, 1542-43 (2005); Henrik Jacobsen Kleven, Claus Thustrup Kreiner & Emmanuel Saez, *Why Can Modern Governments Tax So Much? An Agency Model of Firms as Fiscal Intermediaries*, 83 ECONOMICA 219 (2016).

[258] *See* United Kingdom's Finance (No. 2) Act 2017, sched. 16, which outlines new penalties for tax avoidance intermediaries. In this law intermediaries are classified as "enablers" of tax avoidance, which are defined as designers, managers, marketers, enabling participants, or financial enablers of the tax avoidance arrangements.

[259] *See*, *e.g.*, OECD, STUDY INTO THE ROLE OF TAX INTERMEDIARIES (2008), which identified intermediaries as a significant problem in the area of tax avoidance. The report recommended various methods for reining in the intermediaries that enable tax avoidance including future compliance agreements, penalties, non-monetary sanctions (e.g., "injunctions to stop the promotion of a scheme, and censures, suspension or disbarment from practice under professional conduct

however, the EU has been the leader of this trend. The EU has developed its aggressive stance against the intermediaries of abusive tax behavior out of a growing sense that intermediaries were facilitating, and indeed encouraging, tax avoidance.[260] For example, in July 2016 the European Parliament specifically condemned intermediaries as playing a crucial role in tax avoidance, and also suggested the imposition of mandatory disclosure requirements on intermediaries as one solution to counter their activities.[261]

Moreover, when suggesting that the European Union adopt MDRs, the Economic and Financial Affairs Council (ECOFIN) of the European Council specifically identified intermediaries as a target and drew inspiration from BEPS for ways to combat them.[262] The aggressive stance against intermediaries adopted by the EU was also influenced by the release of the Panama Papers in April 2016 at around the same time these proposals were being developed.[263] In the eyes of the EU, the Panama Papers shed light on the potentially dangerous role intermediaries were playing in enabling tax avoidance.[264] Moreover, the historical legacy of the

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rules"), and general anti-avoidance rules. The report also identified the MDRs of Canada, South Africa, the United Kingdom, and United States as highly effective ways of deterring intermediaries from facilitating tax avoidance schemes ("In these four countries, much of the obligation for disclosure falls on the tax intermediary. The experiences of countries using disclosure regimes are that they have a significant deterrent effect and reduce the attractiveness of aggressive tax planning. They directly affect the economic attractiveness of aggressive tax planning, significantly reducing the time taken by the revenue body to detect a scheme and embark on a response (either legislative or through the courts). For the tax intermediary, the period in which professional fees can be earned is reduced; for taxpayers, a swifter response means a reduced period in which tax advantages accrue"). *See id*. at 19. This report was itself inspired by the Seoul Declaration, in which 39 economies and organizations agreed to find ways to counter tax avoidance including by "examining the role of tax intermediaries (e.g.,., law and accounting firms, other tax advisors and financial institutions) in relation to non-compliance and the promotion of unacceptable tax minimization arrangements." OECD, SEOUL DECLARATION, at 4 (Sept. 2006). *See also* OECD, TACKLING AGGRESSIVE TAX PLANNING THROUGH IMPROVED TRANSPARENCY AND DISCLOSURE – REPORT ON DISCLOSURE INITIATIVES, *supra* note 165; OECD, ENDING THE SHELL GAME: CRACKING DOWN ON THE PROFESSIONALS WHO ENABLE TAX AND WHITE COLLAR CRIMES (2021) (describing how countries can individually and collectively identify, disrupt, and deter "professional enablers," i.e. intermediaries, from promoting and implementing tax avoidance schemes). The report identifies MDRs as one of the primary tools for deterring tax avoidance schemes and encourages their implementation. In particular, the CRS MDRs, DAC 6, and BEPS Action 12 are all listed as models that countries may consider when designing their MDRs.

[260] *See* European Commission, *supra* note 197, at 5-6.

[261] *See* European Parliament Special Committee on Tax Rulings, 2016/2038(INI), *Tax Rulings and Other Measures Similar in Nature or Effect* (July 6, 2016) ("Members regretted deeply that some banks, tax advisers, law and accounting firms and other intermediaries have been instrumental and have played a key role in designing aggressive tax planning schemes for their clients…[The Commission] was also asked to come forward with a legislative proposal introducing a mandatory disclosure requirement for banks, tax advisers and other intermediaries concerning complex structures and special services that are linked to jurisdictions included on the common EU list of tax havens.").

[262] *See* COUNCIL OF THE EUROPEAN UNION, COMMISSION COMMUNICATION ON AN EXTERNAL STRATEGY FOR EFFECTIVE TAXATION AND COMMISSION RECOMMENDATION ON THE IMPLEMENTATION OF MEASURES AGAINST TAX TREATY ABUSE, 9452/16 (2016).

