

STATES OF JERSEY



**DRAFT TAXATION
(IMPLEMENTATION)
(INTERNATIONAL TAX COMPLIANCE)
(MANDATORY DISCLOSURE RULES
FOR CRS AVOIDANCE
ARRANGEMENTS AND OPAQUE
OFFSHORE STRUCTURES) (JERSEY)
REGULATIONS 202- (P.129/2019):
COMMENTS**

Presented to the States on 4th September 2020
by the Economic and International Affairs Scrutiny Panel

STATES GREFFE

COMMENTS

Background

[P.129/2019](#) was lodged by the Minister for External Relations on 31st December 2019. The draft Regulations, if approved, would be made under the [Taxation \(Implementation\) \(Jersey\) Law 2004](#). They implement the commitments given by the Government of Jersey to the EU Code of Conduct Group in July 2018 to introduce a Mandatory Disclosure Rules (MDR) Regime.

The Economic and International Affairs Scrutiny Panel received a briefing on the Proposition from the Deputy Comptroller of Revenue and Deputy Director of Tax Policy on 27th January 2020. The Panel had expected to receive additional information relating to the Proposition before the debate, but the information had not been forthcoming. The debate was subsequently deferred until the 16th June 2020. The Panel called-in the legislation under [Standing Order 72\(5\)](#) during the debate, following adoption of the principles.

The Panel received an additional briefing on 20th August 2020 from the Deputy Comptroller of Revenue with other Government Officials in attendance.

Purpose of the Regulations

The purpose of the draft Regulations are to introduce a Mandatory Disclosure Regime (MDR) Regime, which would require promoters, service providers and, in some circumstances, users of Common Reporting Standard (CRS) avoidance arrangements and opaque offshore structures to provide the Comptroller of Revenue with information about those arrangements and structures.

Information relating to users resident in other jurisdictions would be exchanged with the tax authority of that jurisdiction in accordance with the terms of the Multilateral Competent Authority Agreement on the automatic exchange regarding CRS avoidance arrangements and opaque offshore structures.

The MDR Regime put forward within P.129/2019 broadly follows the OECD [model](#) which is the international standard for MDR. The OECD explains that the purpose of the MDR is to provide tax administrations with information on CRS Avoidance Arrangements and Opaque Offshore Structures, including the users of those Arrangements and Structures and those involved in their supply.

P.129/2019 explains that the intention is that the draft Regulations will be supplemented by further guidance to be published by the Comptroller of Revenue, which will provide guidance on the important “reasonable to conclude” decision that industry will need to make when deciding whether or not to report specific Arrangements or Structures.

In developing the draft Regulations, the Government of Jersey has worked closely with the Governments of other Crown Dependencies (Guernsey and the Isle of Man) with the aim of providing consistency across the Islands to benefit those operating across jurisdictions. Both Guernsey and the Isle of Man have approved their MDR Regulations:

- **Guernsey:** The Income Tax (Approved International Agreements) (Implementation) (Mandatory Disclosure Rules) [Regulations 2020](#) were passed by Guernsey on 11th March 2020 with a commencement date yet to be announced;
- **Isle of Man:** The Income Tax (Mandatory Disclosure Rules) [Regulations 2019](#) were approved by Tynwald on 10th December 2019. A commencement date is yet to be announced.

Consultation

A [consultation](#) exercise was undertaken between 23rd September and 15th November 2019 by Revenue Jersey. The consultation followed an initial meeting with representatives of industry to gauge the potential issues of adopting an MDR Regime. A consultation response [report](#) explains that there was support for Jersey to implement an MDR regime based on the OECD Model Rules.

The Panel wrote to a number of Law firms, family offices and accountancy firms in Jersey asking for their views on the proposals. The Panel did not receive any concerns from these industries.

Panel concerns

The Panel raised a number of concerns during the briefing on 27th January. The concerns were mainly in relation to Regulations 4 and 18:

- **Regulation 4** confers power on the Comptroller of Revenue to issue guidance on how the expression “reasonable to conclude” is to be determined in the context of deciding whether or not an arrangement or structure is a CRS avoidance arrangement or an opaque offshore structure.

The Panel was concerned about this Regulation as it states that, for the purposes of Regulations 2 and 3, the Comptroller may issue guidance on how to determine the expression “reasonable to conclude” [emphasis added]. It is the Panel’s view that guidance for industry should always be issued.

