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Targeting Tax Avoidance Enablers

Noam Noked* & Zachary Marcone**

The Panama Papers, the Paradise Papers, and the Pandora Papers have exposed how tax advisors, lawyers, financial institutions, and other intermediaries have helped the world's economic elites hold their wealth through corporations and trusts organized in tax havens. These professional enablers are frequently located in a country other than that of the relevant taxpayers. This means that the tax avoidance enablers are often out of the reach of the victim governments.

How can a government counter the activities of professional enablers located in other countries? This has proven to be a formidable challenge. This Article proposes a novel solution: a new international reporting standard, referred to as Global Mandatory Disclosure Rules (GMDR), which will impose reporting obligations on intermediaries assisting taxpayers with designing and implementing cross-border tax schemes.

This proposal builds on the legal mechanisms currently deployed in several countries. Mandatory disclosure rules (MDRs), which require that intermediaries report their clients' tax schemes, were introduced in the United States in the 1980s. Since then, MDRs have been adopted in several countries as domestic measures targeting local tax avoidance enablers and their clients. In recent years, the European Union and the Organization for Economic Cooperation and Development have introduced multilateral MDRs that focus on certain cross-border arrangements. Drawing upon these reporting regimes, this Article proposes GMDR as a comprehensive standard.

GMDR is a missing piece in the global tax transparency framework which could close gaps in other international tax reporting standards. This Article explains the need for GMDR, explores the relevant design options, and proposes an implementation strategy. As GMDR could be an indispensable tool in the international effort to curb cross-border tax abuse, this proposal deserves serious consideration.

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INTRODUCTION

In the early eighteenth century, the British-born, Caribbean-based pirate "Black Bart" roamed the oceans, seizing the fortunes of European navies.[1] The name of Black Bart's most infamous ship, the *Royal Fortune,* conspicuously flaunted the ultimate source of his wealth: the coffers of European states. Three centuries later, the British-born, Dubai-based trader Sanjay Shah sailed the oceans in a yacht not-so-subtly named "Cum-Ex."[2] Cum-Ex refers to schemes described by one

1. *See* DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES 214 (Hancourt Brace & Company eds., 1997); Mark Cartwright, *Bartholomew Roberts*, WORLD HIS. ENCYC. (Sept. 7, 2021), https://www.worldhistory.org/Bartholomew_Roberts/ [https://perma.cc/N9J7-Z9UY].

2. David Segal, *It May Be the Biggest Tax Heist Ever. And Europe Wants Justice*, N.Y. TIMES (Jan. 24, 2020), https://www.nytimes.com/2020/01/23/business/cum-ex.html [https://perma.cc/3NB5-AX3C?type=standard].

analyst as "the biggest tax theft in the history of Europe."[3] Shah himself is suspected of defrauding the Danish government alone of $1.7 billion in tax revenues, a sum that far eclipses the meager exploits of the eighteenth century "scourge of the Atlantic."[4] Shah is not alone—many other financial institutions, law firms, and other professionals assisted clients with the design and implementation of Cum-Ex schemes.[5]

Cum-Ex schemes typically involved two investors supported by a financial institution and an intermediary like Sanjay Shah.[6] These parties would implement a series of steps to claim refunds twice for tax that was paid only once.[7] In many cases, the parties to these transactions were based in different countries; this is how a Dubai-based intermediary might work alongside a U.S. financial institution to deny Denmark billions in tax revenues. Unfortunately, Cum-Ex schemes are not isolated examples of foreign intermediary-enabled tax abuse. A series of leaks, including the Panama Papers, the Paradise Papers, and most recently the Pandora Papers, have revealed numerous examples of overseas service providers and financial institutions enabling the avoidance and evasion of tax by corporations and high net worth individuals.[8] These foreign enablers exacerbate a hidden wealth problem that has

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3. *See id.*

4. *Id.*; David Segal, *A Financier Suspected in a Nearly $2 Billion Danish Tax Fraud is Arrested*, N.Y. TIMES (June 3, 2022), https://www.nytimes.com/2022/06/03/business/sanjay-shah-arrested-denmark-taxes.html [https://perma.cc/ABA4-NUDL?type=standard]. A Dubai court recently approved Shah's extradition to Denmark. *Sanjay Shah, a British-Indian in Dubai, to be Extradited to Denmark for $1.7 in Tax Fraud*, BUS. INSIDER: INDIA (Dec. 30, 2022, 10:38 AM), https://www.businessinsider.in/india/news/sanjay-shah-a-british-indian-in-dubai-to-be-extradited-to-denmark-for-1-7-bn-tax-fraud/articleshow/96613134.cms [https://perma.cc/9DLD-EDMT].

5. *See* Theo Leggett, Manuel Daubenberger & Oliver Schroem, *Tax Cheat Schemes Cost Governments Billions*, BBC NEWS (Oct. 21, 2021), https://www.bbc.com/news/business-58984813 [https://perma.cc/XCZ5-DTTW].

6. *See id.* For a more detailed description of how Cum-Ex schemes function, see European Parliament, *The Cum-Ex Files- Information Document* (2018). *See also* OECD, *Ending the Shell Game: Cracking Down on the Professionals Who Enable Tax and White Collar Crimes*, at 17–19 (2021).

7. *See* Leggett et.al., *supra* note 5.

8. *See* BASTIAN OBERMAYER & FREDERIK OBERMAIER, THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH AND POWERFUL HIDE THEIR MONEY (Oneworld Publ'ns Ltd. eds. 2016); Lawrence J. Trautman, *Following the Money: Lessons from the Panama Papers: Part 1: Tip of the Iceberg*, 121 PENN ST. L. REV. 807, 808–10 (2017); Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532, 536–37 (2018); James O'Donovan, Hannes F. Wagner & Stefan Zeume, *The Value of Offshore Secrets: Evidence from the Panama Papers*, 32 REV. FIN. STUD. 4117, 4130 (2019); *Pandora Papers*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), https://www.icij.org/investigations/pandora-papers/ [https://perma.cc/VVM3-X8TB]. For in-depth discussion on the distinction between tax avoidance and evasion, see Erich Kirchler, Boris Maciejovsky & Friedrich Schneider, *Everyday Representations of Tax Avoidance, Tax Evasion, and Tax Flight: Do Legal Differences Matter?,* 24 J. ECON. PSYCHOL. 535, 536–50 (2003); Paul Merks, *Tax Evasion, Tax Avoidance and Tax Planning*, 34 INTERTAX 272, 272–73 (2006); Joel Slemrod, *Tax Compliance and Enforcement*, 57 J. ECON. LIT. 904, 906 (2019); Annette Alstadsaeter, Niels Johannesen, Segal Le Guern Herry & Gabriel Zucman, *Tax Evasion and Tax Avoidance*, 206 J. PUB. ECON. 1 (2022). Tax evasion generally involves willful underpayment of taxes in an unambiguously illegal manner, typically by filing false tax returns or failing to report complete and accurate information to the tax authorities. Tax avoidance generally involves reducing tax liability through measures that are not considered to be criminal. Most MDRs target tax avoidance. The CRS MDRs target arrangements that raise concerns of tax evasion. OECD, *Model Mandatory Disclosure Rules for CRS Avoidance and Opaque Offshore Structures* 14, 24 (Mar. 9, 2018) [hereinafter CRS MDRs], https://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-

reached mammoth proportions in recent years. The wealth stored in tax havens was recently estimated at $9.8 trillion.[9] While not all of that money is being siphoned away from governments, one estimate calculates an annual tax revenue loss of $483 billion due to tax abuse.[10]

Foreign intermediary-enabled tax abuse is challenging to detect and deter, as discussed in Part I of this Article. First, governments have limited tools to regulate the conduct of intermediaries in foreign countries. While criminal charges might be brought in the most egregious cases, criminal penalties are rarely imposed on foreign intermediaries.[11] This is because the victim government might have limited ability to investigate, prosecute, and penalize them.[12] Moreover, the foreign government where the intermediaries are located may have little incentive to target these intermediaries (which may include powerful financial institutions) that erode the tax bases of other governments.[13] For example, some Cum-Ex schemes targeting Europe were carried out with the assistance of U.S. financial institutions.[14] While aiding and abetting others who commit foreign tax evasion is a serious federal crime under the U.S. Criminal Code, we are not aware of any enforcement action by the U.S. Department of Justice against U.S. financial institutions that participated in

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structures.htm [https://web.archive.org/web/20220901041748/https://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.htm].

9. *See* EUROPEAN COMMISSION, MONITORING THE AMOUNT OF WEALTH HIDDEN BY INDIVIDUALS IN INTERNATIONAL FINANCIAL CENTRES AND IMPACT OF RECENT INTERNATIONALLY AGREED STANDARDS ON TAX TRANSPARENCY ON THE FIGHT AGAINST TAX EVASION: FINAL REPORT (2021), https://op.europa.eu/en/publication-detail/-/publication/0f2b8b13-f65f-11eb-9037-01aa75ed71a1 [https://perma.cc/392S-CTNU?type=standard] (estimating hidden wealth of $9.8 trillion in 2018); *see also* CHARLES VELLUTINI, GEORGES CASAMATTA, LÉA BOUSQUEST & GRZEGORZ PONIATOWSKI, ESTIMATING INTERNATIONAL TAX EVASION BY INDIVIDUALS (2019) (estimating global offshore wealth at $7.8 trillion in 2016); Valeria Pellegrini, Alessandra Sanelli & Enrico Tosti, *What do External Statistics Tell Us About Undeclared Assets Held Abroad and Tax Evasion?,* QUESTIONI DI ECONOMIA E FINANZA (OCCASIONAL PAPERS), Nov. 2016; GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 35 (Teresa Lavender Fagan trans., 2015) (estimating the global hidden wealth at $7.6 trillion).

10. *See* Mark Bou Mansour, *Losses to OECD Tax Havens Could Vaccinate Global Population Three Times Over, Study Reveals*, TAX JUST. NETWORK (Nov. 16, 2021), https://taxjustice.net/2021/11/16/losses-to-oecd-tax-havens-could-vaccinate-global-population-three-times-over-study-reveals/ [https://perma.cc/4GXK-RA7A].

11. For example, the United States investigated and penalized Swiss banks and bankers for aiding and abetting tax evasion. *See Offshore Compliance Initiative*, U.S. DEP'T OF JUST., https://www.justice.gov/tax/offshore-compliance-initiative [https://perma.cc/27QR-QBWK] (Aug. 2, 2023). However, this came after decades during which the U.S. government undertook very little action against the known tax evasion by U.S. taxpayers holding undeclared funds in Swiss banks. In addition, most U.S. investigations against foreign financial institutions that aided and abetted their clients' tax evasion were concluded in non-prosecution agreements in exchange for collaboration and, in some cases, the payment of fines.

12. There may also be jurisdictional questions whether the victim country can criminally charge the foreign intermediary for conduct that did not take place in its territory. *See* Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155 (1971).

13. *See* Omri Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 201, 202–04 (2017).

14. *See, e.g.*, Karin Matussek, *Barclays, Merrill Resurface in Third German Cum-Ex Indictment*, BLOOMBERG (Mar. 5, 2020, 7:33 AM), https://www.bloomberg.com/news/articles/2020-03-05/barclays-merrill-resurface-in-third-german-cum-ex-indictment#xj4y7vzkg [https://perma.cc/7DSF-CBF9].

Cum-Ex schemes.[15] At the same time, the United States might be harmed by the conduct of foreign intermediaries in other countries where governments have little interest in protecting the U.S. tax base.

Second, national governments suffer from an information problem. Many abusive tax schemes are not easily detected with the information available within the borders of one sovereign nation.[16] A full appreciation of these schemes would require examining data from multiple different countries. Also, some tax schemes may be uncovered earlier in some countries than others. Without proper information sharing between countries, many national tax authorities may not be aware of the types of schemes they should be on the lookout for. The Cum-Ex scandal illustrates this information problem: schemes similar to Cum-Ex had been identified and prohibited in the United States years before the same schemes emerged in Europe.[17] Nevertheless, U.S. financial institutions promoted and implemented Cum-Ex schemes in Europe for nearly a decade after these schemes had been banned in the United States.[18] As proposed in this Article, an international system of reporting by intermediaries would have tipped European governments off to Cum-Ex schemes at an earlier stage. Years later, European governments are now struggling to recoup their lost revenues.[19]

To resolve these challenges, this Article proposes the introduction of a new international reporting standard, referred to as Global Mandatory Disclosure Rules (GMDR). In general, mandatory disclosure rules (MDRs) require intermediaries to disclose participation in arrangements that bear the hallmarks of aggressive tax planning.[20] As discussed in Part II, since the United States first adopted MDRs in the 1980s to counter the proliferation of domestic tax shelter schemes for individuals, MDRs have been implemented successfully in Canada, the United

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15. *See* Pasquantino v. United States, 544 U.S. 349 (2005) (holding that a plot to defraud a foreign government of tax revenue constituted a wire fraud); 18 U.S.C. § 1343. The maximum penalties for wire fraud include imprisonment of not more than 20 years. This conduct may also constitute money laundering. 18 U.S.C. §§ 1956, 1957. *See also* Howard Fischer, Joshua Ray & Salome Lemasson, *The Cum-Ex Scandal: Will US Prosecutors Elbow Into Europe's Greatest Tax Fraud?*, THOMSON REUTERS: WEST LEGALEDCENTER (2021) ("Up to now, the scandal—and government efforts to prosecute those complicit in it—have been largely limited to Europe.").

16. *See 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,* at 29, SWD (2017) 236 final (June 21, 2017) [hereinafter *European Commission Staff Working Document*] ("Experience shows that national provisions against aggressive tax planning cannot be fully effective. The disclosure requirements under national rules would be limited to the domestic territory and therefore only deal with a single fragment of a cross-border scheme. . . . In addition, if only part of a scheme becomes known to the authorities, it is very possible that the potentially harmful elements of the scheme escape."); *see also* OECD, MANDATORY DISCLOSURE RULES, ACTION 12, at 68–69 (Oct. 5, 2015), https://www.oecd-ilibrary.org/docserver/9789264241442-en.pdf?expires=1680369599&id=id&accname=ocid177578&checksum=9B9784F14CC8966FE261E056C7F352CA [https://perma.cc/FQ4C-8URV].

17. *See Dividend Tax Abuse: How Offshore Entities Dodge Taxes on U.S. Stock Dividends: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Gov't Affairs*, 110th Cong. (2008).

18. *See* Matussek, *supra* note 14.

19. *See* Segal, *supra* note 4.

20. *See* Noam Noked, Zachary Marcone & Alison Tsang, *The Expansion and Internationalization of Mandatory Disclosure Rules*, 13 COLUM. J. TAX L. 122 (2022); *infra* Part II.

Kingdom, and several other countries.[21] For example, MDRs have been credited for reducing the problem of corporate tax shelters in the United States in the early 2000s.[22] However, thus far most MDRs have been implemented in narrow domestic settings. As shown in this Article, confining MDRs within national, sovereign states is a policy flaw that prevents MDRs from reaching their full potential.[23] For example, a recent study found that the implementation of EU-wide MDRs prompted an increase in cross-border deposits in countries that are not subject to the bloc's MDRs.[24] If properly coordinated and implemented at the multilateral level, GMDR would ensure that taxpayers cannot avoid reporting under MDRs by locating assets and activities in offshore jurisdictions.

GMDR would create a unified mandatory disclosure regime that brings together different countries and jurisdictions.[25] Under GMDR, intermediaries would be required to report tax schemes that match a set of hallmarks to the tax authorities in their home countries. These tax authorities would then share these disclosures with all relevant governments within the regime. This would facilitate the identification of cross-border tax schemes and prevent situations like the Cum-Ex scandal where countries remained ignorant of a scheme despite its previous identification in a different country. As discussed in Part III, if this mechanism were implemented widely, it would resolve the information problem identified above.

