

## Gibraltar's Mandatory Disclosure Regime

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### Background

Gibraltar's Mandatory Disclosure Regime (MDR) imposes a requirement to disclose to the Commissioner of Income Tax any cross-border arrangement or transaction that falls within any of a number of specific "hallmarks." If there is an "intermediary" involved, the onus to report is on the intermediary. In the absence of an intermediary, the reporting requirement falls to the taxpayer.

The [Income Tax \(Amendment\) Regulations 2020](#) made the necessary amendments to Gibraltar's *Income Tax Act 2010* in order to introduce the legislation. MDR was applied in Gibraltar in order to implement [EU Directive 2018/822](#), otherwise known as "DAC6," on the mandatory automatic exchange of information in relation to reportable cross-border arrangements.

### Reporting parties

MDR requires "intermediaries" - or if there is no intermediary, the taxpayer - to report.

An intermediary is, broadly-speaking, any professional who provides assistance or advice in planning, making available or implementing a transaction or arrangement. They are most likely to be tax consultants, company managers, or lawyers, but in some circumstances could include others, such as insurance managers or banks.

An intermediary is defined as being any person that:

- ▶ *designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement; or*
- ▶ *having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation.*

An intermediary's reporting requirement may be waived in the following cases:

- ▶ If they have proof that another intermediary, either in Gibraltar, the United Kingdom (UK) or within the European Union (EU) has reported the same information that they would be required to report.
- ▶ Where reporting would be a breach of legal professional privilege. In such cases they must notify without delay any other intermediary, or if there is no other intermediary, the taxpayer, of their reporting obligations. Legal professional privilege will apply to lawyers in Gibraltar in some circumstances.

The Directive does not require intermediaries to investigate facts and tax implications beyond the scope of their own services.

## Impact of Brexit

At the time of publication, Gibraltar has adopted MDR as if it were still within the EU. The position after the transition period is still uncertain.

However, it is generally expected that the implementation of MDR by Gibraltar and the UK will not be affected, other than the mechanics for the exchange of information.

We note that the International Agreement with Spain on Gibraltar taxation and other matters commits Gibraltar to implement the EU Directive on MDR.

## What is a cross-border arrangement?

A cross-border arrangement is an arrangement concerning either more than one Member State,\* or a Member State\* and a third country where at least one of the following conditions are met:

- ▶ Not all the participants in the arrangement are resident for tax purposes in the same jurisdiction.

- ▶ One or more participants are simultaneously tax resident in more than one jurisdiction.
- ▶ One or more participants carries on a business in another jurisdiction through a permanent establishment (PE) in that jurisdiction, and the arrangement forms part of the business of that PE.
- ▶ One or more participants carries on an activity in another jurisdiction without either being tax resident or having a PE in that jurisdiction.
- ▶ The arrangement has a possible impact on the automatic exchange of information or identification of beneficial ownership.

\* *it is assumed that "Member State" will effectively include Gibraltar and the UK - see "Impact of Brexit" section above.*

## Taxes covered by MDR

MDR applies to all taxes, except for value-added tax, customs duties, excise duties and compulsory social insurance contributions.

## Guidance and interpretation

Gibraltar's legislation has added no requirements or definitions not contained in the Directive.

Gibraltar has issued no guidance and is unlikely to in the foreseeable future, other than technical guidance on the filing process.

## Timing and triggers

There are distinct phases in the implementation of MDR.

### Transitional phase

- ▶ Arrangements or transactions where the first step is implemented between 25 June 2018 and 30 June 2020. Where reporting is required for such arrangements, the report must be made by 28 February 2021.

### Extended transitional phase

- ▶ Arrangements which, between 1 July 2020 and 31 December 2020:
  - a) Are made available for implementation
  - b) Are ready for implementation
  - c) Where the first step in the implementation of the reportable cross-border arrangement has been made

Where reporting is required for such arrangements, the report must be made by 30 January 2021.

## Full implementation

This covers arrangements which, from 1 January 2021 onwards:

- a) Are made available for implementation
- b) Are ready for implementation
- c) Where the first step in the implementation of the reportable cross-border arrangement has been made

Reporting for such arrangements must be made within 31 days from the date of (a) or (b) above, or within 30 days of the date of (c), whichever occurs first.