[263] *See* European Commission, *supra* note 197, at 5.

[264] *See id.*

2008 financial crisis and the subsequent Eurozone crisis likely played a role in motivating European officials to take a strong anti–tax avoidance stance.[265] These developments help explain the EU's expansive approach to intermediary reporting.

In summary, there is a growing consensus among countries and institutions that one of the best ways to ensure global tax equity is to target the enablers of tax avoidance and evasion. MDRs are increasingly used to discourage a wide variety of professional service providers from acting as such enablers.

C. Internationalization of MDRs

From their domestic origins, MDRs have evolved into a potent multilateral instrument to counter cross-border tax avoidance and evasion. The first MDRs were initiated and developed by national governments primarily to deal with domestic tax avoidance issues. This was true of both the tax shelter registration rules of the 1980s and the reportable transaction disclosure regimes of the 2000s and early 2010s.[266] However, more recent developments in MDRs have been driven by international and supranational organizations: the OECD and the EU. This started with the OECD's BEPS Action 12 in 2015, which was soon thereafter taken up in an expanded form by the EU and applied to its 27 Member States.[267] Additionally, the OECD designed the CRS MDRs, which are now being adopted in an increasing number of jurisdictions.[268]

The increasingly multilateral nature of anti-tax avoidance policy stems from a realization that many tax schemes rely on structures and transactions involving more than one country.[269] This could be the result of the substantial increase in cross-border activities and the transfer of assets across jurisdictions in the years since the implementation of the first-generation MDRs in the 1980s.[270] In order to combat cross-border tax avoidance and evasion, countries have increasingly been collaborating to develop and implement measures that target international tax schemes, as seen in BEPS, CRS and other initiatives.[271]

The internationalization of MDRs has affected what needs to be reported, who needs to report, and how information is exchanged between jurisdictions. First, DAC 6 and the CRS MDRs focus on cross-border tax issues.[272] While some older

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[265] For further discussion on the historical origins behind the EU's aggressive implementation of the BEPS proposals, *see* Sigrid J.C. Hemels, *Implementation of BEPS in European Union hard law*, 67 RITSUMEIKAN ECON. REV. 85 (July 2018); Communication from the Commission to the European Parliament and the Council, *An Action Plan to strengthen the fight against tax fraud and tax evasion*, COM/2012/0722 final, (Dec. 6, 2012).

[266] *See supra* Part I and Part II.

[267] *See supra* Part III.B.

[268] *See id.*

[269] *See* Action 12, *supra* note 22, at 3; European Commission, *supra* note 197, at 4; U.S. Gov't Accountability Office, *supra* note 99, at 9 (warning that abusive tax avoidance transactions have become increasingly international).

[270] *See* Action 12, *supra* note 22, at 3; European Commission, *supra* note 197, at 4; U.S. Gov't Accountability Office, *supra* note 99, at 9.

[271] *See* Mason, *supra* note 11, at 355-67 (describing the evolution of international cooperation in tax enforcement since the 2008 financial crisis with a particular focus on BEPS).

[272] *See supra* Part III.

MDRs contain a handful of cross-border provisions, none have tackled this issue as comprehensively as DAC 6.[273] Additionally, the CRS MDRs contain hallmarks targeting CRS Avoidance Arrangements and Opaque Offshore Structures.[274] Each of these hallmarks, by definition, deal with cross-border arrangements. Finally, the new MDRs of Mexico and Argentina require the reporting of both domestic and cross-border transactions with certain characteristics.[275] Thus, the schemes that must be reported under the newest MDRs have a greater focus on cross-border transactions than older MDRs.

Second, the multilateral nature of the newest MDRs affects the types of intermediaries that are required to report. Under most earlier regimes, only domestic intermediaries were required to report.[276] However, under DAC 6 an intermediary that has ties to any EU Member State[277] is required to report a transaction even if the transaction occurs in a Member State other than that which the intermediary has ties to.[278] Moreover, under DAC 6, intermediaries have a primary reporting obligation to their home Member State even if the transaction occurred in a different Member State.[279] Under the CRS MDRs, an intermediary may be required to report to their home jurisdiction if they have not already reported to another jurisdiction in which they have a branch and where the reportable services were rendered.[280] Thus, both DAC 6 and the CRS MDRs enable tax authorities to identify intermediaries in other countries that are providing services to local taxpayers.