GMDR could also resolve the issues surrounding the enforcement of reporting obligations. Responsibility for enforcing GMDR reporting would rest on every government within the international agreement. Thus, if an intermediary in country A facilitates the denial of tax revenue to country B, GMDR would require country A to ensure that the intermediary satisfies its reporting obligations.[26] The implementation strategy, discussed in Part V, addresses situations where some governments refuse to adopt GMDR. To ensure the effective enforcement of reporting obligations, GMDR-implementing governments can engage directly with intermediaries in countries that do not implement GMDR. This enforcement model would draw upon the United States' Foreign Account Tax Compliance Act (FATCA), which requires that foreign financial institutions report information regarding their U.S. account holders directly to the Internal Revenue Service (IRS) or face penalties.[27]

GMDR would add to the growing number of international tax transparency reforms that have been adopted in the past decade. Although these reforms have improved tax transparency, they leave several blind spots. The Common Reporting

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21. *See* Noked et al., *supra* note 20.

22. *See* 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) ("The tax shelter war is over, the government won.").

23. *See infra* Part II.

24. *See* Elisa Casi-Eberhard, Mohammed Mardan & Rohit Reddy Muddasani, *So Close and Yet So Far: The Ability of Mandatory Disclosure Rules to Crack Down on Offshore Tax Evasion* (TRR 266 Accounting for Transparency, Working Paper Series No. 104, 2022).

25. *See infra* Part IV.

26. This assumes that the intermediary is in a country that implements GMDR. See *infra* Part V for a discussion of how to apply GMDR to intermediaries in non-cooperative jurisdictions.

27. *See infra* Part V; Noam Noked & Zachary Marcone, *The International Response to the U.S. Tax Haven*, 48 YALE J. INT'L L. 177 (2023).

Standard (CRS) only applies to financial assets maintained by financial institutions in CRS-implementing countries.[28] Many forms of tax avoidance and evasion cannot be detected through CRS reporting.[29] GMDR, on the other hand, would not be limited to the financial account information that is reported under CRS. Second, country-by-country reporting (CbCR) and the newly introduced global minimum tax apply to large multinational enterprises (MNEs) with over 750 million euros in annual revenue.[30] No such limit would exist under GMDR.[31] Third, the spontaneous exchange of tax rulings only involves rulings issued by governments and does not extract new information from nongovernmental actors.[32] Finally, transparency measures such as public beneficial ownership registers do not produce comprehensive information on abusive tax schemes.[33] GMDR would instead require detailed disclosures that reveal far more information about such schemes and the role intermediaries play in their design, marketing, and implementation.

Thus, GMDR can close substantial gaps in the international tax framework. The main advantage of GMDR lies in its reporting obligations that cover many different types of tax avoidance and evasion schemes, known and unknown.[34] Moreover, GMDR expands the regulation of professional service industries by requiring intermediaries such as tax advisors, accountants, lawyers, financial institutions, trustees, and others to disclose their involvement in such schemes. These reporting requirements will have a deterrent effect on intermediaries' engagement in abusive cross-border tax schemes.[35] Ultimately, GMDR applies the

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28. *See* OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (July 21, 2014) [hereinafter CRS], https://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters-9789264216525-en.htm [https://web.archive.org/web/20230322191313/https://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters-9789264216525-en.htm].

29. *See* Noam Noked, *Tax Evasion and Incomplete Tax Transparency*, 7 LAWS 31 (2018).

30. *See* OECD, TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING, ACTION 13, at 10 (Oct. 5, 2015) [hereinafter ACTION 13]; OECD, STATEMENT ON A TWO-PILLAR SOLUTION TO ADDRESS THE TAX CHALLENGES ARISING FROM THE DIGITALISATION OF THE ECONOMY 4 (2021).

31. In addition, while CbCR provides high-level summary information, GMDR will require detailed information about reportable cross-border schemes.

32. *See* OECD, COUNTERING HARMFUL TAX PRACTICES MORE EFFECTIVELY, TAKING INTO ACCOUNT TRANSPARENCY AND SUBSTANCE, ACTION 5, at 47, https://www.oecd.org/tax/beps/beps-actions/action5/ [https://web.archive.org/web/20230304062918/https://www.oecd.org/tax/beps/beps-actions/action5/] (last visited Aug. 20, 2023); Markus Ferber, *Automatic Exchange of Information on Tax Rulings*, EUROPEAN PARLIAMENT LEGISLATIVE TRAIN: ECONOMIC AND MONETARY AFFAIRS - ECON (Nov. 20, 2021), https://www.europarl.europa.eu/legislative-train/carriage/automatic-exchange-of-information-on-tax-rulings/report?sid=6801 [https://perma.cc/ZB9B-P89Y].

33. *See* Philip Marcovici & Noam Noked, *Cooperative Compliance Program for Individuals and Trusts: A Proposal for a Compliance Passport*, 6 J. TAX ADMIN. 33 (2021).

34. MDRs typically contain both generic and specific hallmarks. Generic hallmarks are designed to cast a wide net by making certain unchangeable features of tax avoidance schemes trigger reportability. Thus, even if a certain type of scheme is unknown to the authorities at the time of the MDRs' adoption, the scheme may still feature one of these generic hallmarks and thus trigger reportability. Generic hallmarks, therefore, anticipate future schemes and make it difficult for enabling intermediaries to design schemes that avoid disclosure requirements. *See infra* text accompanying note 265.

35. *See infra* Part III.

advantages of MDRs at the multilateral level. These advantages include effective and early detection of abusive cross-border tax schemes, deterrence of enabling intermediaries, and timely intelligence gathering that allows for proactive policy responses to tax avoidance.[36]

As noted, most existing MDRs are domestic regimes that focus on domestic tax avoidance. However, two notable exceptions were introduced in recent years: the Organization for Economic Cooperation and Development's (OECD) Model MDRs for CRS Avoidance Arrangements and Opaque Offshore Structures (CRS MDRs)[37] and a 2018 amendment to the European Union's (EU) Directive on Administrative Cooperation (DAC6).[38] CRS MDRs narrowly apply to CRS avoidance and opaque offshore structures. Thus, although CRS MDRs may be poised for widespread adoption, they do not constitute GMDR as proposed in this Article. DAC6 applies to various tax schemes but is confined to the twenty-seven Member States of the EU. As discussed in Part IV, the DAC6 model would need to undergo several important adjustments to be adopted globally as GMDR.

Ultimately, GMDR is a practical and feasible solution. GMDR has the potential to become an international standard, similar to other tax transparency standards from recent years. To maximize adoption and implementation, this Article proposes several ways to encourage countries to adopt GMDR.[39] It also suggests ways that GMDR could apply to intermediaries even if they are located in countries that do not implement GMDR.[40] This implementation plan would allow GMDR to function effectively even if some countries refuse to join.

Part I of this Article analyzes the problems tax authorities encounter when dealing with cross-border tax abuse and the failure of the current international tax transparency standards to address these problems. Part II examines the current state of MDRs and finds that the fragmented nature of existing regimes limits their ability to rein in cross-border tax abuse. Part III introduces the proposal for GMDR and explains how it would resolve the issues identified in Parts I and II. Part IV explores the design options and considerations of GMDR, drawing upon the EU's DAC6 as a model. Part V develops the implementation strategy.

I. THE INEFFECTIVENESS OF CURRENT ANTI-TAX ABUSE RULES

Tax avoidance and evasion schemes are responsible for large revenue losses every year.[41] A study from 2020 estimated that $7.5 trillion will not be collected over the next decade in the United States alone.[42] Others have estimated that tax avoidance by shifting corporate profits offshore has cost the U.S. government tens,

36. *See id.*
37. CRS MDRs, *supra* note 8; *see infra* Part II.
38. Council Directive 2018/822, 2018 O.J. (L 139) 1 [hereinafter DAC6]; *see infra* Parts I and III.
39. *See infra* Part V.
40. *See id.*
41. See *supra* note 8 for the difference between tax avoidance and evasion.
42. Natasha Sarin & Lawrence H. Summers, *Understanding the Revenue Potential of Tax Compliance Investment* (Nat'l Bureau of Econ. Rsch., Working paper No. 27571, 2020), https://www.nber.org/system/files/working_papers/w27571/w27571.pdf [https://perma.cc/5EWK-QGSB].

if not hundreds, of billions of dollars in revenue each year.[43] Another study estimates the revenue losses from tax avoidance, which primarily affects developing countries, at half a trillion dollars per year.[44] Thus, tax avoidance and evasion plague nations of all geographies and economies. Leakages of such magnitude cripple the provision of public goods, exacerbate inequality, and hinder economic development.[45]

The challenge of eliminating abusive cross-border tax schemes arises from a disconnect between the nature of schemes and that of the enforcement institutions tasked with detecting and curbing them.[46] Globalization has fostered connections across borders between formerly isolated parties.[47] Now a single taxpayer may hold citizenship in country A, reside in country B, hold their assets in country C, and employ the services of various lawyers, accountants, and other intermediaries in other countries. Many of these exchanges are positive and support global development. However, the new interconnectedness of the world also exposes vulnerabilities in current tax enforcement systems.[48] These vulnerabilities can be exploited by some intermediaries that wish to enable tax avoidance and even tax evasion.[49] These enablers have an outsized impact on tax revenue, as evidenced by Sanjay Shah's alleged ability to personally facilitate the extraction of around $1.7 billion from Denmark alone.[50] The importance of foreign intermediaries as enablers of tax abuse cannot be understated.[51]

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43. Kimberly A. Clausing, *The Effect of Profit Shifting on the Corporate Tax Base in the United States and Beyond* 905 NAT'L TAX J. (2016) (finding that profit-shifting had cost the U.S. government approximately $77 billion to $111 billion by 2012); STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 110TH CONG., REP. ON DIVIDEND TAX ABUSE: HOW OFFSHORE ENTITIES DODGE TAXES ON U.S. STOCK DIVIDEND (2008), https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/091108DividendTaxAbuse.pdf [https://perma.cc/WS9U-V45L] (noting that the U.S. might lose up to $100 billion annually in tax revenue from offshore tax abuse); Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, 4 NAT'L TAX J. 727, 737–41 (2009) (estimating that corporate profit shifting may cost the U.S. government $60 billion in revenue with losses as high as $70 billion per year).

44. Alex Cobham & Peter Jansky, *Global Distribution of Revenue Loss from Corporate Tax Avoidance: Re-estimation and Country Results*, 30 J. INT'L DEV. 206, 206–07 (2018); Ernesto Crivelli, Rudd De Mooji & Michael Keen, *Base Erosion, Profit Shifting and Developing Countries* 23 (IMF Working Paper No. 15/118, 2015) (estimating the global revenue loss due to corporate tax avoidance at $650 billion annually).

45. *See* CLEMENS FUEST & NADINE RIEDEL, TAX EVASION, TAX AVOIDANCE AND TAX EXPENDITURES IN DEVELOPING COUNTRIES: A REVIEW OF THE LITERATURE (2009) (report prepared for the UK Dep't for Int'l Dev.). *See also* Mansour, *supra* note 10. Several studies have also shown that tax evasion disproportionately benefits wealthy individuals. *See* Annette Alstadsæter, Niels Johannesen & Gabriel Zucman, *Tax Evasion and Inequality*, 109 AM. ECON. REV. 2073 (2019).

46. *See* GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 67–68 (Teresa Lavender Fagan trans., 2015); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576–77 (2000).

47. *See* Avi-Yonah, *supra* note 46, at 1575.

48. *See* Zucman, *supra* note 46, at 1–7.

49. *See* Noked et al., *supra* note 20, at 124–25.

50. *See* Segal, *supra* note 4.

51. *See* Willem Pieter De Grien, *Role of Advisors and Intermediaries in the Schemes Revealed in the Panama Papers*, PE 602.030, IP/A/PANA/2016-05 (Apr. 2017); BEN SCHUMANN, USUAL SUSPECTS? CO-CONSPIRATORS IN THE BUSINESS OF TAX DODGING (2017), https://www.greens-efa.eu/files/assets/docs/usual_suspects___intermediaries_in_tax_dodging.pdf [https://perma.cc/V7H4-FY29].

While intermediaries and taxpayers have kept pace with globalization, enforcement institutions have lagged.[52] Many tax rules are designed to deal with *domestic* tax abuse.[53] However, domestically focused tax enforcement is limited in its ability to effectively curb abusive cross-border tax schemes, which have become more prevalent in recent decades.[54] There are several reasons for this. First, an enforcement problem arises because domestic tax and law enforcement authorities have little incentive to prevent domestic intermediaries from facilitating tax abuses that harm other countries.[55]

As a result, intermediaries' conduct within one country can go unchecked and lead to negative externalities for other countries. This occurred, for example, in the Cum-Ex scandal in which U.S. financial institutions shifted their activities to Europe once Congress began scrutinizing their deprivation of U.S. tax revenue.[56] Naturally, the U.S. authorities were less concerned with preventing the denial of revenue to European governments than their own.[57] Consequently, U.S. financial institutions continued profiting from Cum-Ex schemes in Europe after similar schemes had been prohibited in the United States.[58] These issues are exacerbated when some governments give refuge to enabling intermediaries as a matter of policy.[59] This may occur in tax havens or other financial centers that attempt to attract businesses and funds.[60] In summary, with each country only looking out for its interests, governments have few incentives to act against domestic intermediaries when their conduct creates negative externalities for other countries. At the same time, the victim governments have limited ability to act against foreign intermediaries.

In addition, there is an information problem that inhibits the timely identification of cross-border tax schemes. As a result, cross-border tax schemes may go undetected and, therefore, cannot be scrutinized.[61] Tax authorities generally access data within their national boundaries. While tax treaties enable information exchange on request, these information exchanges are typically non-comprehensive and irregular.[62] Without data from various geographic and jurisdictional sources, it

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52. OECD, ADDRESSING BASE EROSION AND PROFIT SHIFTING 6–7 (2013), https://read.oecd-ilibrary.org/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page1 [https://perma.cc/4EGQ-ZL6W] ("This report also shows that current international tax standards may not have kept pace with changes in global business practices . . . . In an era where non-resident taxpayers can derive substantial profits from transacting with customers located in another country, questions are being raised on whether the current rules are fit for purpose.").

53. *See European Commission Staff Working Document*, *supra* note 16, at 12, 29–30.

54. *Id.*; De Grien, *supra* note 51, at 10.

55. Some governments may even support these practices, as shown in Marian, *supra* note 13, with respect to Luxembourg.

56. *See* Segal, *supra* note 2.

57. *See id.*

58. *See id.*

59. *See* Marian, *supra* note 13, at 201–05.

60. *See id.*

61. *See* Mansour, *supra* note 10 (claiming that the tax abuse we observe is the "tip of the iceberg"); OECD, *supra* note 6, at 42 ("With globalisation, the ability for professional enablers to operate cross-border and arrange transactions that send funds abroad instantly has increased. However, law enforcement authorities have less knowledge of activity outside their borders.").

62. *See European Commission Staff Working Document*, *supra* note 16, at 16, 63.

can be challenging to appreciate the breadth and purpose of a cross-border scheme.[63]

The information problem exacerbates the enforcement problem: governments cannot consider their responses and act against these practices without information about these practices. Addressing the information problem could enable better enforcement. For example, after a whistleblower revealed to the U.S. Department of Justice how UBS, a large Swiss bank, had engaged in extensive illegal activities of aiding and abetting U.S. taxpayers to hide undeclared funds in Switzerland, the U.S. government used this information to take enforcement actions against UBS and dozens of other Swiss banks.[64] These revelations led the Department of Justice to launch its Offshore Compliance Initiative, an ongoing program that has since expanded to investigate and prosecute financial institutions and tax evaders.[65]

To address the failures of domestic tax authorities to rein in cross-border tax avoidance and evasion, several significant multilateral tax reforms have been implemented in recent years. However, as explained below, these reforms remain blind to many different forms of tax abuse. These reforms have gaps that allow foreign intermediaries to continue enabling cross-border tax abuse.

