FAQs - Reporting Obligation Parties Involved in Cross-Border Tax Arrangements

Coronavirus Postpones # DAC 6 Reporting Deadlines

The EU Directive 2018/822, known as 'DAC 6' came into force on 25 June 2018; here partner Sarah Woodall (Barrister, Head of Tax) answers some key questions.

Q. When does the DAC 6 reporting obligation begin?

A. The rules are still set to come into force on that 01 July 2020.

However, on 8th May and in response to the coronavirus the European Commission made a proposal to postpone reporting deadlines by 3 months. Under the proposals the 30 day period for reporting new arrangements now look set to start on 1 October 2020. This means arrangements that become reportable in July, August and September would now not need to be reported in practice until 31 October 2020

Q. Might DAC 6 reporting deadlines be extended again?

A. Potentially, yes. The proposals include a power for the European Commission to make a further extension, yet only for a further 3 months. This means it is important to get ready, where reasonably possible.

R. Who is obliged to report?

A. DAC 6 imposes a reporting obligation on intermediaries and occasionally taxpayers involved in cross-border tax arrangements (which meet specified hallmarks).

Q. What are the hallmarks of reportable cross-border arrangements?

A. A cross-border arrangement is reportable under DAC 6 where it satisfies one or more of 15 hallmarks, split into 'generic' and 'specific' hallmarks.

Many hallmarks must also fulfil the main benefit test for the cross-border arrangement to be reportable:

> *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.*

HMRC's position is that the main benefits test is an objective one and the specific motives or intention of the participants are not relevant.

The hallmarks are too many and complex to describe here. For more information take advice or see the Article 3(18) et seq of Directive 2011/16/EU as amended by Directive 2018/822

Q. Where do I make a report?

A. In the UK, all reports made under the Regulations must be made electronically using HMRC's electronic return system.

Intermediaries under a reporting obligation in multiple Member States are only required to make a report to one Member State, reporting to the first applicable Member State listed; the Member State:

- where the intermediary is resident for tax purposes
- where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided
- which the intermediary is incorporated in or governed by the laws of, or
- where the intermediary is registered with a professional association related to legal, taxation or consultancy services.
- Where a relevant taxpayer is required to make a report in multiple Member States, they should report to the first applicable Member State listed, the Member State where the relevant taxpayer:
- is resident for tax purposes
- has a permanent establishment benefitting from the arrangement
- receives income or generates profits, where the relevant taxpayer is not resident for tax purposes and does not have a permanent establishment in any Member State, or
- carries on an activity, where the relevant taxpayer is not resident for tax purposes and does not have a permanent establishment in any Member State.

The obligation on the intermediary or relevant taxpayer to file the same information in subsequent Member States is waived where they have proof that the same information has been filed in another Member State.

Q. What exactly is a cross-border tax arrangement?

A. 'Tax arrangement' is not defined by DAC 6. A tax arrangement is regarded as 'cross-border' and therefore potentially subject to DAC 6 where it concerns either more than one Member State or a Member State and a third country and at least one of the following conditions is met:

- not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction
- one or more participants is a dual resident

- one or more of the participants has a permanent establishment in another jurisdiction and the arrangement forms part or all of the business of that permanent establishment

- one or more of the participants carries on an activity in another jurisdiction without being resident for tax purposes or having a permanent establishment in that jurisdiction, or

- the arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

HMRC's view is that for an arrangement to be 'cross-border' the jurisdictions concerned must have 'material relevance' to the arrangement.

Q. What is a tax advantage?

A. The Regulations define 'tax advantage' as including:

- relief or increased relief from tax

- relief or increased repayment of tax

- avoidance or reduction of a charge to tax or an assessment to tax

- deferral of a payment of tax or advancement of a repayment of tax

- avoidance of on obligation to deduct or account for tax

'where the obtaining of the tax advantage cannot reasonably be regarded as consistent with the principles on which the relevant provisions that are relevant to the cross-border arrangement are based and the policy objective of those provisions.'