Third, multilateral MDRs are facilitating the creation of international systems of information exchange. In order for the aforementioned reporting schemes to function effectively so that the interested tax authority receives the relevant information, it is necessary for countries to have in place a method for sharing tax information.[281] For example, if an intermediary in Spain reports on a tax arrangement undertaken by a taxpayer that is resident in Germany, then it is necessary for some mechanism to be in place for the information to be transmitted from Spain to the relevant tax authority in Germany. Both DAC 6 and the CRS MDRs incorporate methods for jurisdictions to share data with each other.[282] Under these regimes, intermediaries are required to report to only one country which then shares this information with other countries within the same regime.[283]

These changes are part of broader trends in international tax policy. As

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[273] *See supra* note 181.
[274] *See supra* Part III.B.
[275] *See supra* Part III.C.
[276] *See supra* Part I and Part III.
[277] *See supra* note 170; DAC 6, art. 1(1).
[278] *See id.*
[279] *See* DAC 6, *supra* note 9, art. 1(2).
[280] *See* CRS MDRs, *supra* note 9, rule 2.1.
[281] *See, e.g.*, European Commission, *supra* note 197, at 4.
[282] For DAC 6, *see* DAC 6, *supra* note 9, at art. 1. For the CRS MDRs, *see* OECD, *supra* note 26, and the accompanying text for note 203.
[283] *See id.* Under the CRS MDRs it is the responsibility of the country which received the disclosure to share that information with all other relevant countries (that are also part of CRS and the CRS MDRs). Under DAC 6, the disclosure information is recorded in a central repository that is open to all Member States of the EU.

noted by Ruth Mason, recent developments in international policymaking, particularly BEPS, have transformed and multilateralized international taxation.[284] International tax policy is becoming more multilateral and the OECD is continuing to play a leading role in the setting of global tax norms.[285] These observations are consistent with the changes we identify in MDRs. In particular, norm-setting for MDRs is being led by the OECD and EU, and MDRs are promoting a multilateral mechanism to address international tax challenges. Additionally, multilateral MDRs increase transparency across jurisdictions, complementing other transparency enhancing regimes such as CRS, country-by-country reporting, and the automatic exchange of tax rulings.[286]

V. THE PATH AHEAD FOR MDRS

MDRs have grown and expanded over the past four decades with a rapid acceleration of these trends in the past six years. As we have shown in the previous part, these trends are directly tied to broader movements in international tax policy. If these broader international trends continue, it is likely that the expansion, proliferation, and internationalization of MDRs will continue as well.

Several factors may accelerate the adoption of MDRs. One factor is potential pressure from the OECD. Although the adoption of the CRS MDRs is currently voluntary, countries may come under pressure from the OECD to adopt CRS MDRs or a similarly effective anti-CRS avoidance measure. CRS already requires that jurisdictions implementing CRS have "rules to prevent any Financial Institutions, persons or intermediaries from adopting practices intended to circumvent the reporting and due diligence procedures."[287] Thus, the OECD may require in the future that CRS-implementing countries adopt either the CRS MDRs or similarly effective rules against CRS avoidance. Such a requirement would likely result in a wide-scale international adoption of CRS MDRs. The fact that the EU Member States, the United Kingdom, Jersey, Guernsey, and the Isle of Man have all adopted or are in the process of adopting the CRS MDRs may indicate that these rules are on track to becoming a widely adopted international tax standard.[288]

Another factor is a potential EU blacklisting of jurisdictions that do not adopt certain MDRs.[289] For example, the EU may announce in the future that

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[284] *See* Mason, *supra* note 11.

[285] *See id.*

[286] For further discussion on CRS, CbCR, and automatic exchange of tax rulings, *see* CRS, *supra* note 191; Elisa Casi, Christoph Spengel & Barbara M.B. Stage, *Cross-border tax evasion after the common reporting standard: Game over?* 190 J. PUB. ECON. (2020); Michelle Hanlon, *Country-by-Country Reporting and the International Allocation of Taxing Rights,* 72 BULL. FOR INT'L TAX'N (2018); Anjana Haines, *No more secret tax rulings in the EU?*, INT'L TAX REV. (2017).

[287] CRS, *supra* note 191, at 61.

[288] *See* Leigh-Alexandra Basha, *Overview on recent developments for the legislation, regulatory and anti-money laundering US update,* 25 TR. & TRUSTEES 138, 146 (Feb. 2019) ("Although countries are not obligated to adopt the Mandatory Disclosure Rules, it appears likely, that, over time, many countries will adopt them and that they will become part of the international norms.").