The OECD's Base Erosion and Profit Shifting (BEPS) project comprises several reporting standards aiming to close the information gap tax authorities face when dealing with cross-border activities.[66] Under BEPS, large MNEs are required to file an annual CbCR, which includes information about their revenue, income, tax payments, employees, and tangible assets in all jurisdictions where they have subsidiaries and branches.[67] Under BEPS, CbCR is a minimum standard, meaning that it must be implemented by all members of the inclusive framework, which includes over 135 jurisdictions.[68] This standard only applies to MNEs with annual revenues equal to or exceeding 750 million euros.[69] No similar reporting requirement applies to non-corporate taxpayers or corporate taxpayers below this revenue threshold. Even for in-scope MNEs, the CbCR provides only summary

63. *Id.* at 29 ("Experience shows that national provisions against aggressive tax planning cannot be fully effective. The disclosure requirements under national rules would be limited to the domestic territory and therefore only deal with a single fragment of a cross-border scheme. In fact, such schemes usually involve numerous companies with tax residence in a variety of jurisdictions. Sometimes, when it comes to multinational groups, the taxpayer in a single jurisdiction may not even be fully informed of the structure of a scheme that stretches across the group. It would therefore be unrealistic to expect to receive the full picture of a cross-border scheme applying to a multinational group through placing of disclosure to a local subsidiary. In addition, if only part of a scheme becomes known to the authorities, it is very possible that the potentially harmful elements of the scheme escape.").

64. *See* J. Richard (Dick) Harvey Jr., *Offshore Accounts: Insider's Summary of FATCA and Its Potential Future*, 57 VILL. L. REV. 471, 476–79 (2012).

65. *See* U.S. DEP'T OF JUST., *supra* note 11.

66. *See* OECD, *Inclusive Framework on Base Erosion and Profit Shifting* [hereinafter OECD, *Inclusive Framework on Base Erosion and Profit Shifting*], https://www.oecd.org/tax/beps/ [https://web.archive.org/web/20230705121913/https://www.oecd.org/tax/beps/] (last visited Aug. 20, 2023); OECD, *Action Plan on Base Erosion and Profit Shifting*, at 7–11, 21 (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf [https://perma.cc/KH27-MZT8]; OECD, *supra* note 52.

67. *See* ACTION 13, *supra* note 30; RICHARD MURPHY, GLOBAL TAX FAIRNESS 96 (Thomas Pogge & Krishen Mehta eds., 2016); Noam Noked, *Public Country-by-Country Reporting: The Shareholders' Case for Mandatory Disclosure*, 90 TAX NOTES INT'L 1501 (2018).

68. *See* OECD, *Inclusive Framework on Base Erosion and Profit Shifting, supra* note 66.

69. *See* ACTION 13, *supra* note 30, at 10.

information per jurisdiction. It does not provide information about tax avoidance schemes used by MNEs.[70]

Another BEPS minimum standard requires that tax authorities share with other countries information about certain tax rulings that affect MNEs' tax position.[71] For example, the Irish government is required to disclose information to the U.S. government regarding any preferential tax treatment it provides to U.S. MNEs through a tax ruling.[72] This spontaneous exchange of tax rulings only achieves transparency concerning foreign governments' reportable tax rulings.[73] It does not apply to tax schemes devised and implemented with the assistance of nongovernmental parties, such as tax advisors, lawyers, financial institutions, trustees, and other intermediaries.

Another important reform is the CRS for the automatic exchange of financial account information.[74] Under this standard, a financial institution in a CRS-implementing country must identify account holders who are foreign tax residents and report them to the domestic tax authority, which then transmits the information to the account holders' countries of tax residency.[75] This information exchange increases the information available to tax authorities and helps them identify taxpayers' offshore financial assets. However, CRS is limited to offshore financial account information.[76] Also, taxpayers can use several loopholes to avoid CRS reporting.[77] The OECD has proposed the implementation of CRS MDRs.[78] However, CRS MDRs, as further discussed in the next Part, only mandate the disclosure of CRS avoidance arrangements and opaque offshore structures.[79] Neither CRS nor CRS MDRs will capture abusive tax schemes that do not involve CRS avoidance or opaque offshore structures.

Thus, these recent reforms have failed to effectively solve the enforcement and information problems that allow cross-border tax abuse to flourish. Where these reforms curb certain tax avoidance and evasion opportunities, taxpayers may adopt other abusive tax schemes which are not covered under these reforms.[80] There is a need for a new international standard to fill in the gaps where current measures fall short.

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70. This means that tax authorities could still have substantial challenges when they collect the relevant information to understand which cross-border tax schemes are used by the MNE globally.

71. *See* OECD, *supra* note 32, at 47–58.

72. *See*, *e.g.*, Jenni Ryall, *A Deep Dive into Apple's 'Sweetheart Deal' with Ireland*, MASHABLE (Aug. 30, 2016), https://mashable.com/article/apple-sweetheart-deal-ireland [https://perma.cc/WX7D-74X7].

73. *See* OECD, *supra* note 32, at 47–51.

74. *See, e.g.*, CRS, *supra* note 28, at 9–17; Noam Noked, *FATCA, CRS, and the Wrong Choice of Who to Regulate*, 22 FLA. TAX REV. 77 (2018) [hereinafter Noked, *FATCA, CRS, and the Wrong Choice of Who to Regulate*]; Noam Noked, *Should the United States Adopt CRS?,* 118 MICH. L. REV. ONLINE 118 (2019) [hereinafter Noked, *Should the United States Adopt CRS*?].

75. *See* CRS, *supra* note 28, at 9–17.

76. CRS does not facilitate reporting with respect to many asset classes, including real estate, precious metals, collectibles, cryptocurrencies, and other nonfinancial assets. *See* Noked, *supra* note 29, at 1–3.

77. *See id.* For example, taxpayers may use the "shell bank" loophole; see Noam Noked & Zachary Marcone, *Closing the "Shell Bank" Loophole*, 61 VA. J. INT'L L. 119 (2023).

78. *See* CRS MDRs *supra* note 8; *infra* Part II.

79. *See infra* text accompanying note 142.

80. *See* Noked, *supra* note 29, at 4–8.

The EU has recently acknowledged this need for new measures aimed at tackling enablers of tax evasion and aggressive tax planning.[81] Between July and October 2022, the European Commission held a public consultation in which feedback was solicited on three proposals targeting the enablers of tax evasion and aggressive tax planning.[82] The first proposal would prohibit enablers from helping to create tax evasion or aggressive tax planning schemes.[83] Supplementary due diligence checks would also be required.[84] The second proposal includes the provisions of the first while also requiring all enablers that assist EU taxpayers to register in an EU Member State.[85] Only registered enablers would be allowed to provide tax advice and services to EU taxpayers.[86] The third proposal would create a code of conduct that all enablers would be obliged to follow.[87] Finally, the EU has also suggested that EU taxpayers who have participation above twenty-five percent in a "non-listed company located outside of the EU" could be required to declare this participation in their annual tax returns.[88]

The EU proposals' influence on tax transparency may be limited. While the details of the proposals and the policy outcomes of this consultation remain to be seen, it appears that the proposed measures only require disclosures pertaining to ownership of overseas assets which, as some have noted, may be eluded.[89] Also, the proposed measures' effectiveness may be limited. For example, codes of conduct are generally difficult to enforce.[90] It is unclear whether and to what extent the EU could regulate the conduct of intermediaries outside of its borders.[91] Moreover, as the proposed measures are designed to protect EU tax revenues, they may not prevent enablers from facilitating tax schemes that harm non-EU governments. Thus, while the EU may benefit from a stricter regulation of intermediaries as proposed in the consultation, these measures are unlikely to address challenges caused by non-EU intermediaries and tax evasion and avoidance globally.

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81. European Commission, *Call for Evidence for an Impact Assessment*, Ref. Ares (2022) 4939801 (July 6, 2022), https://www.vatupdate.com/wp-content/uploads/2022/07/2022-07-14-Impact-assessment.pdf [https://perma.cc/N3TS-NKWP].

82. *Id.*

83. *Id.* at 2. This proposal requires that enablers carry out a "test" to determine whether they are facilitating schemes that could lead to tax evasion or avoidance. The enabler would then be required to maintain records of their completion of this test.

84. *Id.*

85. *Id.* at 2–3.

86. *Id.*

87. *Id.* at 3. The EU does not provide details on what this code of conduct would include except to say that it "obliges enablers to ensure that they do not facilitate tax evasion or aggressive tax planning."

88. *Id.*

89. *See* Eva Danzi, *EU Consultation on Tackling the Role of Enablers*, TAX JUST. NETWORK (Nov. 17, 2022), https://taxjustice.net/2022/11/17/eu-public-consultation-on-tackling-the-role-of-enablers/ [https://perma.cc/57JB-3KWX].

90. *See id.*

91. One way to govern external intermediaries is through the threat of withholding taxes. *See infra* Part V; Noked & Marcone, *supra* note 27.

II. THE FRAGMENTED STATE OF EXISTING MDRS

MDRs were first developed in domestic settings to target local tax abuse.[92] In general, MDRs require intermediaries, such as tax advisors, lawyers, accountants, and financial advisors, to disclose their clients' participation in any arrangement that matches certain hallmarks (i.e., characteristics).[93] The chosen hallmarks describe characteristics that abusive tax schemes usually possess.[94] Intermediaries must disclose arrangements that match a certain number of hallmarks.[95] MDRs provide tax authorities with timely, comprehensive data on the tax planning market.[96]

While many countries around the globe have adopted MDRs, this adoption has proceeded in a disorganized, uncoordinated fashion.[97] As a result, the current global landscape of MDRs consists mainly of a heterogeneous patchwork of localized regimes.[98] As discussed in Section II.A below, this patchwork can be divided into three broad categories: domestic MDRs, DAC6, and CRS MDRs. As analyzed in Section II.B, the globally fragmented state of MDRs fails to effectively rein in cross-border tax abuse.

A. The Current State of MDRs

1. Domestic Regimes

The United States was the first country to design and implement MDRs in the 1980s under its tax shelter registration rules.[99] In the early 2000s, these rules were expanded to capture various tax avoidance schemes carried out by individuals, corporations, and other entities.[100] The U.S. reportable transactions regime identifies reportable schemes as "listed transactions" and other schemes that contain various hallmarks or are otherwise deemed "transactions of interest."[101] In the United States, there are parallel reporting obligations on both taxpayers and "material advisors."[102] Material advisors are intermediaries that play a direct role in

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92. *See infra* Section II.A; Noked et al., *supra* note 20, at 128–42.

93. See OECD, *supra* note 16, at 18–21 for a general description of MDRs.

94. *Id.* at 39–49.

95. *See id.*

96. *See id.* at 13–14, 20–22.

97. *See infra* Section II.A; Noked et al., *supra* note 20 (providing a comprehensive overview of the development of MDRs).

98. Excepting the EU-wide DAC6, several countries have domestically and unilaterally adopted MDRs. These regimes are not coordinated with each other. For more background on the history and development of MDRs, see Noked et al., *supra* note 20.

99. *See* Deficit Reduction Act of 1984, H.R. 4170, 98th Cong. §§ 141-144 (1984) (enacted); I.R.C. §§ 6111, 6112, 6707, 6708.

100. Treas. Regs. §§ 1.6011-4, 20.6011-4, 25.6011-4, 31.6011-4, 53.6011-4, 54.6011-4, 56.6011-4 (2010). The regulations were published in Federal Register 68 FR 10161. These rules were finalized in 2004. *See* American Jobs Creation Act, H.R. 4250, 108th Cong. §§ 815-820 (2004) (amending I.R.C. §§ 6111, 6112, 6700, 6662, 6664, 6694, 6707, 6708, 7408).

101. Treas. Reg. § 1.6011-4(b) (2011). *See also Transactions of Interest*, IRS, https://www.irs.gov/businesses/corporations/transactions-of-interest [https://perma.cc/RXK3-27YZ] (last visited Aug. 20, 2023); *Listed Transactions*, IRS, https://www.irs.gov/businesses/corporations/listed-transactions [https://perma.cc/RQ7N-YVEV] (last visited Aug. 20, 2023).

102. I.R.C. §§ 6111, 6112.

the tax aspects of a scheme.[103] Overall, the U.S. reportable transactions regime is mostly domestically focused.[104]

The second country to implement MDRs was Canada, which followed the lead of the United States by implementing a tax shelter registration system in 1988.[105] Canada later expanded this regime in 2013 to adopt many of the changes implemented by the United States a decade earlier.[106] A scheme is reportable under the Canadian MDRs if it meets at least two hallmarks from a list of hallmarks.[107] Under the Canadian regime, there are parallel reporting requirements for every beneficiary, scheme user, advisor, and promoter.[108] The Canadian MDRs, like their U.S. counterparts, are primarily domestically focused.[109]

Following the expansion of the U.S. MDRs in the early 2000s, the United Kingdom created its version of MDRs.[110] The United Kingdom's Disclosure of Tax Avoidance Schemes (DOTAS) contains mostly generic hallmarks and requires promoters to report schemes.[111] DOTAS requires a scheme to be reported if it meets three criteria: the scheme might lead to a tax advantage, the tax advantage is or might be expected to be the main benefit of the scheme, and the scheme matches at least one of the hallmarks listed by the UK government.[112] Like its U.S. and Canadian counterparts, this regime is domestically focused. The United Kingdom has also adopted the CRS MDRs recently.[113] Other countries, such as South Africa, Portugal, and Ireland, have adopted MDRs that generally follow the United States' or the United Kingdom's MDRs.[114]

In recent years, Mexico and Argentina have designed and implemented their MDRs, covering domestic and cross-border tax schemes.[115] While the United States and several other countries adopted their MDRs before any international standard had been developed, Mexico and Argentina each adopted their regimes after the introduction of BEPS Action 12, CRS MDRs, and DAC6, which are further discussed below.[116] Both Mexico's and Argentina's MDRs are a mix of international

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103. Material advisors include those intermediaries that produce a tax statement with regard to a transaction. 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." Treas. Reg. § 301.6111-3 (2011).

104. *See* Noked et al., *supra* note 20, 134–37.

105. *See id.* at 132–33.

106. *See id.* at 142.

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.* at 137–40.

111. *See id.*

112. *See id.*

113. *See* Sharon Baynham, *Mandatory Disclosure Rules Reporting*, KPMG (Apr. 3, 2023).

114. *See* Noked et al., *supra* note 20, at 140–42.

115. Código Fiscal de la Federación [CFF], arts. 197-202, Diario Offical de la Federación [DOF], 12-31-1981, últimas reformas DOF 12-11-2021 (Mex.); Law No. 4838/2020, Oct. 20, 2020, B.O. (Arg.).

116. Action 12 is one of the OECD's fifteen actions to combat BEPS. *See* OECD, *supra* note 16. It analyzes various design considerations for domestic MDRs. *See id.* Mexico's regime was enacted in December 2019 while Argentina's was published in October 2020. *See* Ernst & Young, *Taxpayers Should Be Aware of Mexico's New Reportable Transaction Obligation*, GLOB. TAX ALERT, Mar. 20, 2020; PwC, *Argentina Adopts Broad Informative Regime Requiring Domestic and International Tax Planning Disclosures*, 91 INT'L TAX NEWS, Oct. 27, 2020.

best practices and local adaptation. In Mexico, schemes that generate a tax advantage and that meet one of fourteen hallmarks are reportable.[117] Mexico's MDRs include provisions for the reporting of CRS and FATCA avoidance arrangements.[118] In Argentina, schemes that create a tax benefit and meet certain characteristics are required to be reported.[119] Argentina's MDRs apply to a variety of domestic and cross-border transactions.[120]

2. DAC6: Mandatory Disclosure in the EU

In 2018, the EU adopted DAC6, which requires all Member States to adopt MDRs with specific characteristics.[121] DAC6 was partly inspired by the OECD's BEPS Action 12, which was released in 2015.[122] However, DAC6 deviated from the OECD recommendations by imposing broader reporting obligations on European intermediaries.[123] Following the directive's adoption, Member States were given two years to adopt national legislation implementing the directive. At present, all twenty-seven Member States of the EU have accomplished this.[124] The United Kingdom had initially agreed to implement DAC6 along with the EU but decided to reverse course in late 2020 following Brexit.[125]

DAC6 targets cross-border arrangements involving at least one Member State.[126] Like other MDRs, DAC6 provides a list of hallmarks that trigger reporting.[127] The hallmarks include a mix of generic and specific hallmarks, some of which are linked to a "main benefit" test.[128] Some hallmarks specifically concern transfer pricing.[129] DAC6 also adopts the CRS MDRs[130] and an information-sharing system.[131] Overall, DAC6 distinguishes itself from other MDRs in its focus on cross-border arrangements and its multilateral nature.

