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Mandatory Disclosure Rules – HMRC Consultation

Response by the Chartered Institute of Taxation

1 Executive Summary

1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.

1.2 We support the aims of the Mandatory Disclosure Rules (MDR) regime. From the feedback we have received from our members, there is clearly a widespread desire to comply fully with the rules to ensure that disclosures, when required, are correct, complete and on time. However, there is also a high level of concern that the rules requiring disclosure of Common Reporting Standard (CRS) avoidance arrangements going back to 29 October 2014 will introduce a disproportionate administrative burden on business in relation to the perceived benefits to HMRC.

1.3 There will be significant practical challenges in complying with this seven to eight year look back requirement. It is our view that the only way to mitigate the burdens it will cause is to bring forward the date, perhaps to 25 June 2018[1]. We discuss these issues in more detail below.

1.4 We do not support the long look back period proposed. On a practical level, businesses are not required to retain records beyond a six year period (although some may well do). Even if records have been maintained, during such a long period of time, it is likely that many businesses will have undergone significant change, through group restructures, turnover of staff at all levels, etc, and so if any areas of concern had been present in the past, they may no longer be. In addition, during that period, businesses now have to deal with General Data Protection Regulation (GDPR), and so it may create significant burden for some businesses who may be required to carry out an exercise before they are able to disclose information, in order to ensure they do not go outside of GDPR rules.

[1] This was the approach taken in the DAC6 rules implemented by SI 2020/25 – see https://www.legislation.gov.uk/uksi/2020/25/made.

1.5 The impact of MDR and the look back period is wider than just these practical difficulties we have identified. Businesses operate more than ever in a highly regulated and public arena where risk management is a priority and the financial and reputational consequences of inadvertent non-compliance with the law are severe. Some examples of these alternative impacts are the interlinking of these proposals with the Senior Accounting Officer (SAO) rules, the Corporate Criminal Offence requirements, and the stated approach to tax which is publicised in Tax Strategies of large groups. The challenges the MDR rules present during a time when businesses are also dealing with a multitude of other changes to both the UK and international tax systems, in particular Pillar 2, Uncertain Tax Positions (UTPs), Environmental Social and Governance requirements, cannot be underestimated.

1.6 We urge HMRC to reflect carefully on the issues we raise and suggestions we make in this written submission together with those we discussed in our meeting with HMRC on 31 January 2022 and ask that they are taken into consideration in their discussions with Ministers and when drafting the final regulations.

2 About us

2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.

2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

3 Introduction

3.1 We refer to the consultation document published on 30 November 2021[2] which is seeking views on the design of draft regulations requiring disclosure of certain arrangements to HMRC, being the UK's implementation of *Mandatory Disclosure Rules*. The regulations, once enacted, will implement the OECD's 'Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures', as announced by the government at Budget 2021. These regulations will replace similar EU rules introduced previously.

3.2 As noted in the consultation document, the OECD published the model rules in March 2018. The EU developed similar rules, known as 'DAC 6' in parallel. As a member of the EU at the time, the UK implemented DAC 6 in

[2] https://www.gov.uk/government/consultations/mandatory-disclosure-rules

January 2020. However, now that the UK has left the EU and the transition period has ended, the government will implement the OECD model rules to replace the EU version.

3.3 Our stated objectives for the tax system include:

- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
- Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

3.4 Our comments below are largely limited to addressing the issues around the commencement date of the rules as these aspects of the draft regulations have been identified by our members as likely to present difficulties in practice.

4 Commencement and Transition (Chapter 3)

4.1 Question 3 asks whether we agree with the government's rationale for including the reporting of pre-existing arrangements. Question 4 asks for views on the safeguards and mitigations that are intended to minimise the burden on business, and also seeks views around the balance between the burden and ensuring that the regime operates effectively.

4.2 Our view on these aspects of the consultation is that the requirement to disclose CRS avoidance arrangements going back to 29 October 2014 is unduly onerous. Whilst the 2014 commencement date is something that derives from the OECD schema, it is more than seven years ago now. It will be practically challenging for businesses to comply with given the extent of staff and systems / IT changes which will have inevitably happened since then. The scale of the challenge this presents should not be underestimated. In addition, this period of time is already longer than the general requirement for statutory record keeping so relevant documents may no longer exist.

4.3 Reporting of arrangements since 29 October 2014 could potentially provide useful information for HMRC if the tax at stake is Income Tax, Capital Gains Tax or Inheritance Tax (as there is a 12 year assessment time limit for careless behaviour in s36A Taxes Management Act 1970 which covers the tax year 2013/14 and subsequent years). However, if the tax is not these three then the information will not be useful in most cases as the assessment time limits will have expired (in the absences of deliberate behaviour or failures to notify without a reasonable excuse).