[289] Council Conclusions on the Criteria for and Process Leading to the Establishment of the EU

jurisdictions that do not adopt CRS MDRs would be blacklisted as non-cooperative tax jurisdictions. The EU has shown that it is willing to use the blacklisting threat as a means to force other jurisdictions to adopt EU tax norms, which now include CRS MDRs as part of DAC 6.[290]

Nevertheless, even without OECD and EU pressure, it is possible that more countries will adopt new MDRs or expand their existing MDRs of their own volition. For example, Mexico and Argentina have recently adopted their own MDRs, and Australia and Japan are discussing introducing MDRs.[291] It will be interesting to see whether the United States or Canada, which already have their own set of second-generation MDRs, will adopt more expansive rules. Thus far, the United States has expressed little interest in expanding its MDRs.[292] Moreover, given that the United States utilizes its own FATCA regime instead of CRS, it should not be expected to adopt CRS MDRs.[293] Thus, despite initiating and leading the expansion of MDRs for decades, it does not seem likely that the United States will participate in this latest chapter in the evolution of MDRs. Canada, however, has indicated that it plans to expand its MDRs to adjust them more closely to BEPS Action 12.[294]

In addition to these developments, there is also the possibility of the development and adoption of a new global standard for MDRs that focuses on international tax issues. The international community has not yet rallied behind a single agreed-upon standard for MDRs to address cross-border tax challenges. Instead, the EU and various countries have innovated their own MDRs. It is possible that, similar to other harmonization and cooperation trends in international taxation, more countries will seek to design and adopt an international standard for

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List of Non-Cooperative Jurisdictions for Tax Purposes, 2016 O.J. (C 461) 2. For a description of the EU blacklisting process, *see* Giuseppe Melis & Alessio Persiani, *The EU Blacklist: A Step Forward but Still Much to Do,* EC TAX REV. 2019-5 (2019). For a description of some of the consequences of an EU blacklisting, *see* Aija Rusina, *Name and shame? Evidence from the European Union tax haven blacklist*, INT'L TAX & PUB. FIN. 27 (2020).

[290] *See* European Council, Taxation: EU list of non-cooperative jurisdictions (last reviewed on Oct. 7, 2021), https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/ [https://perma.cc/747J-EXKR].

[291] *See* 2016-17 Australian Budget Report, *Making Our Tax System More Sustainable* (May 2016) at 11; EY Global, *The Latest on BEPS and Beyond – December 2019*, (Dec. 17, 2019). For further discussion on Australia, *see* Oguttu & Kayis-Kumar, *supra* note 80; Annet Wanyana Oguttu & Ann Kayis-Kumar, *Curtailing Aggressive Tax Planning: The Case for Introducing Mandatory Disclosure Rules in Australia (Part 2) - Cues from the United Kingdom and South Africa*, 17 EJOURNAL TAX RES. 233 (2020); Irma Johanna Mosquera Valderrama, *The OECD-BEPS Measures to Deal with Aggressive Tax Planning in South America and Sub-Saharan Africa: The Challenges Ahead*, 43 INTERTAX 615 (2015).

[292] *See* Isabelle Ioannides, *EU-US trade and investment relations: Effects on tax evasion, money laundering and tax transparency – Ex-Post Impact Assessment*, EUR. PARL. RSCH. SERVICE, at 18 (Mar. 2017) ("Existing US law has statutory and regulatory disclosure rules for aggressive tax planning. There are no active proposals for change.").

[293] For further discussion on the US' relationship with CRS, *see* Rachel E. Brinson, *Is the United States Becoming the New Switzerland: Why the United States' Failure to Adopt the OECD's Common Reporting Standard Is Helping It Become a Tax Haven*, 23 N.C. BANKING INST. 231 (2019); Basha, *supra* note 288.

[294] Peter Clark & Josephine Chuk, *Canada: Expansion of mandatory disclosure rules proposed in Budget 2021*, GLOBAL COMPLIANCE NEWS (June 11, 2021).

MDRs. This standard could draw upon DAC 6, CRS MDRs, and the MDRs of various countries.[295]

Conclusion

MDRs have developed from domestic measures with a narrow scope into prominent tools in the international fight against tax avoidance and evasion. With more countries adopting MDRs each year, it appears that their expansion and development are likely to continue. Certain MDRs, such as the CRS MDRs, may become widely adopted international standards. In the next few years, policymakers in different countries may consider, either voluntarily or under international pressure, to adopt MDRs or amend their existing MDRs. Understanding the development of MDRs and the underlying trends can contribute to policy discussions on whether to adopt MDRs or expand existing MDRs.

This Article contributes to the literature by exploring the development of MDRs over time with a cross-jurisdictional lens, exposing trends in the evolution of MDRs, and examining how the expansion and internationalization of MDRs have affected what needs to be reported, who needs to report, and how information is exchanged between jurisdictions. This Article shows how the trends in the evolution of MDRs fit into broader movements in international tax policy: an enhancement of efforts to curb tax avoidance and evasion, a focus on tax avoidance enablers, and international multilateralism and cooperation on tax matters. As these trends continue, we expect to see a further expansion and internationalization of MDRs.

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[295] It could also build on the recommendations of Action 12, although these are somewhat outdated after the developments of the past six years.