Moreover, while other regimes impose reporting requirements on promoters or material tax advisors, DAC6 extends this obligation to a broad set of

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117. Código Fiscal de la Federación [CFF], art. 199, Diario Offical de la Federación [DOF], 12-31-1981, últimas reformas DOF 12-11-2021 (Mex.). Some of these hallmarks resemble the hallmarks in DAC6 and Action 12, while others are unique to Mexico. *See* Kimberly Tan Majure, Armando Lara Yaffar & John DerOhanesian, *INSIGHT: Mandatory Disclosure Rules in the European Union and Mexico (1)*, BLOOMBERG TAX (Oct. 2020).

118. Código Fiscal de la Federación [CFF], art. 199, Diario Offical de la Federación [DOF], 12-31-1981, últimas reformas DOF 12-11-2021 (Mex.).

119. Law No. 4838/2020, arts. 3-4, Oct. 20, 2020, B.O. (Arg.).

120. *Id.*

121. DAC6, *supra* note 38. For an in-depth analysis of DAC6, see FLORIAN HAASE, EU TAX DISCLOSURE RULES (2021).

122. *See European Commission Staff Working Document*, *supra* note 16, at 4–5.

123. *See* Carole Hein, Eric Centi & Julien Lamotte, *DAC6: One Directive, Several Applications,* INT'L TAX REV. (July 29, 2020).

124. *See* KPMG, *Mandatory Disclosure Requirements – Updates* (June 4, 2021).

125. *See* Danish Mehboob, *UK Opts Out of DAC6 to Follow OECD Rules After Brexit*, 32 INT'L TAX REV. 11 (2021).

126. DAC6, *supra* note 38, at Annex IV pt. II.C.

127. *Id.* at Annex IV.

128. *Id.*; *see also infra* Section IV.B.

129. DAC6, *supra* note 38, at Annex IV pt. II.E.

130. *Id.* at Annex IV pt. II.D.

131. *Id.* at art. 1(2); *see also infra* Section IV.C.

intermediaries from many industries.[132] Specifically, DAC6 imposes reporting obligations on

> 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, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.[133]

These reporting obligations could apply to lawyers, accountants, bankers, trustees, and company service providers even if they are not involved with the tax aspects of the cross-border arrangement.[134] Thus, DAC6 imposes reporting obligations on various intermediaries that could feasibly enable tax avoidance and evasion through professional services rendered to taxpayers.[135] Although the EU adopted DAC6 at the supranational level, there are some differences among Member States with respect to the laws and regulations that transpose this directive into their national laws.[136] As a result, while all twenty-seven Member States have adopted similar regimes, there are some differences among them.[137]

3. CRS MDRs

In 2018, the OECD published a set of model mandatory disclosure rules that could assist in CRS enforcement.[138] CRS MDRs are designed to ensure that taxpayers do not circumvent CRS reporting.[139] CRS MDRs contain hallmarks to identify two types of schemes: CRS avoidance arrangements and opaque offshore structures.[140] These schemes must be reported by a broad set of intermediaries, including those that design or market the reportable schemes or those who provide "relevant services" with respect to the schemes.[141] Similar to DAC6, CRS MDRs require reporting by any intermediaries who are "reasonably . . . expected to know the Arrangement or Structure is a CRS Avoidance Arrangement or an Opaque Offshore Structure."[142] CRS MDRs include a system of information exchange.[143]

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132. DAC6, *supra* note 38, at art. 1(1).

133. *Id.* at art. 1(1)(b)(21).

134. *See* Noked et al., *supra* note 20, at 126–30.

135. *See id.*

136. *See* Elisa Casi-Eberhard, Xiao Chen, Mark D. Orlic & Christoph Spengel, *One Directive, Several Transpositions: A Cross-Country Evaluation of the National Implementation of DAC6*, 13 WORLD TAX J. 63 (2021).

137. *See id.*; Haase, *supra* note 121, at 195–224.

138. *See* CRS MDRs, *supra* note 8.

139. *Id.* at 9.

140. *Id.* at rules 1.1, 1.2.

141. *Id.* at rules 1.3, 2.1.

142. *Id.*

143. *See* OECD, INTERNATIONAL EXCHANGE FRAMEWORK FOR MANDATORY DISCLOSURE RULES ON CRS AVOIDANCE ARRANGEMENTS AND OPAQUE OFFSHORE STRUCTURES (2019), https://www.oecd.org/tax/exchange-of-tax-information/international-exchange-framework-for-mandatory-disclosure-rules-on-crs-avoidance-arrangements-and-opaque-offshore-structure.pdf [https://perma.cc/QCP6-K3XP]; *infra* Section IV.C (describing information sharing under GMDR).

The adoption of CRS MDRs is optional under current OECD guidelines.[144] Nonetheless, CRS MDRs have been adopted in several jurisdictions and seem poised to continue spreading.[145] For example, when the United Kingdom opted out of DAC6, it chose to implement CRS MDRs.[146] Following the United Kingdom's lead, Jersey, Guernsey, the Isle of Man, and Gibraltar have adopted or are in the process of adopting CRS MDRs.[147] Mexico incorporated the reporting of CRS and FATCA avoidance schemes into its MDRs, and South Africa has also adopted CRS MDRs.[148] Finally, DAC6 itself provides for the implementation of CRS MDRs in all twenty-seven Member States of the EU.[149] It is plausible that CRS MDRs will become an international standard among the jurisdictions that implement CRS.[150] However, in light of the narrow scope of CRS MDRs, which only target CRS avoidance and opaque offshore structures, global adoption of CRS MDRs will not address other forms of tax avoidance and evasion.

B. The Perils of a Fragmented Response

While this fragmented landscape of MDRs may lead to some victories, especially with respect to domestic tax schemes, it does not curb cross-border tax abuse effectively.[151] Specifically, domestic MDRs face information and enforcement issues when trying to target cross-border tax abuse because they might only reveal partial and incomplete information about cross-border schemes.[152] Domestic MDRs generally cannot compel intermediaries located in foreign jurisdictions to file a disclosure. This means that transactions that involve foreign intermediaries are less likely to be detected, a significant oversight in a market in which foreign intermediaries play an important role. Countries may attempt to resolve this challenge by imposing secondary or parallel reporting obligations on

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144. *See* CRS MDRs, *supra* note 8, at 3.

145. *See* Noked et al., *supra* note 20, at 133–34.

146. *See* Mehboob, *supra* note 125.

147. *See* Taxation (Implementation) (International Tax Compliance) (Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures) (Jersey) Regulations 2020, Jersey Legal Info. Bd. R&O.112/2020; Income Tax 1970, Income Tax (Mandatory Disclosure Rules) Regulations 2019, Explanatory Note, Statutory Doc. No. 2019/0454 (Isle of Man); The Income Tax (Approved International Agreements) (Implementation) (Mandatory Disclosure Rules) Regulations 2020, Guernsey Statutory Instrument 2020 No. 2; Income Tax Act 2010 (Amendment) (EU Exit) Regulations 2021, Second Amend. to Gibraltar Gazette 2021/078.

148. *See South Africa Issues New Regulations to Implement the Common Reporting Standard*, ERNST & YOUNG, 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/2QU7-V89P]; *supra* text accompanying note 118.

149. *See* DAC6, *supra* note 38, at Annex IV pt. II.D.

150. *See* Noked et al., *supra* note 20, at 144–46. As of January 25, 2023, the signatories of the Multilateral Competent Authority Agreement for CRS MDR exchanges are Belgium, Bermuda, Cayman Islands, Colombia, Costa Rica, Croatia, Cyprus, Finland, Guernsey, Iceland, Isle of Man, Jersey, Portugal, Slovenia, South Africa, Spain, and the United Kingdom; *see* OECD, *Signatories of the Multilateral Competent Authority Agreement on the Automatic Exchange regarding CRS Avoidance Arrangements and Opaque Offshore Structures* (Jan. 25, 2023), https://www.oecd.org/tax/exchange-of-tax-information/mdr-mcaa-signatories.pdf [https://perma.cc/F8Y6-EGVT].

151. *See* OECD, *supra* note 16, at 68–69.

152. *See* Franklin Cachia, *Tax Transparency for Intermediaries: The Mandatory Disclosure Rules and Its EU Impact*, 27 EC TAX REV. 206, 208–209 (2018).

taxpayers. However, this response might be ineffective due to underreporting by taxpayers who are unaware of the reporting obligations or are trying to hide tax schemes from their tax authorities.[153] Also, there are additional benefits from requiring the relevant intermediaries to report, which will not materialize if the taxpayers make the reporting.[154]

Fragmented MDRs also inhibit the exchange of tax information between countries. In the absence of a multilateral framework for the sharing of information obtained through one country's MDRs, other affected countries might not be able to detect the relevant cross-border schemes, understand their operation and prevalence, or assess their impact.[155] Intermediaries and taxpayers also incur costs as a result of fragmented MDRs.[156] When MDRs are fragmented, countries cannot easily harmonize which schemes are reportable, who must report, and what needs to be reported. This leads to a complex landscape of diverse reporting requirements, which increases the compliance burden.[157]

Finally, under a fragmented approach, it is unlikely that tax havens and financial centers that host tax avoidance enablers will adopt MDRs. This is because these jurisdictions may not have substantial domestic interest in the information that could be obtained through MDRs. They may, perhaps, adopt CRS MDRs if they are pressured to do so by the OECD or the EU. However, the same cannot be said for a more comprehensive mandatory disclosure system absent a coordinated multilateral approach as proposed in this Article.

The problems that arise from the localized implementation of MDRs are evident from the EU's experience with DAC6. While DAC6 has likely reduced aggressive tax practices within the EU,[158] there is evidence indicating that this reporting regime prompted some taxpayers to move their assets out of the EU to countries that do not implement DAC6.[159] Taxpayers have also taken advantage of

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153. *See infra* text accompanying note 179.

154. *See infra* Section III.A.

155. Countries can exchange information on request under comprehensive double tax agreements (CDTAs) or tax information exchange agreements (TIEAs). However, to file such requests, they need to know who to ask and what to ask for. A tax authority that is unaware of a scheme, or is aware of a scheme but without a full picture of the relevant jurisdictions, may not be able to obtain sufficient information through information exchange requests. Even if a tax authority knows what information it needs from a CDTA or TIEA partner, preparing and handling information requests requires resources which might not be available in underfunded tax authorities. Also, taxpayers and intermediaries can strategically choose jurisdictions that do not have CDTAs and TIEAs with their home countries.

156. Intermediaries in each country need to follow the domestic MDRs of that country. *See also* Noked et al., *supra* note 20 (discussing various differences between domestic MDRs of different countries).

157. *See id.*

158. *See* Casi-Eberhard et al., *supra* note 24, at 4, 17–19 (documenting an increase in EU residents' deposits in the EU following the implementation of DAC6).

159. There is evidence suggesting that tax evaders use citizenship-by-investment (CBI) and residence-by-investment (RBI) programs to avoid reporting. *See id.* at 5 ("Our results show a statistically significant increase of 30% in cross-border deposits owned by residents of CBI/RBI countries compared to residents of non-CBI/RBI countries post DAC6. When considering the economic size of the effect we detect, this translates into an approximately USD 14 billion increase of cross-border deposits held by CBI/RBI residents in the deposit locations outside EU post-DAC6, of which $7 billion are in tax havens outside the EU. Our findings provide evidence of the use of these schemes as regulatory arbitrage to circumvent the disclosure mandated under DAC6."). For more on how CBI

the nonuniform implementation of DAC6 within the EU and have shifted their assets to Member States with more lenient regulatory environments.[160] These findings indicate that when MDRs are not adopted globally and uniformly there are opportunities for noncompliance. If GMDR is adopted widely and coordinated effectively, it could resolve these issues by extending common reporting obligations to all major economies and financial centers.

III. THE CASE FOR GMDR

In the previous parts, we have shown how existing anti-tax abuse measures, including current MDRs and international tax transparency standards, fail to fully address the problem of intermediary-enabled cross-border schemes. This Part proposes GMDR as a solution. The key elements of this proposal are as follows: GMDR would define "reportable schemes" for all countries within a multilateral agreement. Intermediaries residing in these countries (or with some other specified nexus to these countries) would be required under the domestic law of GMDR-implementing countries to disclose their clients' reportable cross-border schemes. Intermediaries in non-cooperative countries would be required to comply with similar disclosure requirements or face penalties. A system of information exchange would be established to facilitate the exchange of information obtained under GMDR with the jurisdictions of the relevant taxpayers. Before discussing the design options for GMDR, explored in Part IV, this Part considers the potential benefits and costs of GMDR. Section III.A evaluates the potential advantages of GMDR. Section III.B considers the costs and potential objections.

A. Potential Advantages

MDRs have been credited with curbing various types of domestic tax abuse schemes. The U.S. reportable transactions regime, for example, has been credited with reversing the rapid proliferation of corporate tax shelters in the early 2000s.[161] One tax lawyer remarked that because of mandatory reporting, "[t]he tax shelter war is over. The government won."[162] Other MDRs, including DAC6, have seen similar success in changing the behaviors of both intermediaries and taxpayers.[163] The success of MDRs can be attributed to three main reasons: (1) their ability to enhance the detection of tax schemes, (2) their deterrent effect on enabling intermediaries, and (3) their ability to enable intelligence gathering.[164] GMDR is expected to have similar advantages arising from its application of reporting obligations to cross-border schemes that are not within the scope of existing MDRs.

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programs may be used by tax evaders, see Dominika Langenmayr & Lennard Zyska, *Escaping the Exchange of Information: Tax Evasion via Citizenship-by-Investment* (CESifo Working Paper No. 8956, 2021).

160. *See* Casi-Eberhard et al., *supra* note 24, at 4–5, 17–19.

161. *See* Joshua D. Blank, *United States National Report on Mandatory Disclosure Rules*, MANDATORY DISCLOSURE RULES (Int'l Bureau Fiscal Documentation, 2022).

162. *See* Olson, *supra* note 22, at 567–81.

163. *See* Alexander Edwards, Michelle Hutchens & Anh Persson, *Do Third-Party Cross-Border Tax Transparency Requirements Impact Firm Behavior?* (Rotman School of Management, Working Paper No. 3792342, 2021).

164. *See* OECD, *supra* note 16, at 25–26.

1. Early Detection and Third-Party Reporting

The first reason why MDRs are effective is straightforward: more tax schemes are detected by governments that employ MDRs.[165] MDRs require reporting transactions that contain specific characteristics associated with tax avoidance or suspected tax evasion schemes.[166] Thus, MDRs provide tax authorities with a valuable tool to identify such schemes. MDRs typically require reporting schemes early, usually not long after the quarter in which the scheme is first offered for use or even earlier under some regimes.[167] Thus, not only do MDRs enhance the detection capabilities of the tax authorities, they can also facilitate detection before substantial revenue losses are incurred.[168] This early detection would allow the tax authorities to proactively prevent tax schemes from being used.[169] Without MDRs, tax authorities identify tax schemes through audits that may be conducted and concluded years after the schemes were introduced.[170]

Furthermore, MDRs improve the accuracy and completeness of disclosures. By imposing reporting obligations on intermediaries, MDRs facilitate third-party reporting.[171] Third-party reporting generally improves the accuracy and completeness of information submitted to tax authorities.[172] Taxpayers who stand to benefit from a scheme have stronger incentives to underreport information than professional service providers, such as financial institutions, lawyers, trustees, and others.[173] This is especially true under certain MDRs, like DAC6, which can require reporting by intermediaries that may not be involved in the tax aspects of the transaction.[174]

Third-party reporting under MDRs also increases the accuracy of taxpayer-submitted disclosures under regimes where there is a parallel reporting obligation

165. *See id.*

166. *See* CRS MDRs, *supra* note 8, at 24–25. CRS avoidance arrangements may be indicative of tax evasion. If a transaction is structured to avoid CRS reporting, this raises the suspicion that the scheme may function to hide undeclared funds. *See id.*

167. *See* Noked et al., *supra* note 20 (providing reporting timelines under existing regimes).

