

Mandatory Disclosure Rules

United Kingdom DAC6 regulations

This article provides a summary of the UK regulations to incorporate mandatory disclosure rules under DAC6 into UK domestic law.

Status

On January 13, 2020, regulations to incorporate Directive (EU) 2018/822 on mandatory disclosure rules (hereinafter “DAC6” or “the Directive”) into UK law were published.

The provisions in the regulations will be fully operational on July 1, 2020, but – in line with DCA6, reporting also extends to arrangements the first step of which was implemented on or after June 25, 2018.

The publication of the regulations follows the culmination of a public consultation process which ran from July to October 2019. HMRC published a summary of the responses received to the consultation on January 13, 2020.

It is expected that administrative guidance will be published by the authorities in the UK in the coming months. Please note that the summary is based on regulations and draft guidance available as at April 10, 2020.

Scope

The scope of the regulations is closely aligned with the Directive, with no extension of scope proposed for e.g. VAT, customs duties or excise duties (which are excluded from the scope of DAC6).

The UK mandatory disclosure rules under DAC6 will also only apply for “cross-border arrangements” (i.e. domestic transactions will not be in scope). A separate disclosure regime for domestic arrangements has been in force since 2004.

Definitions

The main definitions included in the regulations align with the text of the Directive. In particular, the definitions of “associated enterprise”, “intermediary”, “relevant taxpayer”, “cross-border” and “marketable arrangement” mirror the text of the DAC6.

1) Intermediary

The regulations clarify that a person is not to be treated as an intermediary where:

- the person is an employee of an employer; and
- The employer is an intermediary or relevant taxpayer in relation to the reportable cross-border arrangement.

2) Tax advantage

The regulations include the following definition of a “tax advantage”:

- Relief or increased relief from tax;
- Repayment or increased repayment of tax;
- Avoidance or reduction of a charge to tax or an assessment to tax;
- Avoidance of a possible assessment to tax;
- Deferral of a payment of tax or advancement of a repayment of tax; and
- Avoidance of an obligation to deduct or account for tax,

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

3) Participants

Legislation introduced in the UK in 2019 to facilitate the introduction of DAC6 MDRs defines the meaning of the term “participates” for the purposes of the definition of a cross-border arrangement. The term is defined as including “being involved in, or facilitating, the arrangements in any way (for example, by receiving any benefit from them or by designing, marketing or providing services in connection with them, or arranging for others to do so)”.

Definitions (cont.)

A party that provides advice on an arrangement could therefore be deemed to be a participant in that arrangement for UK MDR purposes.

Hallmarks

The list of hallmarks in the UK regulations is aligned to the hallmarks in DAC6.

The regulations provide some additional clarification on how certain hallmarks should be interpreted:

- Hallmark C(4) (material difference in consideration for asset transfer): The consideration referred to in the hallmark is the consideration for tax purposes..
- Category D hallmarks: When assessing category D, the regulations state that the hallmarks should be interpreted in accordance with the OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures (2018) and related commentary.
- Category E hallmarks: The regulations clarify that the Category E transfer pricing hallmarks will not apply where the relevant taxpayer and any associated enterprise would be exempt from the basic transfer pricing rule by Chapter 3 of Part 4 to the Taxation (International and Other Provisions) Act 2019. This broadly exempts SMEs but only to the extent the transfer pricing rules would otherwise apply. The regulations also clarify that OECD Transfer Pricing Guidelines (2017) should be used to interpret the category E hallmarks.

Reporting - Intermediaries

Reporting timelines broadly mirror the requirements of the Directive, i.e. for bespoke arrangements, 30 days from the day after the relevant reporting is triggered.

The information to be disclosed is in line with the requirements of the Directive.

A reporting obligation will only arise where the intermediary is a "UK intermediary" that participates in the arrangement. A UK intermediary is determined in the regulations to be:

- i. an intermediary that is resident in the UK for tax purposes;

- ii. an intermediary with a permanent establishment in the UK through which the services with respect to the arrangement are provided;
- iii. an intermediary incorporated in the UK; or
- iv. an intermediary that is registered with a professional association that is established in the UK.

However, a reporting obligation would not arise in the UK if the UK intermediary is also liable to report the information in another Member State which, when applying the list above, features before the UK and the intermediary has evidence that a report of the same information has been made.

In addition, an intermediary will not be required to report if there is evidence that the same information has already been reported by another intermediary.

An intermediary should only be required to report information which is in its knowledge, possession or control.