In their guidance, HMRC makes clear that the use of certain products designed and intended to generate a certain beneficial tax outcome, such as ISAs or pensions will not inherently mean that the main benefit test is met.

Q. Am I an intermediary?

A. Accountants, lawyers and other professional advisers can all be 'intermediaries'. A person can only be regarded as an intermediary if they:

- are resident for tax purposes in a Member State

- have a permanent establishment in a Member State through which the services with respect to the arrangement are provided

- be incorporate in, or governed by the laws of, a Member State, or

- be registered with a professional association related to legal, taxation or consultancy services in a Member State.

Intermediaries include anyone who:

- designs
- markets
- organises
- makes available for implementation, or manages the implementation of

a reportable cross-border tax arrangement.

This includes any person that: 'having regard to the relevant facts and circumstances ….**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 any of the actions listed above.'

HMRC's Regulations excludes employees (including officer holders) of a person that is an intermediary or relevant taxpayer in relation to an arrangement.

An employee may also be treated as an employee of a person connected (closely bound by financial, economic or organisational links) to their employer.

HMRC's guidance is that someone who only provides aid, assistance or advice would be regarded as a 'service provider' and

- could include providing finance, expertise or knowledge, sharing experience or offering accounting advice but would not include someone who subsequently becomes aware of the arrangement but has no other involvement with it, such as an auditor
- what an service provider could reasonably be expected to know will depend on the facts of a particular situation and
- service providers are not expected to carry out any additional due diligence than what they would normally do in the course of their business, in compliance with their existing obligations.

Q. Am I an intermediary, if another adviser is acting too?

A. Yes, it's possible. Where there are multiple intermediaries, each is under a duty to report unless they have proof another intermediary has already reported the same information in respect of the same arrangement.

Q. Does legal professional privilege (LPP) mean I do not need to report?

A. Yes, sometimes. LPP does takes precedence over an intermediary's reporting obligation. It is also important to remember that a client always has discretion to waive privilege.

Where an intermediary is prevented from making a report due to LPP they must notify another intermediary (if there is one) or the relevant taxpayer that they must make a report instead.

A lawyer will still need to report any information that is not legally privileged and HMRC say this is likely to include:

- the names of the relevant taxpayers and other intermediaries
- a description of the transactions that are part of the arrangements.

In the absence of any intermediary, or where intermediaries are all prevented from making a report by LPP, the relevant taxpayer is under an obligation to report and the relevant taxpayer is any person who:

- is ready to implement a reportable cross-border arrangement
- has implemented the first step of such an arrangement, or
- to whom a reportable cross-border arrangement is made available for implementation.

HMRC's guidance says that:

A person does not have to have implemented or have started to implement the arrangement, nor do they have to have decided that they will implement the arrangement. Simply having an arrangement made available to them for implementation, or being ready to implement an arrangement is sufficient.

In addition:

proactive marketing of an arrangement by an intermediary, also means that the arrangement is being made available to prospective clients. This could include advertising the arrangement online or offering it to potential clients in person.

Q. Will member states exchange information I submit?

A. Yes. Tax authorities will automatically exchange this information with other Member States.

Member States have one month from the end of the quarter in which the information was disclosed to share the information.

Q. What timescale do I have for reporting?

A. The timescales are quite tight.

First reports - 31 October 2020

Once DAC 6 comes into force on 01 July, all qualifying transactions occurring since 25 June 2018 were due to be reported by 31 August 2020. However under the proposal the 30 day period for reporting new arrangements now look set to start on 1 October 2020. This means arrangements that become reportable in July August and September would now not need to be reported in practice until 31 October 2020.

New transactions need to be reported within 30 days of the first of:

- the day after the arrangement is made available for implementation;
- the day after the arrangement is ready for implementation; or
- the first step in implementing the arrangement is made.