168. Under the U.S. tax shelter registration rules of the 1980s, for example, the IRS would issue pre-filing notification letters to taxpayers involved in a tax shelter before they had filed their tax returns. *See* Michael J. Bradley, *Registration of Tax Shelters*, 63 TAXES 563, 565 (1985).

169. *See id.*

170. *See* Blank, *supra* note 161, at 2–4 (describing an instance in which the IRS' detection of a questionable tax scheme was delayed by several years prior to the adoption of MDRs for corporate tax avoidance in the early 2000s); OECD, *supra* note 16, at 25–26.

171. In general, third-party reporting means reporting by a party other than the taxpayer; for example, an employer's tax filing with respect to the employee's income. *See infra* note 172.

172. *See* Henrik Jacobsen Kleven, Martin B. Knudsen, Claus Thustrup Kreiner, Søren Pedersen & Emmanuel Saez, *Unwilling or Unable to Cheat? Evidence from a Tax Audit Experiment in Denmark*, 79 ECONOMETRICA 651, 652 (2011); Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733 (2010); 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); Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 BYU L. REV. 1515 (2005).

173. This assumes that there is no collusion between the taxpayer and the intermediaries. However, colluding would increase the costs and reduce the benefits of underreporting. *See* Kleven et al., *supra* note 172.

174. *See supra* text accompanying note 134.

on third parties and taxpayers.[175] This is because taxpayers must submit a disclosure consistent with the information disclosed by the intermediary. This reduces the incentives for taxpayers to enter into reportable schemes, thereby reducing the demand for aggressive tax planning.[176] As the OECD noted, "Taxpayers are likely to adopt a more cautious approach before entering into a tax planning scheme if they know it has to be reported and that the tax authorities may take a different position on the tax consequences of that scheme or arrangement."[177]

Under GMDR, the early detection of cross-border schemes facilitated through third-party reporting by intermediaries addresses the information problem discussed in Part I and enables tax authorities to respond to such schemes quickly. GMDR would likely detect abusive cross-border schemes that are not reported under domestic reporting requirements and international tax standards. GMDR would not be limited to financial account information as is the case for CRS or the avoidance of CRS reporting as is the case for CRS MDRs. GMDR would not be limited to large MNEs, as is in the case of CbCR. GMDR would capture a much larger set of schemes spanning cross-border tax avoidance, tax evasion, and other abusive practices. For example, GMDR could have detected the Cum-Ex schemes in their infancy.

2. Deterring Professional Enablers

One of the most potent aspects of MDRs is their ability to affect the conduct of professional service industries, which serve as reservoirs of expertise in designing and implementing tax schemes. These intermediaries include tax advisors, accountants, financial advisors, lawyers, company service providers, trustees, and others. The role of intermediaries in designing, implementing, and marketing tax schemes has long been identified in the literature.[178] Without the assistance of intermediaries, many taxpayers would lack the skills, knowledge, and opportunities to engage in tax schemes.[179] Thus, regulating the conduct of such intermediaries is important for effective tax enforcement.

MDRs are designed to disincentivize intermediaries from participating in reportable tax schemes. The EU Commission noted, "It should be expected that the mandatory disclosure of potentially aggressive tax planning schemes would dissuade intermediaries from designing and marketing such schemes."[180] The OECD noted that "[i]nfluencing the behaviour of promoters, advisers and intermediaries may reduce the incidence of aggressive tax planning more quickly

175. *See* Lederman, *supra* note 172, at 1738–39.

176. *See* OECD, *supra* note 16, at 27.

177. *Id.*

178. *See* Prem Sikka & Hugh Willmott, *The Tax Avoidance Industry: Accountancy Firms on the Make*, 9 CRITICAL PERSP. INT'L BUS. 415, 431 (2013) ("We have shown how accounting firms are at the centre of a huge tax avoidance industry. But it is salutary to appreciate that these firms form an integral part of a network of banks, law firms and other professionals . . . ."); 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, 1217 (2019); Kai A. Konrad, *Dynamics of the Market for Corporate Tax-Avoidance Advice*, 123 SCAND. J. ECON. 267 (2019).

179. *See European Commission Staff Working Document*, *supra* note 16, at 16.

180. *See id.* at 34.

and in a more cost-effective way than strategies that focus exclusively on the taxpayer."[181]

How do MDRs create this effect? First, intermediaries incur compliance costs associated with the reporting obligations, and these costs are higher for intermediaries that engage in more reportable schemes.[182] Intermediaries could be penalized for failing to report a reportable scheme.[183] Intermediaries incur costs when implementing procedures to determine whether a disclosure is required. When a reportable scheme is identified, the intermediary's legal and compliance team would need to consider how to satisfy the reporting obligations. In some cases, determining whether a disclosure is required would entail a detailed analysis of the application of the law to the facts of the scheme. The intermediary may need to obtain external legal advice on these issues. Consequently, intermediaries engaged in reportable schemes would likely incur higher costs and need to exert additional effort to ensure compliance with MDRs.

In addition to the compliance costs, intermediaries face heightened risks of audits and investigations, which could result in criminal and regulatory penalties as well as civil and reputational costs.[184] MDRs increase the likelihood of audits and investigations of intermediaries and their clients.[185] MDRs aim to provide timely and comprehensive information to the tax authorities, allowing them to identify and investigate questionable tax schemes more efficiently.[186] Intermediaries may suffer from reputational costs if they are found to engage in abusive tax schemes.[187]

In essence, the effect of MDRs is similar to a corrective tax on the supply-side of aggressive tax planning products and services.[188] The justification for such a measure derives from the negative externalities generated when intermediaries supply tax products and services that deny the government revenue and create burdens for others.[189] The externalities associated with aggressive tax advising are even more pronounced in cross-border tax schemes where an intermediary's facilitation of tax abuse may deprive foreign governments of tax revenues. Overall, GMDR would make aggressive cross-border tax planning a costlier and riskier activity, thereby making intermediaries reconsider involvement in such schemes. This deterrent effect is significant in the context of foreign intermediaries because,

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181. OECD, *supra* note 16, at 27.

182. MDRs may also result in compliance costs for many intermediaries that do not engage in reportable transactions. *See* Michael Schler, *Effects of Anti-Tax-Shelter Rules on Nonshelter Tax Practice*, 109 TAX NOTES 915, 917 (2005).

183. *See infra* Section IV.D.

184. *See id.*

185. *See* Joshua D. Blank, *Overcoming Overdisclosure: Toward Tax Shelter Detection*, 56 UCLA L. REV. 1629, 1631 (2008).

186. *See id.*

187. Another reputational cost might arise when clients learn that an intermediary reported information about their schemes to the relevant authorities.

188. *See* OECD, *supra* note 16, at 27. MDRs also reduce the demand for aggressive tax planning because taxpayers know that their schemes will be reported.

189. *See* Stephanie A. Sikes & Robert E. Verecchia, *Aggregate Corporate Tax Avoidance and Cost of Capital* 2 (Working Paper, 2020) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3662733 [https://perma.cc/G53R-BLFK]) ("[A]n increase in tax avoidance by a measurable number of firms affects the cost of capital of even those firms that are not engaged in tax avoidance.").

as a result of the enforcement problem discussed above, governments have limited ability to regulate the conduct of foreign intermediaries overseas by other means.[190]

3. Intelligence Gathering and Other Benefits

MDRs are effective tools for providing the tax authorities with information on the current state of tax avoidance in the economy.[191] Many MDRs contain generic hallmarks that capture various diverse transactions and arrangements.[192] While some of these transactions and arrangements may be legal under current laws, governments may use this information to consider whether a legislative or regulatory change is required to address loopholes or weaknesses in the current system.[193] Without MDRs, tax authorities may only become aware of new tax avoidance schemes after the schemes have already been denying the government substantial revenue for some time.[194] That is, of course, if they are detected at all. National governments with well-developed MDRs have successfully shut down questionable schemes before such schemes could be broadly employed.[195] In the context of cross-border abusive tax schemes, governments may face a greater need for intelligence gathering than in the domestic context. This is because of the information problem discussed in Part I. GMDR would be useful for collecting data and closing the information gap. It would allow tax authorities to identify new types of transactions and arrangements early so that policymakers can react more quickly.[196]

The effects of GMDR are aligned with the principle of progressivity in taxation.[197] Wealthy individuals and large corporations are the principal users of cross-border tax schemes.[198] Small and medium enterprises and low- and middle-income taxpayers are less likely to employ intermediaries to implement cross-border tax schemes.[199] As a result, GMDR place additional costs on high-income taxpayers who engage in cross-border tax schemes while sparing low- and middle-income taxpayers. By increasing tax compliance and collection from high-income taxpayers, GMDR could relieve the tax burden on low- and middle-income taxpayers.[200]

In addition, the international adoption of GMDR could accelerate the spread of domestic MDRs around the globe. While MDRs are already spreading rapidly—with more than thirty countries adopting new MDRs in the past five years alone—

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190. *See supra* text accompanying note 55.

191. *See* OECD, *supra* note 16, at 25–26.

192. *See id.*

193. *See id.*

194. Late detection may occur through audits. *See supra* note 170 and accompanying text. For example, Cum-Ex schemes could have been preempted earlier had they been detected earlier in Europe. *See supra* Part I.

195. OECD, *supra* note 16, at 25–26.

196. *See id.* at 25.

197. *Cf.* Joshua D. Blank & Ari Glogower, *Progressive Tax Procedure*, 96 NYU L. REV. 668 (2021).

198. *See, e.g.*, Alstadsæter et al., *supra* note 45; Annette Alstadsæter, Niels Johannesen & Gabriel Zucman, *Who Owns the Wealth in Tax Havens? Macro Evidence and Implications for Global Inequality* (Working Paper, 2017).

199. *See id.*

200. MDRs can include de minimis thresholds to reduce the likelihood that they will affect low-income taxpayers.

their adoption is not mandatory.[201] Many countries, including tax havens and financial centers, have not yet adopted MDRs. If such countries adopt GMDR to address cross-border tax abuse, they may also consider extending the disclosure obligations to domestic schemes.

B. Costs and Critiques

GMDR can substantially expand international tax transparency and counter cross-border tax abuse. However, a reform of such a scale is not without its costs and risks. This Section discusses GMDR's compliance costs, its potential adverse effects on legitimate activities, the problems of over-disclosure and under-disclosure, privacy concerns, and other critiques.

1. Compliance Costs and Deadweight Loss

GMDR would increase costs for intermediaries and taxpayers.[202] Under the reporting obligations suggested here, intermediaries would need to expend resources on an ongoing basis to monitor and determine whether they have participated in any reportable scheme.[203] Intermediaries would likely try to shift these costs to their clients, making their services more expensive. While GMDR aims to increase the price of abusive tax schemes, it would likely increase the overall compliance burden for affected intermediaries, including those who do not design or implement reportable schemes.

Depending on the GMDR's definition of "reportable schemes," this reporting regime may increase the cost of tax planning services if transactions that follow legitimate tax planning are also reportable.[204] Tax laws generally do not require taxpayers to adopt structures or arrangements that would maximize their tax liability. However, even tax planning that is not considered to be problematic would be discouraged if it must be reported under GMDR. Consequently, GMDR might increase the cost of advisory tax services for cross-border activities in general and incentivize professional advisers to take overly conservative positions, not required under the law, so that they will not need to file disclosures. These outcomes might be suboptimal and could lead to a societal deadweight loss.

2. Over-disclosure and Under-disclosure

Over-disclosure occurs when broad or ambiguous reporting obligations result in reporting many legitimate schemes that do not warrant the attention of tax authorities.[205] When intermediaries are faced with overly broad or vague reporting

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201. BEPS Action 12 is not a minimum standard. *See* OECD, *supra* note 16.

202. *Cf.* Anat R. Admati & Paul Pfleiderer, *Forcing Firms to Talk: Financial Disclosure Regulation and Externalities*, 13 REV. FIN. STUD. 479 (2015).

203. *See infra* Section IV.D.

204. For a discussion on the differences between "legitimate" and "illegitimate" tax planning, see Jose Manuel Calderon Carrero & Alberto Quintas Seara, *The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border Between Legitimate and Illegitimate Tax Planning*, 44 INTERTAX 206 (2016).

205. In essence, over-disclosure is a type I error (false positive) in which too many nonaggressive transactions become reportable. *See* Blank, *supra* note 185 (discussing over-disclosure under the U.S. reportable transactions regime); Arthur Bianco, *DAC6 and the Challenges Arising from*

obligations, they may find it cost-efficient to disclose excessively.[206] Excessive disclosure allows intermediaries to reduce the costs associated with determining reportability and to lower the risk of penalties for failing to make a disclosure.[207] Overly broad reporting obligations would increase compliance costs and the potential deadweight loss discussed above.

There is also a risk that over-disclosure might inundate tax authorities beyond their capacity to analyze each disclosure thoroughly.[208] Nonetheless, it is unclear whether too much information is a problem with the current technologies available to tax administrations. Tax authorities are increasingly using data mining and artificial intelligence tools when analyzing information to detect problematic behaviors.[209] Similar tools could be used to analyze information obtained through disclosures.

Under-disclosure could occur when GMDR does not capture problematic schemes.[210] Under-disclosure may occur if the hallmarks are too narrow.[211] The negative consequences of under-disclosure are straightforward: tax authorities will not obtain information about problematic schemes. Furthermore, with fewer tax schemes detected and less tax revenue reclaimed, the costs associated with implementing GMDR are less likely to be justified. Under-disclosure can be avoided through proper hallmark design and the imposition of appropriate penalties.[212]

3. Privacy Concerns and Attorney-Client Privilege

GMDR raises privacy concerns. The information collected under GMDR will be shared among the tax authorities of the relevant countries, as will be discussed in Part IV. Collecting and sharing information about taxpayers and intermediaries would increase privacy risks.[213] More specifically, the risk of leaks, hacking, and

Its Disclosure Obligation, 30 EC TAX REV. 8, 16–19 (2021) (discussing the risk of over-disclosure under DAC6); Shelley C. Rhoades, *Costly False Detection Errors and Taxpayer Rights Legislation: Implications for Tax Compliance, Audit Policy and Revenue Collections*, 19 J. AM. TAX. ASSOC. 27 (1997).

206. *See* Bianco, *supra* note 205, at 17 ("Indeed, the lack of definition or the vagueness of hallmarks, among others, may expose intermediaries to more difficulties than necessary, generating more costs than expected, which may encourage the sharing of all arrangements regardless of their reportability."). However, intermediaries have incentives not to over-report if additional reporting increases the risk for audits and investigations.

207. Additionally, other reasons may incentivize both conservative and aggressive tax planners to over-disclose. *See* Blank, *supra* note 185.

208. *See* Bianco, *supra* note 205, at 17.

209. *See* Cristina Garcia-Herrera Blanco, *The Use of Artificial Intelligence by Tax Administrations, a Matter of Principles*, INTER-AMERICAN CENTER OF TAX ADMIN. (Mar. 2, 2020), https://www.ciat.org/the-use-of-artificial-intelligence-by-tax-administrations-a-matter-of-principles/?lang=en [https://perma.cc/2Z2K-ARVZ] (last visited Sept. 2, 2023); Antonio Faundez-Ugalde, Rafael Mellado-Silva & Eduardo Aldunate-Lizana, *Use of Artificial Intelligence by Tax Administrations: An Analysis Regarding Taxpayers' Rights in Latin American Countries*, 38 COMPUT. L. & SEC. REV. (2020).