Legal Professional Privilege

Under the terms of the regulations, a UK intermediary will not be obliged to disclose any information that is privileged in accordance with UK law.

Where legal professional privilege applies, the intermediary is required to notify any other intermediaries or, if no other intermediaries exist, the relevant taxpayer "as soon as reasonably practicable" of the reporting obligation.

The reporting deadline for the notified parties is 30 days from the date on which the notification was received.

Reporting – Relevant Taxpayer

Reporting timelines for relevant taxpayers mirror the requirements of the Directive.

The relevant taxpayer is required to report if it has a presence in the UK. The regulations provide that a relevant taxpayer will have a reporting obligation if:

- i. the taxpayer is resident in the UK for tax purposes;
- ii. the taxpayer has a permanent establishment in the UK which benefits from the arrangement;

Reporting – Relevant Taxpayer (cont.)

- iii. the relevant taxpayer receives income or generates profits in the UK; or
- iv. the relevant taxpayer carries on an activity in the UK.

A reporting obligation would, however, not arise in the UK if the UK relevant taxpayer is also liable to report the information in another Member State which, when applying the list above, features before the UK and the taxpayer has evidence that the relevant information has been reported.

Where multiple taxpayers are involved, the relevant taxpayer that is required to file the information is the one that features first in the list below:

- 1) The taxpayer that agreed the arrangement with the intermediary;
- 2) The taxpayer that is managing the implementation of the arrangement.

A taxpayer will not be required to report if:

- There is evidence that the arrangement has been reported by an intermediary; or
- There is evidence that the arrangement has been reported by another relevant taxpayer; or
- The taxpayer has evidence that the information has been reported in another Member State by either an intermediary or relevant taxpayer.

The regulations also require that a relevant taxpayer provides details to the UK tax authorities regarding the use of the arrangement in each of the years for which the relevant taxpayer participates in the arrangement and obtains a tax advantage.

The regulations clarify that evidence that the information has already been filed must comprise the following:

- The reference number issued by the UK tax authorities or the authorities of another EU Member State; and
- Such other information which demonstrates that the intermediary or relevant taxpayer does not have knowledge, possession or control of any other reportable information in relation to the arrangement.

The evidence requirements listed above also apply where an intermediary is claiming relief from reporting.

Unique Reference Number

An arrangement reference number will be provided by HMRC to each person that reports an arrangement.

The regulations require that the UK intermediary or relevant taxpayer that receives the arrangement reference number must forward the number to any other intermediary or relevant taxpayer who the UK intermediary or relevant taxpayer knows or should reasonably be expected to know is involved in the arrangement.

Penalties

The UK regulations provide that a penalty of GBP 5,000 (approximately EUR 5,700) is applicable where a person fails to comply with the regulations.

However, for certain categories of offenses, the penalty can be increased if the GBP 5,000 amount appears to an officer of HMRC to be too low when all relevant circumstances are considered. The relevant categories of offenses include failures of a UK intermediary:

- to disclose an arrangement;
- to make a return of new information on a marketable arrangement;
- to notify where legal professional privilege applies;
- to comply with a request from a HMRC officer for additional information.

The increased rate of penalties can also apply where a UK relevant taxpayer fails to disclose an arrangement.

When setting the applicable penalty, "relevant circumstances" to be considered include:

- the fees earned by intermediaries;
- the size of the tax advantage gained by the taxpayer;
- a reasonable excuse for the failure, including whether any internal procedures are in place to protect against the failure; and
- whether the failure was deliberate.

Penalties (cont.)

The higher penalties can only be applied by the First tier Tribunal and the maximum penalty that can be imposed by the Tribunal is GBP 1million (approximately EUR 1.14million).

Penalties may also be reduced in "special circumstances". However, such circumstances do not include an ability of the person to pay the penalty or the fact that there is no overall loss of tax.

Penalties also apply where an intermediary fails to supply the Arrangement Reference Number to other parties and where a taxpayer fails to complete the annual reporting requirements.

These penalties are at the lower level of £5,000 although they can be increased where repeated failures occur (subject to caps at approximately GBP 10,000 (approx. EUR 11,400)

For more information, please refer to KPMG's [EU Mandatory Disclosure Rules page](#) or contact the following:

Janette Wilkinson

Partner
KPMG in the UK
Janette.Wilkinson@kpmg.co.uk

Raluca Enache

Director
KPMG's EU Tax Centre
Enache.Raluca@kpmg.com

[kpmg.com/socialmedia](https://www.kpmg.com/socialmedia)



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