In an accompanying [briefing note](#) to the Guernsey Regulations, it mentions the guidance for service providers concerning the principles behind the “reasonable to conclude” test. It states that there is an intention to work with Jersey and the Isle of Man to determine whether joint guidance can be issued and include a number of scenarios in order to provide clarity. During the Panel’s briefing on 20th August, the Deputy Comptroller of Revenue confirmed that guidance would be issued and that it would be shared with both Guernsey and the Isle of Man to ensure consistency.

- **Regulation 18** makes provision for persons authorised by the Comptroller to enter business premises for the purpose of investigating compliance with these Regulations.

The Panel was concerned about this provision because the Regulations refer to “authorised person” which means the Comptroller, or any person authorised by the Comptroller, can perform the functions under Regulation 18. During the briefing on

27th January, the Panel raised concerns about this Regulation, as it felt that the definition was too broad in the context of allowing any authorised person to enter business premises.

Following the briefing, the Minister for External Relations provided the Panel with an explanatory note about Regulation 18 (the briefing note can be viewed in full in Appendix 1). It explains –

This legislation promotes compliance with tax transparency standards and will help to prevent instances of intermediaries in Jersey facilitating tax avoidance and evasion by offshore clients in another tax jurisdiction.

It also provides statutory support to certain aspects of the codes of practice established by JFSC and the Jersey Finance Members' Code of Conduct.

Revenue Jersey does not expect many cases of serious wrongdoing by intermediaries to emerge. However they do need to have powers to enforce compliance with CRS and other international agreements.

A number of areas of Jersey's domestic and international tax legislation do give similar powers to the tax administration (in other specific fields) to require the production of documents and, if necessary, to enter premises for inspection and copy or take up business records.

It should be stressed that almost all Revenue Jersey visits at business premises are currently undertaken by arrangement in advance and without the need to recourse to formal powers. The statutory right to enter is created to reinforce these routine visit arrangements and needs to be there for the occasions when taxpayers simply refuse to co-operate.

Providing Revenue Jersey with this power to examine and copy papers also forms an important legal safeguard for third-party intermediaries against any legal action by an affected client. The power creates the "legal gateway" which allows the intermediary to provide information to Revenue Jersey and cooperate with these routine visits.

Because these MDR regulations deal with areas where non-compliance may exist, they do need to cater for the likelihood that an intermediary and/or clients may be uncooperative (more so than under general tax and related regulations). In extreme cases, the risk of failure to comply and the risk of intermediaries actively altering or destroying records, may be greater. Therefore, it is important that the tax administration is given the power to enter business premises at reasonable hours and to take up or copy records.

During the briefing on 20th August, Government Officials also explained that peer reviews undertaken by the OECD would include the adequacy of legislation as well as the effectiveness of compliance activities.

Conclusion

Given that the Panel did not receive any concerns from the businesses it wrote to, it is satisfied with the purpose of the draft Regulations. The Panel thanks the Minister and Government Officials for their time, and for providing further clarification/explanation on a number of areas.

APPENDIX

E&IA PANEL: Questions relating to the Draft Taxation (Implementation) (International Tax Compliance) (Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structure) (Jersey) Regulations 202-

The Powers Required by Revenue Jersey to Enter Business Premises and Examine Business Documents or Client Records

1. Jersey has committed to high standards of tax transparency under the Common Reporting Standard (CRS) and other agreements and treaties.
2. The OECD is concerned that some taxpayers may be taking steps to avoid making the necessary CRS reports and that there may be cases where this is done in concert with an **intermediary** of one form or another. This is generally viewed by the OECD as a form of aggressive tax avoidance.
3. Jersey has undertaken to implement the OECD Mandatory Disclosure Regime (MDR), which compels domestic taxpayers, domestic intermediaries and offshore intermediaries to disclose such arrangements to their local tax administration.
4. Taxpayers and intermediaries will be required to provide information about unusual arrangements which are designed to avoid disclosing assets and their ownership. In due course, the MDR regime will also lead to the onward reporting by Revenue Jersey of specified assets, where appropriate, to the jurisdiction of residence of the true beneficial owners.
5. This legislation promotes compliance with tax transparency standards and will help to prevent instances of intermediaries in Jersey facilitating tax avoidance and evasion by offshore clients in another tax jurisdiction.
6. It also provides statutory support to certain aspects of the codes of practice established by JFSC and the Jersey Finance Members' Code of Conduct.
7. Revenue Jersey does not expect many cases of serious wrongdoing by intermediaries to emerge. However, they do need to have powers to enforce compliance with CRS and other international agreements.
8. A number of areas of Jersey's domestic and international tax legislation do give similar powers to the tax administration (in other specific fields) to require the production of documents and, if necessary, to enter premises for inspection and copy or take up business records.
9. It should be stressed that **almost all Revenue Jersey visits at business premises are currently undertaken by arrangement in advance and without the need to recourse to formal powers.** The statutory right to enter is created to reinforce these routine visit arrangements and needs to be there for the occasions when taxpayers simply refuse to co-operate.
10. Providing Revenue Jersey with this power to examine and copy papers also forms an **important legal safeguard** for third-party intermediaries against any legal