210. Just as over-disclosure is a type I error, under-disclosure is a type II error (false negative): aggressive schemes that should be reported go undisclosed.

211. *See* OECD, *supra* note 16, at 45.

212. *See infra* Part IV.

213. *See* Michael Hatfield, *Cybersecurity and Tax Reform*, 93 IND. L.J. 1161 (2018); Michael Hatfield, *Privacy in Taxation*, 44 FLA ST. U. L. REV. 579 (2018).

other privacy-related problems would likely increase.[214] For example, the Bulgarian tax authority's database was hacked in 2019, and information obtained through CRS was leaked to the media.[215]

Another concern involves the risk of eroding the taxpayers' attorney-client privilege.[216] A mandatory disclosure regime could potentially require lawyers to disclose privileged client information. Despite these concerns, MDRs have thrived in countries such as the United States and the United Kingdom, which have long respected the legal privilege for attorney-client communications.[217] As a solution, some MDRs grant reporting exemptions for those intermediaries who cannot report the required information because it is protected under attorney-client privilege.[218] In such cases, the reporting obligation shifts either to another intermediary or to the taxpayer.[219] This approach raises several concerns. First, it replaces third-party reporting (by the intermediary) with self-reporting (by the taxpayer), which could result in under-reporting or a failure to report.[220] Second, while this approach does not result in the attorney disclosing privileged information, requiring taxpayers to disclose information regarding communications with their lawyers may still erode the protection of such communications. For example, several analysts have considered whether DAC6, which adopts this approach, violates the EU right to confidentiality and the right against self-incrimination.[221]

Ultimately, GMDR comes with certain challenges, costs, and risks. These should be compared to GMDR's potential benefits from curbing cross-border tax abuse. Moreover, these costs can be reduced through careful design choices informed by four decades of experience with MDRs. These design considerations are discussed in the next Part.

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214. S*ee id*. For data breaches involving the IRS, see Jose Pagliery, *IRS Taxpayer Data Theft Seven Times Larger Than Originally Thought*, CNN (Feb. 26, 2016); for a discussion on transparency vs. privacy, see Oei & Ring, *supra* note 8, at 613–15; for a discussion on information leakage in other contexts, see Noam Noked, *Public Country-by-Country Reporting: The Shareholders' Case for Mandatory Disclosure,* 90 TAX NOTES INT'L 1, 501 (2018); Marcovici & Noked, *supra* note 33, at 36–37.

215. *Statement on the Data Breach in the National Revenue Agency of Bulgaria*, OECD (Aug. 30, 2019), https://www.oecd.org/tax/transparency/documents/statement-on-the-data-breach-in-the-national-revenue-agency-of-bulgaria.htm [https://perma.cc/283R-Z9ZU].

216. *See generally* JONATHAN AUBURN, LEGAL PROFESSIONAL PRIVILEGE: LAW & THEORY (2000); Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance*, 28 FORDHAM INT'L L.J. 967, 976–1004 (2004).

217. *See generally* Richard S. Pike, *The English Law of Legal Professional Privilege: A Guide for American Attorneys*, 4 LOY. U. CHI. INT'L L. REV. 51 (2006); Geoffrey C. Hazard Jr., *An Historical Perspective on the Attorney-Client Privilege,* 66 CALIF. L. REV. 1061 (1978); JONATHAN AUBURN, LEGAL PROFESSIONAL PRIVILEGE: LAW AND THEORY (2000).

218. The U.K. DOTAS regime and DAC6 follow this approach. *See* HMRC, DISCLOSURE OF TAX AVOIDANCE SCHEMES: GUIDANCE 17 (2018); DAC6, *supra* note 38, at art. 1(2).

219. *See* sources cited *supra* note 218.

220. See *supra* Section III.A.1 for a discussion regarding the benefits from third-party reporting, which would not apply if the reporting obligation is shifted to the taxpayer.

221. *See* 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) (June 1, 2018); Rayssa Gutterres Costa, *Is There a Collision Between The EU Charter and The Obligation to Notify That Intermediaries With Legal Professional Privilege Have Under DAC6?* (Master's Thesis, Lund University) (May 26, 2021); Edward-Hector Spiteri, *The Maltese Implementation of DAC-6*, NOVITA FISCALI (June 2021); Bianco, *supra* note 205, at 21–22.

IV. DESIGN OPTIONS FOR GMDR

This Part explores several key design considerations for GMDR, including who should report, which schemes should be reported, and other aspects, such as the exchange of information obtained through reporting under GMDR. As discussed below, the EU's DAC6 and the OECD's CRS MDRs are potential models for GMDR. However, these regimes should be adapted when designing an international, comprehensive standard for MDRs.

A. Who Should Report?

1. Categories of Intermediaries

There are two broad categories of potential disclosure filers under MDRs: the intermediaries and the taxpayers themselves. The taxpayers are the users and primary beneficiaries of tax schemes. Taxpayer reporting is not unique—taxpayers are generally required to file tax returns, including information returns on specific assets and transactions. The value of MDRs primarily lies in their imposition of reporting obligations on intermediaries.[222] However, this is not to say that MDRs always exclude taxpayers from reporting. Some MDRs impose *parallel* reporting obligations on both taxpayers and intermediaries.[223]

Intermediaries can generally be divided into three categories: promoters, material advisors, and other intermediaries.[224] Promoters are parties directly involved in a reportable tax scheme by designing or marketing it.[225] Under the U.S. reportable transactions regime, material advisors generally include any person who provides a tax statement with respect to a reportable scheme.[226] This category comprises advisors who make representations regarding the tax aspects of a scheme, which could potentially include tax advisors, investment advisors, brokers, and others.[227] Finally, other intermediaries are those intermediaries who provide services with respect to a reportable scheme and can reasonably be expected to be aware of the reportable nature of the scheme.[228] This third category is the broadest as it includes parties who are not involved in the tax aspects of the scheme.

Imposing reporting obligations on promoters is noncontroversial. Promoter reporting was a feature of the earliest MDRs, the U.S. tax shelter registration rules of the 1980s, and is a common characteristic among many existing MDRs.[229] The United States was the first country to expand reporting to material advisors in the

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222. *See supra* text accompanying note 172.

223. For example, the U.S., Canadian, and Argentinian MDRs require parallel reporting by intermediaries and taxpayers. *See supra* Part II; Noked et al., *supra* note 20, at 134–35, 153.

224. *See* Bianco, *supra* note 205, at 19.

225. See Noked et al., *supra* note 20, 135–36, 141, 145, for the definition of "promoter" and the difference between promoters and material advisors.

226. I.R.C. §§ 6111, 6112. 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." INSTRUCTIONS FOR IRS FORM 8918, at 1 (2021).

227. *See* Noked et al., *supra* note 20, at 136.

228. See DAC6, *supra* note 38, at art. 1(1) for the definition of "intermediary."

229. See Noked et al., *supra* note 20, at 126 for the reporting obligations under current and past MDRs.

early 2000s.[230] This approach of imposing reporting obligations on intermediaries involved in the tax aspects of a reportable scheme has been adopted in other countries.[231]

Imposing reporting obligations on intermediaries that have not taken part in the tax aspects of a scheme is a relatively new approach. DAC6 and CRS MDRs impose reporting obligations on a broader group of intermediaries. Intermediaries under DAC6 include 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, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.[232]

This definition is not subject to any qualification other than a nexus requirement.[233] This means that reporting obligations apply to *all* intermediaries—not only those involved in the tax aspects of the arrangements—who provide *any* "aid, assistance or advice" on the design, marketing, or implementation of a reportable scheme.[234]

The adoption of this broad definition of intermediaries was unprecedented for MDRs.[235] It was born out of a growing sentiment within the EU to rein in the enablers of tax avoidance and evasion.[236] As a result of this definition, intermediaries who are not involved in the tax aspects of an arrangement cannot turn a blind eye and avoid disclosure when they assist with the implementation of reportable arrangements. For example, in Sanjay Shah's Cum-Ex schemes, it is possible that only he would be considered as a promoter or material advisor; other financial institutions that assisted with the implementation of the Cum-Ex schemes may not be classified as such, and thus would not be required to report under the U.S. model.[237] Under DAC6, such intermediaries would be required to report if they

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230. *See id.*

231. *See id.* at 134–37.

232. DAC6, *supra* note 38, at 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* OECD, *supra* note 16, at 33–36, 74. CRS MDRs impose reporting on intermediaries in a manner similar to DAC6. CRS MDRs, *supra* note 8, at rules 1.3, 2.1 at 16, 19.

233. For intermediaries to be subject to the reporting obligation, they must either be a tax-resident, incorporated or registered with a professional association related to legal, tax, or consultation services, or have a permanent establishment in a Member State. DAC6, *supra* note 38, at art. 1(1). *See infra* Section IV.A.3.

234. DAC6, *supra* note 38, at art. 1(2).

235. *See* Noked et al., *supra* note 20, at 145–46.

236. *See* European Parliament Special Committee on Tax Rulings 2016/2038 (INI), Tax Rulings and Other Measures Similar in Nature or Effect (July 6, 2016); Council of the European Union 9452/16, Commission Communication on an External Strategy for Effective Taxation and Commission Recommendation on the Implementation of Measures Against Tax Treaty Abuse (May 25, 2016); *European Commission Staff Working Document*, *supra* note 16, at 5; *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); Sigrid J.C. Hemels, *Implementation of BEPS in European Union Hard Law*, 67 RITSUMEIKAN ECON. REV. 85 (2018).

237. Financial institutions typically do not provide tax advice to their clients. Instead, they typically inform their clients that they should obtain advice from their tax advisors.

know or are reasonably expected to know that they assist with the implementation of reportable arrangements. This approach increases the likelihood of complete and accurate reporting because more intermediaries would be required to report.[238] It also discourages a broader group of intermediaries from assisting with the implementation of reportable schemes. For these reasons, GMDR should follow the approach adopted by DAC6 and CRS MDRs.[239]

2. Reporting by Multiple Intermediaries

Imposing reporting obligations on a broad set of intermediaries might lead to duplicate reporting of the same arrangement by several intermediaries.[240] DAC6 provides that an intermediary is not required to report if it can show that another intermediary has already made a disclosure.[241] Some EU Member States have implemented systems where reference numbers are issued for each disclosure made by an intermediary.[242] The intermediary could then provide this number to the taxpayer who would then distribute it to any other intermediaries for the arrangement.[243] These intermediaries could then submit this number as proof of exemption.[244]

Nonetheless, it may be difficult for intermediaries to communicate with each other to determine whether or not a scheme has already been reported.[245] This is exacerbated by the fact that intermediaries are only given thirty days to report.[246] However, it is debatable whether multiple reporting is a problem. First, the burden on intermediaries engaged in reportable schemes is a desired effect of the policy.[247] Second, even if multiple intermediaries of the same transaction were able to communicate with each other and decide which of them would file the disclosure, each intermediary would already have needed to evaluate the transaction to determine that it is reportable and what information needs to be reported. The additional cost of filing a disclosure after determining the reporting obligation is likely small. Also, there are costs associated with communicating and coordinating with other parties. Therefore, the lack of an effective coordination mechanism between intermediaries may not be problematic.[248]

3. Nexus Requirement

The DAC6 reporting obligations generally apply to intermediaries that are resident in an EU Member State, incorporated in or governed by the laws of an EU Member State, or have a permanent establishment within a Member State through

238. *See* Bianco, *supra* note 205, at 19.

239. It should be noted that this approach imposes higher compliance burdens and costs as more intermediaries need to comply with these obligations. However, as noted, MDRs impose these compliance burdens by design. *See supra* Section III.A.2.

240. *See* Bianco, *supra* note 205, at 16–19.

241. DAC6, *supra* note 38, at art. 1(2).

242. *See* Bianco, *supra* note 205, at 20–21.

243. *See id.*

244. *See id.*

245. *See id.* at 20.

246. *See id.*

247. *See supra* Section III.A.2.

248. *Cf.* Bianco, *supra* note 205, at 20–21.

which the relevant services are provided.[249] To make its reach even wider, DAC6 also applies to intermediaries who are "registered with a professional association related to legal, taxation or consultancy services in a Member State."[250]

If GMDR is adopted globally, intermediaries would be required to file the GMDR disclosure in the country where they are resident, and that country would share the information with other relevant jurisdictions.[251] Imposing reporting requirements on nonresidents with certain nexuses to GMDR-implementing countries would become important if GMDR is not adopted widely. Imposing reporting requirements on intermediaries registered as lawyers, accountants, tax advisers, or consultants in GMDR-implementing countries, even if they do not reside in these countries, would expand the application of GMDR to intermediaries beyond the borders of such countries. Some have argued that the DAC6 requirement to file by intermediaries registered with a professional association is overly broad and, in some cases, might be unenforceable.[252] However, imposing reporting obligations on such professionals prevents a simple yet effective avoidance mechanism: licensed professionals (including accountants and lawyers) cannot avoid reporting by moving to another country. GMDR can take a similar approach.

Moreover, it is possible to impose the GMDR obligations on multi-jurisdictional intermediaries, such as the Big 4 accounting firms, law firms with offices in different countries, and banks with branches in various jurisdictions. GMDR can provide that these multi-jurisdictional intermediaries have sufficient nexus to the GMDR-implementing countries where they have operations, and thus must file disclosures under GMDR even for schemes handled by offices in other countries.[253] For example, PricewaterhouseCoopers (PwC) operates in 152 countries with more than 328,000 employees.[254] Say that 100 of these countries adopt GMDR. In addition to requiring that each PwC office file GMDR disclosures in the country where it is located if that country implements GMDR, it is possible to mandate that PwC complies with GMDR globally in all countries where it operates. This means that PwC offices in countries that do not implement GMDR will be required to file disclosures with the relevant GMDR-implementing countries. The mechanism to facilitate such reporting is further explored in Part V below.

4. Taxpayers' Reporting Obligations and Parallel Reporting

Should GMDR require that both intermediaries and taxpayers report? The U.S. reportable transactions regime requires both taxpayers and material advisers to

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249. DAC6, *supra* note 38, at art. 1(2); *see* Bart Peeters & Lars Vanneste, *DAC6: An Additional Common EU Reporting Standard?*, 12 WORLD TAX J. 499 (2020).

250. DAC6, *supra* note 38, at art. 1(1).

251. *See infra* Section IV.C.

252. *See* Peeters & Venneste, *supra* note 249, at 537–38, 555–58.

253. This is similar to the approach taken in CbCR reporting. *See supra* text accompanying notes 67–70.

254. *See About Us,* PWC, https://www.pwc.com/gx/en/about.html [https://perma.cc/CM4C-48NC] (last visited Aug. 20, 2023).

report.[255] In contrast, DAC6 only requires taxpayer reporting in instances in which there is no intermediary (for example, where the reportable arrangement was developed in-house or the intermediaries are outside the EU) or the intermediary is unable to report for a particular reason (for example, where the intermediary cannot report due to an attorney-client privilege).[256]

The EU ruled out imposing reporting obligations on intermediaries alone because of concerns that this approach would miss schemes developed in-house and cases in which the intermediaries are from outside the EU.[257] Furthermore, the EU rejected imposing the reporting obligations only on taxpayers because this regime was designed to obtain information from intermediaries and deter them from designing, marketing, and implementing aggressive tax schemes.[258] The EU also considered parallel reporting obligations on both intermediaries and taxpayers.[259] Although the EU assessed that this strategy would increase the regime's effectiveness, it also foresaw an inordinately large compliance burden on intermediaries and taxpayers that could hinder the operations of tax authorities by inundating them with duplicate reports.[260] Ultimately, the EU determined that imposing a primary reporting obligation on intermediaries with only secondary requirements on taxpayers in certain situations would be the optimal way to achieve the goals of this standard without creating unnecessary inefficiencies and costs.[261]

GMDR can adopt a similar approach. Parallel reporting by both intermediaries and taxpayers would increase the compliance costs for taxpayers without providing tax authorities with much additional information. As noted, increasing the compliance costs will further reduce taxpayers' demand for schemes that might need to be reported.[262] However, if tax authorities already obtain the relevant information from intermediaries, the policy rationale supporting parallel reporting appears to be weak. Instead of requiring taxpayers to report detailed information about schemes that intermediaries already report, it is possible to require that taxpayers include in their tax returns a reference number provided to them by the relevant intermediary.[263] This reference number, which would be issued to the intermediary by the tax authority receiving the disclosure, would enable easy identification of all the taxpayers involved.