4.4 The limitations and mitigations suggested in the consultation document (at para 3.8) are helpful but in our view are not sufficient to alleviate the burden. Client files are likely to kept separately for confidentiality reasons and there will be no central 'database' of information to connect across clients. It will still be necessary to review all files to ascertain which ones might be in scope and then to identify if the mitigations and thresholds apply. Thus the mitigations may reduce the number of reportable arrangements but the time

needed for the review work to identify them will not be significantly diminished by the mitigations proposed. Reviewing individual 'cold' files in this way will be a hugely labour intensive exercise.

4.5 HMRC have suggested that by making the long look back period applicable only to 'promoter', that this will reduce the burden of reporting on 'taxpayers'. However, this is not the case, for reasons already outlined above in relation to SAO, UTPs and Tax Strategy. Businesses and SAOs will not be prepared to take the risk that they would not inadvertently be held responsible (as intermediaries) in the event that any promoter with whom they had engaged in a previous piece of work, failed to report.

4.6 It is not clear to us what can be done to mitigate these burdens apart from bringing forward the date. The regulations which implemented the EU rules (DAC 6) had a look back period to 25 June 2018. One of the mitigations proposed by HMRC is that an arrangement that has been disclosed to HMRC under those regulations (SI 2020/25) does not have to be disclosed again under these rules. It is not clear to us why the regime will not operate effectively if the period in respect of which arrangements must be disclosed runs from the DAC 6 date of 25 June 2018.

4.7 A look back to June 2018 will be a period of four years, at the time that the regulations come into force in Summer 2022. This seems to us to be more than sufficient. We note that the OECD document was written in 2018 and at that stage a look back to 2014 would have been a four year period that may have been proportionate. But it makes little sense to use this date when the UK has effectively taken another four years to implement the OECD rules.

4.8 The burden arising from the requirement to look back to 29 October 2014 is all the more disproportionate when it is considered that promoters will have already undertaken the exercise of looking back in order to identify CRS avoidance arrangements arising since 25 June 2018 within scope of DAC6.

4.9 Promoters may no longer have documentation relating to work done back to 2014 because, as we note above, the period falls in part outside of the general period for which documents are required to be kept for tax purposes so it is quite possible that some files will have been deleted. In this situation, it would be helpful to know whether HMRC would accept that there is no obligation to report where records no longer exist.

4.10 Further, even if promoters do still have documentation relating to work done back to 2014, this is likely to be limited to the facts of what occurred and the intention of those involved in developing the arrangements may no longer be clear. When implementing DAC6, HMRC verbally expressed a view (including in a CIOT webcast) that Hallmark D1 ('Undermining Reporting Obligations') - which is the equivalent to the CRS avoidance hallmark in the OECD rules - is only satisfied where there is an intent to avoid the CRS rules. Notwithstanding the term 'has the effect of' (which clearly makes it seem like an objective test), the fact that it refers to 'undermining' and 'circumventing' seemed to introduce a purpose overlay. Whilst HMRC's guidance is slightly less unequivocal, it still is clear from it (IEIM645010[3]) that intent is a very important factor. It would be helpful to understand whether HMRC's view is that the CRS avoidance hallmark in the OECD rules will also only apply where there is an intent to avoid the CRS rules, in the same way as the DAC 6 hallmark D1. We would be surprised if the intent were clear from any documentation still retained that is limited to the facts of what happened. Intent is something that would only be capable of being inferred, unless the relevant individuals remain with the firm (and then only if they can remember). This seems to us unsatisfactory and we suggest

[3] The guidance in IEIM 645010 states, 'the test in hallmark D(1) is an objective one, but in determining whether an arrangement has the effect of undermining the CRS the intent of those involved will be relevant as it will offer a good indication as to whether the arrangement may have the relevant effect'.
https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim645010

that, given the passing of time and individuals leaving firms, it would be very difficult (if not impossible) for a firm to credibly do such a review seven or eight years later.

4.11 In discussions with HMRC, we were told that the date of 29 October 2014 had been chosen to follow the OECD model rules as closely as possible (it being the date of publication of the CRS) and that this would provide consistency with overseas jurisdictions as they start to implement the OECD's model rules. However, it is our understanding that in reality very few territories have implemented or are implementing the rules based on the OECD's 2018 report. Most territories who are introducing MDR rules are, like the EU, amending them significantly. Of those that are consulting on implementation only the UK Crown Dependencies are proposing sticking to the date of 29 October 2014. In short, we are unconvinced by HMRC's argument that adopting 29 October 2014 will ensure consistency with other jurisdictions and do not consider it justifies adhering to that date.