action by an affected client. The power creates the “legal gateway” which allows the intermediary to provide information to Revenue Jersey and cooperate with these routine visits.

11. Because these MDR regulations deal with areas where non-compliance may exist, they do need to cater for the likelihood that an intermediary and/or clients may be uncooperative (more so than under general tax and related regulations). In extreme cases, the risk of failure to comply and the risk of intermediaries actively altering or destroying records, may be greater. Therefore, it is important that the tax administration is given the power to enter business premises at reasonable hours and to take up, or copy, records.
12. OECD peer reviews do encompass reviews of the adequacy of our legislation as well as the effectiveness of our compliance activities.
13. We expect that any future (OECD) peer review of our legislation and operations would expect to see – at a minimum – the sort of power drafted in Regulation 18. If a person obstructs an officer in such circumstances, the matter ultimately is resolved in the Royal Court.

The Scope of the Power Under these Regulations: its practical limitations and the safeguards

14. Regulation 18 of the MDR Regulations is drafted in exactly the same terms as Regulation 20 of the Taxation (Implementation) International Tax Compliance) (Common reporting Standard) (Jersey) Regulations 2015 – except the current draft regulations also cover “client records” (see below).
15. These Regulations essentially enable Revenue Jersey to administer a Mandatory Disclosure Regime in Jersey for the purposes of better ensuring compliance with international tax treaties and agreements. They compel taxpayers and intermediaries to disclose unusual arrangements which may frustrate the reporting requirements of CRS regulations: these are defined as “avoidance arrangements” and “opaque offshore structures”. The MDR Regulations specifically empower the tax administration to undertake checks on compliance with the mandatory regime.
16. It is also foreseeable that Revenue Jersey could be contacted by a foreign Government which is party to CRS with information about non-compliance by an intermediary in Jersey and/or their offshore client. These are likely to be exceptional cases but nonetheless, Revenue Jersey needs the appropriate powers to deal with such a situation – to enter business premises at any reasonable hour and take copies of any documents which may indicate whether the intermediary and/or their offshore client is not compliant with the MDR and may possibly be engaged in aggressive tax avoidance and/or evasion in that foreign jurisdiction.
17. These powers are more likely to be exercised in respect of Jersey-based intermediaries of offshore clients but the regulations do encompass Jersey-resident entities holding assets overseas.

18. In most cases, as stated above, these enquiries are undertaken with consent and visits are pre-arranged. But powers are needed to compel in some cases; and, in some cases, it may be appropriate to undertake a visit unannounced.
19. Documents protected by **legal professional privilege** are, of course, specifically excluded from these provisions.
20. If an intermediary (or other person) refuses to co-operate, the Regulations give no power to force entry. In this case the matter would be referred into the Royal Court for appropriate judicial oversight. The Court would effectively determine whether the actions of the tax administration were reasonable and either uphold them or not.
21. We believe this judicial safeguard is entirely sufficient for these purposes.
22. Additionally, in respect of the power to examine and copy papers (as stated above), Regulation 18 provides an **important legal safeguard** for third-party intermediaries against any legal action by the affected client. The power creates the “legal gateway” which allows the intermediary to provide information to Revenue Jersey.

Why access to Client Records is required

23. Essentially, business records held by an intermediary will encompass records relating to business transactions on behalf of the client (records which essentially “belong” to the client). The term “client records” extends further - to underlying documents which may belong to the client or to the intermediary and which will encompass documents such as trust deeds and documents setting out the underlying purposes of business transactions.
24. These would inform an intermediary’s decision as to whether it needs to make a disclosure and will help the tax administration (in Jersey or overseas) to ascertain the client’s intentions with regard to business transactions and compliance with CRS. The most extreme examples would be a document recording the rationale for a transaction, which either completely removes any suspicion of wrongdoing or uncovers a deliberate attempt to avoid CRS obligations (unless such a document were covered by legal privilege).

Minister for External Relations

6th June 2020