## How to report under MDR

In Gibraltar, reports must be uploaded in a prescribed XML format, using HM Government of Gibraltar's AEOI (Automatic Exchange of Information) portal.

The Income Tax Office has circulated a copy of the EU's DAC6 XML schema and user guide (both version 3.02). It is possible that this will be superseded.

## Penalties

The following penalties are provided for in Gibraltar's legislation:

- ▶ Initial £300 for failure to report.
- ▶ Further £60 for each day that a failure continues, following notification by the authorities that the initial penalty has been levied.
- ▶ Up to £3,000 for knowingly providing inaccurate information, or failure to take reasonable steps to correct information on discovery of an inaccuracy.

## Hallmarks

A number of the hallmarks only apply where they fulfil the "main benefit test." (MBT) The MBT is fulfilled if it can be established that the main benefit, or one of the main benefits, based on all relevant facts and circumstances, is obtaining a "tax advantage." There is no specific definition in the Directive, nor in the Gibraltar legislation of a "tax advantage." Other hallmarks may apply without there being a tax advantage.

The hallmarks are set out in the legislation within several groups:

- ▶ A: Generic hallmarks linked to the MBT
- ▶ B: Specific hallmarks linked to the MBT
- ▶ C: Specific hallmarks related to cross-border transactions

- ▶ D: Specific hallmarks concerning automatic exchange of information and beneficial ownership
- ▶ E: Specific hallmarks concerning transfer pricing

The hallmarks can be separated into two groups; those that require the "main benefit test" in order to apply, and those that stand without the MBT.

The hallmarks subject to the MBT include:

- ▶ A1: Confidentiality clause
- ▶ A2: Success fee
- ▶ A3: Standardized documentation or structure
- ▶ B1: Acquiring a loss-making company, discontinuing its main activity and using its losses outside the business of the acquired company
- ▶ B2: Income converted to capital or other category of revenue with a more beneficial tax treatment
- ▶ B3: Round-tripping of funds
- ▶ C1(b)(i), (c), (d): Deductible cross-border payments to associated enterprises subject (when received) to a zero or almost zero tax rate, a full tax exemption or a preferential tax regime

The hallmarks not subject to the MBT include:

- ▶ C1(a), (b)(ii): Deductible cross-border payments to associated enterprises where recipient is not tax resident in any jurisdiction, or is resident in a "black-listed" jurisdiction
- ▶ C2: Same asset subject to tax depreciation in more than one jurisdiction
- ▶ C3: Multiple claims of relief for double taxation
- ▶ C4: Transfer of assets with a material difference in the price used for tax purposes
- ▶ D1: EU legislation or any equivalent agreements on automatic exchange of financial account information circumvented
- ▶ D2: Non-transparent legal or beneficial ownership chains used
- ▶ E1: Unilateral transfer pricing safe harbor rules used
- ▶ E2: Transfers of (rights to) hard-to-value intangibles
- ▶ E3: Restructuring resulting in significant profit shifts (>50%) following the transfer of functions and/or risks and/or assets between associated enterprises

The above descriptions are a summary of the hallmarks for ease of reference. However, these are no substitute for the full description of the hallmarks; these are set out below.

Hallmarks that are anticipated to occur more frequently in Gibraltar include B2, E1, E2 and E3.

### Information to be reported

The following information is to be included in the MDR report, where applicable:

- a) The identification of intermediaries and relevant taxpayers, including their name, date and place of birth (for individuals), residence for tax purposes, Tax Identification Number (TIN), and where appropriate the persons that are associated enterprises to the relevant taxpayer
- b) Details of the hallmarks that make the cross-border arrangement reportable
- c) A summary of the content of the reportable cross-border arrangement, including its commonly known name (if any) and a description of business activities or arrangements
- d) The date on which the first step in implementing the reportable cross-border arrangement has been made or will be made
- e) Details of the national provisions that form the basis of the reportable cross-border arrangement
- f) The value of the reportable cross-border arrangement
- g) The Member State\* of the taxpayer and other Member States\* which are likely to be affected by the reportable cross-border arrangement
- h) The Persons that are likely to be affected by the reportable cross-border arrangement and the Member States to which they are linked (if any)

\* *it is assumed that "Member State" will effectively include Gibraltar and the UK*

### Hallmarks – full text from legislation

The following is the complete text from Schedule 11 of Gibraltar's *Income Tax Act 2010*. This follows very closely the text contained in the EU Directive on MDR.