Where an intermediary's involvement is limited to providing aid, assistance or advice, the 30 days runs from the day after the date of the relevant aid, assistance or advice.

In addition to the 30 day timescale provided for under DAC 6, the UK Regulations require an intermediary or relevant taxpayer to make a report where they have been notified of their reporting obligation, within 30 days of the date the notification is received.

Historical reports - 30 November 2020

Historical arrangements for which the first step was implemented between 25 June 2018 and 20 June 2020 were to be reported by 31 August 2020 yet, if the proposal is ratified, reports will not now be due until 30 November 2020.

Update reports - every three months

Intermediaries must make updated reports every three months in respect of marketable arrangements (arrangements that do not require substantial customisation to be implemented). Updated reports should contain any new reportable information with regard to:

- identification details for the intermediaries and relevant taxpayers
- the date the first step in implementing the arrangement has been or will be made
- the Member State of the relevant taxpayer and any other Member State likely to be affected by the arrangement and
- any other person in a Member State likely to be affected and to which Member States those persons are linked.

Annual Reporting Obligation

UK relevant taxpayers are required to make a return for each of the years or accounting periods in which they obtain a tax advantage through a reportable arrangement, starting with the tax year or accounting period in which the first of the following occurs:

- the arrangement is made available for implementation to the UK relevant taxpayer
- the arrangement is ready for implementation by the UK relevant taxpayer, or
- the first step in implementing the arrangement is made in relation to the UK relevant taxpayer.

The Regulations also specify when the return is to be made and what information it must contain.

Q. What if I forget to comply?

A. DAC 6 allows each Member State to determine the penalties for failing to comply with the reporting obligation. Under the Regulations, HMRC officers may require a person they suspect is a UK intermediary or UK relevant taxpayer to provide information or documents within a timescale reasonably required, and no less than 30 days.

Failure to comply with any of the obligations imposed by the Regulations can result in a penalty and its size will depend on the nature of the non-compliance. The tables below set out those penalties.

Table 1

Penalties under Regulation 14(1)	**Reg 14 (a)(i)**	**Reg 14(a)(ii)**	**Reg 14(b)**
Failure	**Initial Penalty**	**Daily Penalty**	**Further Daily Penalty**
Failure by a UK intermediary to make a return of reportable information under Reg 3(1)	Maximum penalty: £5,000	If maximum amount appears to an HMRC officer to be inappropriately low after taking into account all relevant considerations: £600 for each day during the initial period	If the failure continues after the initial penalty, a further penalty not exceeding £600 may be imposed for each day on which the failure continues after the day on which the initial penalty was imposed (excluding any day for which a penalty under this regulation has already been imposed).
Failure by a UK intermediary to make a return of new reportable information (an updated report) under Reg 3(4)	Maximum penalty: £5,000	N/A	
Failure by a UK relevant taxpayer to make a return of reportable information under Reg 4(1)	Maximum penalty: £5,000	If maximum amount appears to an HMRC officer to be inappropriately low after taking into account all relevant considerations: £600 for each day during the initial period	
Failure by a UK intermediary to notify where Legal Professional Privilege exclusion applies under Reg 7(2)	Maximum penalty: £5,000	If maximum amount appears to an HMRC officer to be inappropriately low after taking into account all relevant considerations: £600 for each day during the initial period	
Failure by a UK intermediary to notify arrangement reference number under Reg 8(2)	Maximum penalty: £5,000	N/A	
Failure by a UK intermediary or UK relevant taxpayer to provide information and documents requested in writing by HMRC under Reg 11	Maximum penalty: £5,000	If maximum amount appears to an HMRC officer to be inappropriately low after taking into account all relevant considerations: £600 for each day during the initial period	