B. Which Schemes Should be Reported?

MDRs typically classify an arrangement as reportable if it matches one or more of a set of hallmarks.[264] In general, there are two main types of hallmarks: generic and specific. Generic hallmarks capture a wide variety of mass marketed schemes by targeting characteristics that tend to be present in many schemes even if those

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255. I.R.C. §§ 6111–12.

256. DAC6, *supra* note 38, at art. 1(2).

257. *See European Commission Staff Working Document*, *supra* note 16, at 59.

258. *Id.* at 59–60.

259. *Id.*

260. *Id.*

261. *Id.*

262. *See supra* text accompanying note 173.

263. This approach is adopted in domestic MDRs of several countries. *See* Noked et al., *supra* note 20, at 126, 139.

264. OECD, *supra* note 16, at 36.

schemes otherwise differ significantly.[265] For example, common generic hallmarks include confidentiality and premium fee hallmarks.[266] Confidentiality hallmarks refer to schemes and transactions that are offered by intermediaries under conditions of confidentiality meaning "the advisor who is paid the minimum fee places a limitation on disclosure by the taxpayer of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of that advisor's tax strategies."[267] Premium fee hallmarks refer to schemes or transactions in which intermediaries receive a fee based on the tax advantage obtained from the scheme.[268]

Specific hallmarks are frequently narrower than generic hallmarks and are crafted to target certain types of arrangements.[269] Action 12 describes specific hallmarks as "describing certain potentially aggressive or abusive transactions and including them as a hallmark."[270] For example, the "listed transactions" under the U.S. reportable transactions regime describe specific transactions identified by the IRS as potentially abusive.[271] Action 12 further applies specific hallmarks to the international context and describes several types of cross-border schemes as specific hallmarks. These include, for example, hybrid mismatch arrangements.[272] Hybrid mismatch arrangements are cross-border schemes that create tax advantages by "creating two deductions for one borrowing, generating deductions without corresponding income inclusions, or misusing foreign tax credit and participation exemption regimes."[273] Another specific cross-border hallmark described by Action 12 covers "[a]sset transfers where there is a material difference in the amount treated as payable in consideration for the asset."[274] These cross-border hallmarks are particularly relevant to GMDR given its focus on cross-border tax schemes.

DAC6 features both generic and specific hallmarks to take advantage of the benefits of each.[275] DAC6's hallmarks are divided into five categories. The first category of hallmarks are generic and are linked to the main benefit test.[276] These hallmarks cover confidential transactions, transactions in which the intermediary's fee is linked to tax advantages obtained, and transactions with substantially

265. *Id.* at 39–45, 48–49.
266. *Id.* at 39–42.
267. Treas. Regs. § 1.6011–4(b)(3).
268. OECD, *supra* note 16, at 40.
269. *Id.* at 45–49.
270. *Id.* at 45.
271. *See supra* note 101.
272. OECD, *supra* note 16, at 71.
273. *Id.* at 15.
274. *Id.* at 71. Other specific cross-border hallmarks include arrangements in which two taxpayers claim tax relief for the same asset in two jurisdictions, when deductible cross-border payments are made to "members of the same group that are not resident for tax purposes in any jurisdiction or that are resident in a jurisdiction that does not impose tax on income," and treaty shopping arrangements. See *id.* for a full list.
275. The EU opted to use both generic and specific hallmarks when designing DAC6. The EU Commission observed that generic hallmarks are best suited for capturing a broad set of mass marketed schemes but are less suitable for dealing with more customized tax products. Specific hallmarks, on the other hand, could be designed to capture specific schemes but miss others. In the European Commission's assessment, generic and specific hallmarks complement each other and should be adopted together. *See European Commission Staff Working Document*, *supra* note 16, at 61–62.
276. DAC6, *supra* note 38, at Annex IV pt. II.A.

standardized documentation.[277] The second category covers specific hallmarks linked to the main benefit test.[278] It includes transactions that involve purposeful acquisitions of loss-making companies, arrangements that convert income into capital, and circular transactions.[279] The third category includes specific hallmarks designed to target certain cross-border arrangements.[280] The fourth category implements CRS MDRs.[281] Finally, the fifth category includes hallmarks for transfer pricing.[282] Overall, the DAC6 hallmarks cover a broad range of tax arrangements that might involve tax avoidance and evasion.[283]

GMDR could build on the experience with DAC6 and adopt a similar set of hallmarks targeting cross-border arrangements.[284] Further work is required to identify whether additional hallmarks should be included. GMDR could also apply to certain "listed arrangements," drawing upon the U.S. reportable transactions regime which requires the reporting of certain "listed transactions."[285] GMDR could include a mechanism for new specific arrangements to be declared reportable.[286] The multilateral agreement for the implementation of GMDR could include this mechanism. A professional committee of tax experts (possibly supported by the OECD tax secretariat) could identify new arrangements not captured under the existing hallmarks. Following the recommendations of this committee, GMDR-implementing countries would mandate the reporting of these listed arrangements.[287]

Moreover, the same mechanism could identify a "white list" of arrangements that should be exempted from reporting.[288] This list would contain arrangements that meet (or could potentially meet) one or more of the reporting conditions, but that authorities have found do not raise tax avoidance or evasion concerns.[289] This would reduce the risk and the costs associated with over-disclosure.[290] A white list can help clarify what types of arrangements are reportable, thus reducing the

277. *Id.*

278. *Id.* at Annex IV pt. II.B.

279. *Id.* at Annex IV pt. II.B.

280. *Id.* at Annex IV pt. II.C. Some of the hallmarks under this category are linked to the main benefit test.

281. *Id.* at Annex IV pt. II.D.

282. *Id.* at Annex IV pt. II.E.

283. *See European Commission Staff Working Document*, *supra* note 16, at 12–13.

284. *See* Haase, *supra* note 121, at 89–139, for a detailed discussion of various problems in the design of the DAC6 hallmarks.

285. *See supra* notes 101–104 and the accompanying text.

286. *See id.*

287. Countries' GMDR legislation may allow the relevant administrative bodies to impose reporting requirements on specific transactions by promulgating regulations or issuing other subsidiary legislation. This would reduce the need to update primary legislation every time a new transaction is identified as reportable. This is the approach taken by the United States with respect to its reportable transactions regime. *See supra* notes 101–102.

288. *See* Blank, *supra* note 161, at 8–9; Bianco, *supra* note 205, at 14–18. The vagueness of DAC6 is often the subject of much of the criticism leveled at the law. Some scholars have argued in favor of the EU adopting a white list. *See* Casi-Eberhard et al., *supra* note 136, at 73.

289. *See id.*

290. *See supra* Section III.B.2.

compliance burden with respect to arrangements that are not problematic.[291] At present, the EU has not published any white list for DAC6.[292]

Another consideration regarding identifying reportable arrangements concerns reliance on broad standards (as opposed to specific rules) such as the "main benefit" test.[293] DAC6 incorporates a main benefit test that must be met for several of its hallmarks.[294] The main benefit test is defined as follows: "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."[295]

The use of the main benefit test and similar standards raises several concerns. First, the application of this test is uncertain. This could lead to over-disclosure by some intermediaries (especially risk-averse ones) who may find it cheaper and less risky to report a scheme even if the main benefit test is arguably not satisfied.[296] This could also lead to under-reporting by other intermediaries (especially the more aggressive ones) who may adopt a position that reporting is not required under this test. [297] Second, tax authorities would need to spend considerable resources to challenge intermediaries that determine that this test is not satisfied and reporting is not required. Third, the application of the test could be different in different countries. For example, there are differences in how EU Member States have implemented this test in their domestic laws and court systems.[298] An inconsistent application of this test would be costly and problematic, especially in an international standard such as GMDR.[299] Action 12 also expressed skepticism concerning the usefulness of the main benefit test under an MDR for cross-border arrangements.[300] For these reasons, it is questionable whether the hallmarks under GMDR should include the main benefit test. If it is to be included, then it would be advisable to have one uniform main benefit test and detailed guidance on how it should be applied.

GMDR, similar to DAC6, can include the hallmarks of CRS MDRs.[301] The inclusion of CRS MDRs in DAC6 accelerated the adoption of CRS MDRs in Europe and other jurisdictions.[302] The inclusion of CRS MDRs in GMDR could

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291. *See* Blank, *supra* note 185, at 1672–75.

292. *See* Bianco, *supra* note 205, at 14, 18. The EU resisted the inclusion of a white list in DAC6. However, Germany has issued a white list as part of its implementation of DAC6. *See id.*

293. 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).

294. *See* DAC6, *supra* note 38, at Annex IV pt. I.

295. *Id.*

296. *See* Bianco, *supra* note 205, at 12–15.

297. *See id.* at 15.

298. *See* Casi-Eberhard et al., *supra* note 136, at 70–73.

299. *See id.*

300. *See* OECD, *supra* note 16.

301. All twenty-seven EU Member States implement CRS MDRs as they are included in DAC6. DAC6, *supra* note 38, at Annex IV pt. II.D.

302. *See* Noked et al., *supra* note 20, at 126–27.

further expand their international adoption and effectiveness against CRS avoidance arrangements which often involve foreign intermediaries.[303]

C. Information Sharing

The goal of GMDR, as discussed in Part III, is to address the information problem countries face when dealing with cross-border arrangements involving foreign intermediaries. Therefore, information sharing among GMDR-implementing countries is an integral part of this regime. DAC6 and CRS MDRs present two different models for information sharing. Under DAC6, the EU has launched a central directory wherein disclosure information would be stored and made available to all EU Member States.[304] The EU identified several advantages that come with a central directory.[305] First, a central directory increases efficiency since there is no longer a need to store and retrieve disaggregated disclosure information across different jurisdictions. Second, it allows for flexible access to data that can evolve as a tax authority's knowledge of the extent of a scheme evolves. Finally, it eliminates the burden on tax authorities to determine who they should share the information with.[306] However, a central directory also raises privacy concerns as countries to whom a taxpayer may have no relation could access that person's data.[307] It is unclear whether countries would agree that GMDR information would be available to any other GMDR-implementing country following the EU model.

CRS MDRs adopt a different information exchange model: when a country receives a disclosure detailing a taxpayer's involvement in a scheme, that country must share the information obtained with all other countries in which the taxpayer (i.e., the user of the scheme) is resident for tax purposes.[308] The exchange must be made "within three months of the end of the quarter in which the information regarding the Reportable Arrangement was disclosed."[309] This automatic exchange of information to the taxpayers' residence jurisdictions is consistent with CRS, CbCR, and the automatic exchange of tax rulings.[310] This approach can be considered for GMDR.

In addition to providing detailed information to the taxpayers' residence jurisdictions, it would be useful to provide all GMDR-implementing countries (or potentially all countries) with anonymized or generic information about schemes that have been reported. Anonymized information can include the relevant disclosures with the parties' names and identifying details redacted. Generic information about schemes could include the general features of the schemes. In

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303. OECD, *Game Over for CRS Avoidance! OECD Adopts Tax Disclosure Rules for Advisors* (Sept. 3, 2018), https://www.oecd.org/ctp/game-over-for-crs-avoidance-oecd-adopts-tax-disclosure-rules-for-advisors.htm [https://perma.cc/U623-ZAD5].

304. *See* DAC6, *supra* note 38, at art. 1(4).

305. *European Commission Staff Working Document*, *supra* note 16, at 63–65.

306. *Id.*

307. DAC6, *supra* note 38, at art. 1(2) (stating that "[t]he competent authorities of all member states will have access to the information recorded in that directory.").

308. OECD, *supra* note 143, at 9.

309. *See id.* at 10.

310. *See supra* Part I.

particular, countries would benefit from receiving information about schemes that are increasing in popularity or arrangements that cause substantial revenue losses.

D. Penalties

Countries should impose penalties on intermediaries that fail to comply with the GMDR requirements. DAC6 states that "Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive . . . and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive."[311] However, there is little guidance on what penalties would be considered as "effective, proportionate, and dissuasive."[312] Without a uniform standard for penalties under DAC6, some Member States have set a maximum penalty for intermediaries at 50,000 euros with no regard to the value of the missing or incorrect information or the fees charged by the intermediaries.[313] Only Spain has instituted fees which are proportionate to the fees charged by intermediaries.[314] Low penalties may lead to insufficient deterrence against noncompliance. Similar to DAC6, the CRS MDRs state that countries should adopt penalties "at a level that encourages compliance and maximises their deterrent effect."[315]

Monetary penalties can be set as a fixed rate or as a percentage of the fee received for the relevant services rendered.[316] CRS MDRs recommend setting a monetary penalty large enough to "remove any economic incentive for the Intermediary to avoid disclosure."[317] Nonmonetary penalties can also be considered. Potential nonmonetary penalties include prohibiting noncompliant intermediaries from providing regulated or professional services in the relevant jurisdiction.[318] In addition, tax authorities may "name and shame" intermediaries that fail to comply with these requirements by making public the names of the noncompliant parties.[319] A failure to report may also extend the time the government has to assess tax or extend the limitation period with respect to a disputed arrangement.[320] Finally, the conduct of an intermediary who intentionally and willfully fails to comply with the reporting obligations could constitute a criminal offense, similar to tax crimes involving a willful incorrect reporting or failure to report.[321]

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311. DAC6, *supra* note 38, at art. 1(3).
312. *Id.*
313. *See* Casi-Eberhard et al., *supra* note 136, at 78.
314. *See id.* at 78–79.
315. CRS MDRs, *supra* note 8, at pt. I 12.
316. *See* OECD, *supra* note 16, at 57–60.
317. CRS MDRs, *supra* note 8, at 43. CRS MDRs also suggest the use of a "daily penalty" which helps to ensure that disclosures are made promptly. *Id.*
318. *Id.* at 43–44.
319. CRS MDRs, however, recommend that such a penalty be reserved for instances of proven tax evasion and not be applied to tax avoidance or inadvertent noncompliance. *See id.*
320. OECD, *supra* note 16, at 59; CRS MDRs, *supra* note 8, at 44.
321. *See, e.g.*, I.R.C. § 7207; IRS, TAX CRIMES HANDBOOK 70 (2009), https://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf [https://perma.cc/8EBQ-H3TJ].

V. IMPLEMENTATION PLAN

The implementation of GMDR requires strong measures to incentivize countries and intermediaries to join and comply with the regime. GMDR should be adopted widely and be applied to intermediaries globally to be effective. While many countries, including EU Member States, are likely to be interested in adopting GMDR, some jurisdictions may not join this international standard. This is particularly problematic if tax havens and financial centers that host tax avoidance enablers refuse to join. This Part examines ways to increase participation as widely as possible and, for those countries which refuse to cooperate, proposes a mechanism to elicit compliance from intermediaries directly.

A. Maximizing the Adoption of GMDR

Recent international tax reforms, such as BEPS and CRS, have been adopted by over one hundred jurisdictions globally.[322] A similar objective should be set for GMDR. The earliest adopters of GMDR would likely be EU Member States, given that they have already adopted DAC6. GMDR would benefit EU Member States by imposing reporting obligations on non-EU intermediaries, which are not required to report under DAC6.[323] Moreover, from the EU's perspective, GMDR would level the playing field by curbing abusive tax arrangements globally, not only in the EU and by EU MNEs.[324] For these reasons, the EU may assume a leadership role in developing and spreading GMDR.