#### Part I. Main benefit test

Generic hallmarks under category A and specific hallmarks under category B and under points (b)(i), (c) and (d) of paragraph 1 of category C may only be taken into account where they fulfil the "main benefit test."

That test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

In the context of hallmark under paragraph 1 of category C, the presence of conditions set out in points (b)(i), (c) or (d) of paragraph 1 of category C cannot alone be a reason for concluding that an arrangement satisfies the main benefit test.

### Part II. Categories of hallmarks

#### A. Generic hallmarks linked to the main benefit test

1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.
2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:
  - (a) the amount of the tax advantage derived from the arrangement; or
  - (b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.
3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

#### B. Specific hallmarks linked to the main benefit test

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.

2. An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.
3. An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.

### C. Specific hallmarks related to cross-border transactions

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<sup>1</sup> 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.

### D. Specific hallmarks concerning automatic exchange of information and beneficial ownership

1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of Financial Account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. Such arrangements include at least the following:
  - (a) the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account;
  - (b) the transfer of Financial Accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of Financial Account information with the State of residence of the relevant taxpayer;
  - (c) the reclassification of income and capital into products or payments that are not subject to the automatic exchange of Financial Account information;
  - (d) the transfer or conversion of a Financial Institution or a Financial Account or the assets therein into a Financial Institution or a Financial Account or assets not subject to reporting under the automatic exchange of Financial Account information;
  - (e) the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of Financial Account information;
  - (f) arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.

2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:
  - (a) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and
  - (b) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and
  - (c) where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable.

#### E. Specific hallmarks concerning transfer pricing

1. An arrangement which involves the use of unilateral safe harbour rules.
2. An arrangement involving the transfer of hard-to-value intangibles. The term “hard-to-value intangibles” covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:
  - (a) no reliable comparables exist; and
  - (b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.
3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50% of the projected annual EBIT of such transferor or transferors if the transfer had not been made.

#### International comparison

The OECD issued a number of proposed Actions as part of their Base Erosion and Profits Shifting (BEPS) project. Action 12 contains recommendations for the design of Mandatory Disclosure Rules for aggressive tax planning schemes that countries may wish to adopt. As part of this, the OECD has designed a schema for MDR reporting.

DAC6 is the EU's implementation of the OECD BEPS Action 12, though the scope of arrangements covered by DAC6 is much broader.

Gibraltar's implementation of DAC6 in the *Income Tax Act 2010* closely follows the wording of the EU Directive.

Many other EU jurisdictions have included interpretations not contained in the Directive and have issued guidance. As the Directive establishes minimum requirements, some Member States include additional requirements in their implementation. Therefore, the application in individual Member States may differ.

Examples include:

- ▶ Poland and Portugal have extended MDR to report purely domestic, as well as cross-border arrangements.
- ▶ Poland's rules are extra-territorial, in that they can directly apply to persons with no nexus to Poland if they provide services that involve Poland. Poland has also added additional hallmarks and has severe penalties for non-reporting (criminal sanctions with fines of up to €5.5m).
- ▶ The EU issued a Directive allowing EU Member States to postpone MDR reporting by six months due to Covid-19. Almost all Member States postponed accordingly, as did Gibraltar. Germany and Finland did not, and their reporting commenced on 31 July 2020. Austria had no formal postponement, but due to technical reasons applied a de-facto postponement until 31 October 2020.

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#### Endnote

1. Organisation for Economic Co-operation and Development.

For additional information with respect to this Alert, please contact the following:

**EY Limited Gibraltar**

- ▶ Neil Rumford      [neil.rumford@gi.ey.com](mailto:neil.rumford@gi.ey.com)
- ▶ Stephen Carreras      [stephen.carreras@gi.ey.com](mailto:stephen.carreras@gi.ey.com)
- ▶ Amy Hewitt      [amy.hewitt@gi.ey.com](mailto:amy.hewitt@gi.ey.com)

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