Table 2

Penalties under Regulation 14(6)	**Reg 14(7)(a)**	**Reg 14(7)(b)**	**Reg 14(b)**
Failure	**First Instance**	**One previous failure**	**Two or more previous failures**
Failure by a UK relevant taxpayer to make an annual report under Reg 5	Maximum Penalty: £5,000 in respect of each reportable cross-border arrangement to which the failure relates	Where the taxpayer has failed to comply with Reg 5 on only 1 occasion during the period of 36 months ending with the date of the current failure began: An amount not exceeding £7,500 for each reportable cross-border arrangement to which the current failure relates. N.B. The current failure does not have to be in respect of the same arrangements as those to which the previous penalties applied.	Where the taxpayer has failed to comply with Reg 5 on 2 or more occasions during the period of 36 months ending with the date of the current failure began: An amount not exceeding £10,500 for each reportable cross-border arrangement to which the current failure relates. N.B. The current failure does not have to be in respect of the same arrangements as those to which the previous penalties applied.

Relevant considerations before imposing a penalty include:

- the desirability of setting a penalty at a level appropriate for deterring the person or other persons from similar failure;
- whether the failure was deliberate;
- any procedures maintained by the person liable to secure the identification of reportable cross-border arrangements and compliance with obligations under the Regulations; and
- the reasonably foreseeable consequences of the failure.

The penalties listed here are not the only options open to HMRC, but they are indicative of the initial approach; daily or higher penalties may be imposed.

Q. Are there time limits for penalties?

A. Yes. Penalty determinations (for initial penalties, further daily penalties and penalties for failure to report annually) and proceedings regarding daily penalties must be made or commenced before the latest of the following dates:

- 24 months after the date the non-compliance first came to the attention of an HMRC officer;
- six years after the person became liable to the penalty, and
- for further daily penalties, three years after the determination of the initial or daily penalty.

Penalties must be paid within 30 days of the date the penalty is determined by the First Tier Tribunal, or issue of the notice of determination.

Q. What's the significance of arrangement reference numbers?

A. Where an intermediary or relevant taxpayer complies with their reporting obligations, HMRC must allocate a reference number to the arrangement and notify the person making the report of that number.

The intermediary or relevant taxpayer then has 30 days to notify that number to any person who the UK intermediary or UK relevant taxpayer knows or should reasonably be expected to know is an intermediary or relevant taxpayer in relation to that cross-border arrangement. The 30 days runs from the later of:

- the date of notification of the reference number; and
- the date on which the other intermediary or relevant taxpayer became an intermediary or relevant taxpayer with respect to that arrangement.

Q. Can I be exempt from reporting?

A. Yes, yet it is important to take care. Where an intermediary or relevant taxpayer is relying on evidence of a report made elsewhere or by another party to waive their reporting obligation, the evidence must include:

- the arrangement reference number (or equivalent issued by another Member State) and
- such other information which demonstrates to the satisfaction of an officer of Revenue and Customs that the intermediary or relevant taxpayer, as the case maybe, does not have knowledge, possession or control of any other reportable information in relation to the reportable cross-border arrangement.

In HMRC's view, this may include:

- an intermediary's or taxpayer's records of the arrangement showing the reportable information within their knowledge, possession and control; and
- a copy of the report filed in the other jurisdiction, or information relating to the report made by the other person.

HMRC may then:

- compare the records with the information filed elsewhere or by another person;
- consider whether the records and the return made appear to be complete based on the information available; and
- consider the credibility of the intermediary's position that they hold no further reportable information.

Q. Should variations between member states concern me?

A. Yes, in some cases. Different Member States implemented DAC 6 in different ways and variations could lead to confusion as to how DAC 6 operates.

Lawyers in particular should be mindful that LPP also operates differently across Member States and LPP may prevent reporting, shift the obligation to report from one party to another, or have no effect at all.

It is important to consider the provisions enacted by each jurisdiction involved in an arrangement should to ensure compliance with the various obligations.

Talk to us

Sarah Woodall
Partner (Barrister), Head of Tax
07384 118 426
swoodall@hcrlaw.com

Nicolas Groffman, Partner, Head of International Team
+44 7816 592 934
ngroffman@hcrlaw.com