The EU has even considered spreading MDRs beyond the EU in the past. In 2018, the EU considered a proposal to require offshore jurisdictions, such as the British Virgin Islands and Bermuda, to adopt MDRs "consistent with DAC6 and the OECD work."[325] Under this proposal, offshore jurisdictions would have been required to collect data through MDRs and submit the relevant collected disclosures to EU Member States.[326] This option was considered before DAC6 became operational in the EU.[327] Now that the EU has had several years of implementing DAC6, the time may be ripe for the EU to support the spread of a globalized system of MDRs, i.e., GMDR.

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322. *See* OECD, *CRS by Jurisdiction*, https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/ [https://web.archive.org/web/20230810012814/https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/] (last visited Aug. 20, 2023); OECD, *Inclusive Framework on Base Erosion and Profit Shifting*, *supra* note 66.

323. DAC6, *supra* note 38, at art. 1(1). Where there are no such intermediaries, the reporting obligations with respect to the reportable cross-border arrangements shift to the taxpayers. *Id.* at art. 1(2)(6). However, self-reporting by taxpayers is less likely to occur if the relevant conduct involves tax evasion. Also, taxpayers may not be aware of the reporting obligations. Thus, the advantages of third-party reporting, as discussed above, are lost where the reporting obligations shift to the taxpayers.

324. *Cf.* MARLEY MORRIS, NEGOTIATING THE LEVEL PLAYING FIELD, at 8, 14 (2020).

325. *See* General Secretariat of the Council of the European Union 10421/18 FISC 274 ECOFIN 657, Code of Conduct (Business Taxation) – Scoping paper on criterion 2.2 of the EU listing exercise (June 22, 2018).

326. *Id.*

327. Instead, the EU required that these offshore jurisdictions adopt the economic substance rules. *Id.* *See also* Francesco Guarascio, Trade tensions put global growth at risk, EU to tell G20, Reuters (Apr. 2, 2019, 10:18 PM), https://www.reuters.com/article/us-eu-g20-regulations-idUKKCN1RE1HR [https://perma.cc/APQ6-TNJK] (noting that the EU asked the G20 countries to consider global mandatory disclosure rules for intermediaries).

If the EU supports the adoption of GMDR as an international standard, it may consider adding non-cooperative countries to the EU's blacklist of non-cooperative tax jurisdictions. The EU's list of non-cooperative jurisdictions for tax purposes has been in use since 2017.[328] The EU has added jurisdictions to the list if they have not adopted sufficient tax transparency measures or met other requirements set by the EU.[329] Blacklisted jurisdictions can be penalized through defensive measures adopted by EU Member States, which may include tax and non-tax measures.[330] The blacklist has seen some success in pressuring non-cooperative jurisdictions to implement tax reforms such as CRS and the BEPS minimum standards.[331] Nevertheless, the blacklist is not a foolproof solution, and as discussed in the next section, alternatives will likely be necessary where blacklists fail.[332]

In addition to the EU, the OECD and the members of the Inclusive Framework[333] may participate in the development of GMDR and the formation of an international consensus on its adoption. The GMDR framework could be developed initially for voluntary adoption like the CRS MDRs which the OECD also developed.[334] Other reforms in recent years, such as BEPS and the global minimum tax, have been developed through international consensus by the OECD and the Inclusive Framework.[335] Therefore, if GMDR has the combined support of the OECD and the EU, it will likely be positioned to garner broad international adoption. Furthermore, similar to other international standards, the OECD could facilitate ongoing peer reviews of participating countries to identify weaknesses in their implementation of GMDR.[336]

328. *See Council Conclusions on the Criteria and Process Leading to the Establishment of the EU List of Non-Cooperative Jurisdictions for Tax Purposes*, 2016 O.J. (C 461) 2; *EU List of Non-Cooperative Jurisdictions for Tax Purposes*, EUROPEAN COUNCIL OF THE EUROPEAN UNION, https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/# [https://web.archive.org/web/20230726160944/https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/] (July 17, 2023); Giuseppe Melis & Alessio Persiani, *The EU Blacklist: A Step Forward but Still Much to Do*, EC TAX REV. 2019-5 (2019); Aija Rusina, *Name and Shame? Evidence from the European Union Tax Haven Blacklist*, 27 INT'L TAX & PUB. FIN. 1364 (2020).

329. *See* Rusina, *supra* note 328, at 1365.

330. *Id.* at 1369–71.

331. *See, e.g.*, Alexander Ozkan, *Cayman Islands Removed from EU Tax Blacklist*, PWC (Oct. 9, 2020) ("Cayman Islands was removed from the EU list after it adopted new reforms to its framework on Collective Investment Funds in September 2020."). The EU has even blacklisted sizable economies such as South Korea. *See* Shin Yong-bae, *EU Blacklists 17 Tax Havens including South Korea*, KOREA HERALD (Dec. 5, 2017).

332. *See* Noked & Marcone, *supra* note 27.

333. The Inclusive Framework is a group of over 135 countries and jurisdictions that are working together with the OECD and G20 to design and implement policies to combat base erosion and profit shifting in a coordinated, multilateral manner. *See* OECD, *Inclusive Framework on Base Erosion and Profit Shifting*, *supra* note 66.

334. *See supra* Section II.A.3.

335. *See* Allison Christians & Laurens van Apeldoorn, *The OECD Inclusive Framework*, BULL. FOR INT'L TAX'N 226, 226 (2018); Shu-Yi Oei, *World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership*, 47 YALE J. INT'L L. 199, 200–01 (2022); Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353, 354 (2020).

336. *See generally* Fabrizio Pagani, *Peer Review: A Tool for Global Co-operation and Change*, OECD OBSERVER No. 235 (Dec. 2002); Noked et al., *supra* note 20, at 128.

B. Engaging Directly with Intermediaries in Non-cooperative Countries

Even with the EU and OECD's support, it is not guaranteed that every country will adopt GMDR. For instance, despite pressure from the EU, the United States has refused to join CRS.[337] If an important financial center that hosts tax avoidance enablers refuses to adopt GMDR, there are likely to be significant negative consequences for all GMDR-implementing countries. First, intermediaries in non-cooperative countries would not be subject to GMDR disclosure obligations under domestic law. Thus, the negative externalities arising from the activities of these enablers would persist.[338] Second, non-cooperative countries could become secrecy hubs in which tax avoidance enablers operate with impunity.[339]

What should GMDR-implementing countries do with respect to intermediaries in non-cooperative countries? A potential policy response, which has recently been proposed for CRS, could be applied here.[340] This proposal is inspired by the enforcement provisions contained in the U.S. FATCA regime, which requires that non-U.S. financial institutions (FIs) identify U.S. account holders and report their information to the IRS.[341] Under the FATCA regulations, FIs are generally required to register with the IRS and carry out certain due diligence, reporting, and withholding obligations.[342] FIs that fail to register with the IRS and carry out the FATCA obligations are subject to thirty percent withholding tax on certain payments made to them.[343] Wielding this enforcement mechanism, the United States has elicited broad, international compliance with its tax transparency regime.[344] FATCA's strong unilateral enforcement measures have incentivized many countries to enter into bilateral intergovernmental agreements (IGAs) with the United States for the implementation of FATCA by their FIs.[345]

What happens when a regime lacks such an enforcement mechanism? CRS provides a grim example. The United States has refused to join CRS despite threats by the EU to blacklist the United States unless it implements a fully reciprocal information exchange.[346] As a result of the United States' nonparticipation in CRS, foreign taxpayers may hide wealth in U.S. FIs without being reported to their home

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337. *See* Noked, *Should the United States Adopt CRS?, supra* note 74, at 122–23.

338. *See supra* Part I.

339. *See* Noked & Marcone, *supra* note 27, at 191–93.

340. *See id.* at 203–12.

341. I.R.C. §§ 1471-1474; *see also* WILLIAM BYRNES, GUIDE TO FATCA AND CRS COMPLIANCE § 1.20 (2021); Noked, *FATCA, CRS, and the Wrong Choice of Who to Regulate*, *supra* note 74, at 84–86. FATCA generally uses the term Foreign Financial Institution or FFI (i.e., an FI that is not a U.S. FI), whereas CRS uses the term FI. This Article refers to FFIs as FIs.

342. Treas. Reg. § 1.1471-4. FATCA's due diligence procedures are detailed in its implementing Treasury Regulations. *See* Treas. Reg. §§ 1.1471-1.1474.

343. I.R.C. §§ 1471(a), 1472(a); Treas. Reg. §§ 1.1471-2(a)(1), 1.1472-1(a).

344. *See Foreign Account Tax Compliance Act*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act [https://perma.cc/4W6L-JZMK] (last visited Aug. 20, 2023).

345. *See id.*

346. Noked & Marcone, *supra* note 27, at 201–03. The EU has failed to blacklist the United States even when it has adequately met the criteria for blacklisting. This may be due to the United States' economic power and influence. One analyst has referred to the United States as "too big to be listed." Johan Langerock, *Off the Hook: How the EU is About to Whitewash the World's Worst Tax Havens*, OXFAM 1, 3 (Mar. 2019).

governments.[347] Empirical evidence suggests that wealth is moving from traditional tax havens to the United States.[348] Despite mounting evidence showing how the United States has become one of the world's premier tax havens, Congress has shown no inclination to enact legislation to change this reality.[349] Thus, CRS's lack of an enforcement mechanism against nonparticipating jurisdictions has created a blind spot in international tax transparency that undermines the global fight against tax evasion and other illicit activities.[350]

To address this problem, we have proposed elsewhere that CRS should adopt an enforcement mechanism similar to the one under FATCA.[351] Under this proposal, a group of CRS-implementing countries could require FIs in countries like the United States to implement the CRS due diligence and reporting obligations or face penalties such as withholding taxes on payments made to them.[352] An FI that agrees to implement these obligations will be required to enter into an agreement detailing the relevant obligations.[353] It will be required to engage a local accounting firm to carry out audits to ensure compliance.[354] The details of the mechanism can be provided in model rules and a multilateral competent authority agreement signed by the relevant countries that adopt this enforcement measure.[355] To facilitate reporting, these countries could set up an electronic system for the registration and centralized filing of information by FIs.[356]

To ensure that GMDR does not encounter the same problems as CRS, it is important that it contains an effective enforcement mechanism vis-à-vis intermediaries in non-cooperative countries. GMDR-implementing countries can require that intermediaries in other countries comply with the obligations under GMDR or face penalties. Participating intermediaries would be required to register and make the required reporting through a centralized electronic system.[357] To ensure compliance, participating intermediaries will be required to undergo periodic

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347. See Noked & Marcone, *supra* note 27, at 191–201 for an analysis of the United States' tax haven characteristics. *See also* Peter A. Cotorceanu, *Hiding in Plain Sight: How Non-US Persons Can Legally Avoid Reporting Under Both FATCA and GATCA*, 21 TRUSTS & TRUSTEES 1050, 1054 (2015); Agustin Benetrix, Lorenz Emter & Martin Schmitz, *Automatic for the (Tax) People: Information Sharing and Cross-Border Investment in Tax Havens* (TEP Working Paper No. 1321, 2021).

348. *See, e.g.*, Elisa Casi, Christoph Spengel & Barbara M.B. Stage, *Cross-border Tax Evasion After the Common Reporting Standard: Game Over?*, 190 J. PUB. ECON. 1, 11 (2020); Noked & Marcone, *supra* note 27, at 197–99 (reviewing relevant empirical studies).

349. *See* Noked & Marcone, *supra* note 27, at 197–201.

350. Many examples of illegal activities facilitated by the U.S. tax haven came to light in the Pandora Papers. *See Pandora Papers*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/pandora-papers/ [https://perma.cc/N4FR-2FTN] (last visited Aug. 20, 2023); Noked & Marcone, *supra* note 27, at 197-99.

351. *See* Noked & Marcone, *supra* note 27. This proposal is not limited to tax regimes and the same type of enforcement mechanism could be applied to international agreements on various issues.

352. *Id.* at 203–12.

353. This agreement would be similar to the FFI agreement under FATCA. *See id.* at 205-06.

354. *See id.* at 210–11.

355. For example, see the CRS MDRs and the Crypto-Asset Reporting Framework; OECD, *supra* note 143; OECD, CRYPTO-ASSET REPORTING FRAMEWORK AND 2023 UPDATE TO THE COMMON REPORTING STANDARD (2023); Noked & Marcone, *supra* note 27, at 204–05.

356. *See* Noked & Marcone, *supra* note 27, at 207–08.

357. *See id.*

audits by accounting firms in their countries.[358] The involvement of the governments of the intermediaries in non-participating countries would not be required.

Intermediaries that do not register and comply with the relevant requirements could be subject to a variety of penalties. First, similar to FATCA, penalties may include withholding taxes on certain payments made by payors in GMDR-implementing countries.[359] Second, GMDR could require that intermediaries comply on a group basis.[360] Many intermediaries (such as international law firms, large accounting firms, banks, and others) have presence in multiple jurisdictions. Where intermediaries are part of a group with affiliates or branches in different jurisdictions, GMDR could provide that for an affiliate branch to be considered compliant the whole group must comply with the relevant obligations.[361] This is similar to the treatment of expanded affiliated groups under FATCA.[362] As a result, a branch in a GMDR-implementing country may be penalized for its foreign affiliates' failure to comply with GMDR, which would increase the incentive to participate. Third, GMDR-implementing countries can amend their anti-money laundering (AML) rules to provide that non-participating intermediaries be considered as posing high money laundering risks because they may help their clients engage in tax abuse.[363] This risk assessment would make it more difficult for such intermediaries to do business. Finally, GMDR-implementing intermediaries could be required to report non-participating intermediaries or withhold tax on payments made to them.[364]

The goal of this enforcement mechanism is to incentivize intermediaries to comply with the GMDR reporting requirements even if they are located in countries that refuse to adopt GMDR into their domestic laws. This ensures that the non-cooperation of one or more countries will not undermine the effectiveness of GMDR. It may also work to promote the adoption of GMDR by otherwise reluctant countries. The experience with FATCA shows that countries would be more likely to adopt a reporting regime if it includes an effective enforcement measure that requires intermediaries to comply with the same obligations even where countries refuse to participate.[365]

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358. *See id.* at 210–11 (more on the potential use of audits under a CRS enforcement mechanism).

359. *See id.* at 208–10 (further discussion on potential penalties. Each compliant intermediary can be issued a unique identifying number. This could be modeled after FATCA's Global Intermediary Identification Numbers which are issued by the IRS to participating FIs. This would simplify the identification of compliant and noncompliant intermediaries for the purpose of imposing penalties. *Id.*

360. *See id.*

361. *Id.*

362. *See* Treas. Reg. §§ 1.1471-4(a)(4), 1.1471-5(h).

363. *See* FINANCIAL ACTION TASK FORCE (FATF), https://www.fatf-gafi.org/ [https://perma.cc/5JLP-Y8Z5] (last visited Aug. 20, 2023).

364. This is similar to the FATCA withholding obligations on certain payments from participating FIs to nonparticipating FIs. *See* Treas. Reg. §§ 1.1471-4(b), 1.1471-5(h).

365. *See* Noked & Marcone, *supra* note 27, at 183, 212–13.

CONCLUSION

Intermediary-enabled tax avoidance and evasion are matters of global concern. As the world becomes increasingly interconnected, taxpayers pursuing abusive cross-border tax schemes and their professional enablers have grown ever more sophisticated in their methods. A growing body of evidence, including the Pandora Papers and other leaks, show how professional intermediaries help the world's economic elite hide their wealth offshore, raising tax avoidance and evasion concerns. This Article reveals how gaps in the international tax transparency framework and current MDRs have permitted this reality to persist.

The new international standard proposed in this Article has the potential to resolve the information and enforcement problems that prohibit domestic tax measures from effectively addressing cross-border tax avoidance and evasion. As GMDR could be an indispensable tool in the international effort to curb cross-border tax abuse, this proposal deserves serious consideration.