4.12 The consultation's introduction states that the information will go to HMRC and then 'Tax authorities in implementing jurisdictions will then share this information with the tax authorities of the jurisdiction where the taxpayer is resident'. A similar set of cross border data sharing occurred as a result of the CRS. That also followed model rules being developed by the OECD. In that case the cross border data sharing commenced following co-ordination from the OECD and there was a public statement by them that the first data sharing would be on a specific future date. As far as we know there is no equivalent announcement from the OECD this time and it appears that no other jurisdictions have signed up to data sharing, so it is not clear when HMRC expect the data sharing to start and which jurisdictions will be involved. It would be helpful if HMRC could explain this so that the profession understands what the plan is and how the data will be used, given the effort to which people will need to go to collate and submit information to HMRC.

4.13 We note that HMRC envisage some use for this historic information around using it as part of their risk assessment process to identify and challenge cases of non-compliance. But we are dubious of the value of this information, over and above the information that will be received in respect of arrangements arising since the current DAC 6 date of 25 June 2018. Many of the arrangements that would have to be reported may no longer be in existence, may well have become irrelevant due to changes in law or may have found themselves in a CRS jurisdiction (as the number of adopting countries grew) thus being reported then. As such it is difficult to see how they would inform risk assessment.

4.14 This is effectively retrospective (or at least retroactive) legislation and, as such, requires special justification under the European Court of Human Rights (ECHR). It is not clear to us that such justification exists in relation to the very lengthy look back period that is proposed for these rules.

4.15 Further, we refer to the document published by the government in March 2011 on Tackling Tax Avoidance. This included, at Chapter 4 'the Government's Protocol on unscheduled announcements of tax changes'[4]. This says that retrospective legislation would only be enacted in exceptional circumstances, specifically:

'*The Government has made clear its aim to strike the right balance between restoring the UK tax system's reputation for predictability, stability and simplicity and preserving its ability to protect the Exchequer by making changes where necessary. In particular, changes to tax legislation where the change takes effect from a date earlier than the date of announcement will be wholly exceptional*.'

[4] Tackling tax avoidance (publishing.service.gov.uk)

It is difficult to see how these rules, which broadly reflect rules that are currently in place, in respect of which disclosure is required to periods to 25 June 2018 in any event, fall into a 'wholly exceptional' category that justifies the much longer look back period that is suggested.

5 Opaque Offshore Structures (Para 4.4)

5.1 The opaque offshore structures hallmark under the OECD rules is worded more like the first hallmark / Hallmark D1 compared to Hallmark D2 ('Obscuring Beneficial Ownership') in DAC 6. Hallmark D2 (unlike Hallmark D1) did not include any such language which could infer 'intent' (see para 4.10 above) meaning that arrangements which just have the effect of obscuring the underlying beneficial ownership, without any deliberate intention to obscure it, are disclosable. This means that completely genuine transactions can be reportable under Hallmark D2 and it can be difficult to establish whether something meets the test of being obscure from relevant tax authorities. Therefore it is interesting that the second hallmark in the OECD rules is worded differently and, whilst it might be a stretch to read an intention into the second hallmark, it would provide some comfort if HMRC were to provide some assurances in guidance that they would prioritise focussing on structures that deliberately obscure the underlying beneficial ownership. This would target the actual mischief and make the rules easier to apply.

6 Practicalities of Reporting (Chapter 6)

6.1 Questions 14 to 16 ask what methods a person would use if they needed to make a report under the new regulations, would they expect to report to HMRC themselves or would they want someone else such as an agent to report on their behalf and if their preferred method of reporting was not available, would this cause significant difficulties and why.

6.2 It is difficult to comment fully without knowing how the reporting options will work and how easy they will be to use. The consultation says that HMRC envisage that reporting will be done online. In that case it will be helpful if there is an option to attach and upload additional information and documents (ie common file types such as pdfs). It would also be useful if there was unlimited text entry (ie no fields with limits on the numbers of characters permitted to be used in them).

6.3 In view of the likely smaller volumes of disclosures compared to under DAC 6, HMRC say that they are considering whether it is necessary to provide a manual data entry option as well as xml schema upload. Before making a decision not to provide a manual option, we would urge HMRC to continue to undertake research with stakeholders since the fact that volumes may be lower could well mean a manual option is more appropriate as it may well be prohibitively expensive for xml schema to be developed and it remains unclear whether any third party software providers will provide software for this reporting requirement.

7 Acknowledgement of submission

7.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation
7 February 2022