HM Revenue
& Customs

International Tax Enforcement: disclosable arrangements

Consultation document

Publication date: 22 July 2019

Closing date for comments: 11 October 2019

Subject of this consultation:	Regulations requiring taxpayers and advisers to report details of certain cross-border tax arrangements to HMRC.
Scope of this consultation:	At Budget 2018, the government announced that it would introduce new rules requiring the disclosure of certain offshore arrangements and structures that could be used to avoid or evade tax. This is a consultation on draft regulations to bring those rules into effect. We welcome comments on both the technical application of the rules as well as the policy questions addressed in this document.
Who should read this:	Taxpayers who are involved in cross-border arrangements, and those who provide aid or advice in relation to such arrangements. This could include lawyers, tax advisers and accountants among others.
Duration:	The consultation will last 12 weeks from 22 July 2019 to 11 October 2019.
Lead official:	James Marshall, HM Revenue and Customs (HMRC)
How to respond or enquire about this consultation:	Electronic responses to mandatorydisclosure.rules@hmrc.gov.uk Written responses should be addressed to: James Marshall Exchange of Information Policy - Business International HM Revenue & Customs 9th Floor, Mail point 3 10 South Colonnade Canary Wharf NE98 1ZZ
Additional ways to be involved:	HMRC will engage directly with existing stakeholder networks. Please contact the lead official if you are interested in meeting to discuss this document.
After the consultation:	The Regulations will be reviewed in light of the responses, and amended as necessary. We intend to lay the Regulations before Parliament before 31 December 2019. A summary of responses will be published after the consultation closes.
Getting to this stage:	The EU introduced a Directive in June 2018, requiring member states to introduce rules requiring disclosure of cross border tax arrangements. The UK is currently an EU member state and is therefore working to implement these rules.

Previous engagement: This is the first written consultation on this issue. HMRC has been engaging with interested parties over the last year to identify the best approach for implementing this measure.

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1. Introduction

1.1 Bearing down on tax avoidance and evasion is a key part of the Government's strategy to ensure that everyone pays their fair share of tax. This is essential to provide funding for the UK's vital public services, and to maintain public confidence in the tax system. A crucial element of this strategy has been to tackle offshore non-compliance, through the sharing of tax and financial information between governments.

1.2 At Spring Statement 2019, the No Safe Havens 2019 strategy was published. It sets out how HMRC will ensure those with offshore affairs comply with their UK tax obligations.

1.3 In the last decade, the UK has collaborated with other governments around the world to introduce a range of measures to tackle offshore non-compliance. This includes the exchange of financial account data and information about the profits made, and taxes paid, by multinational corporations in different jurisdictions, which has helped HMRC to raise over £2.9bn by tacking offshore non-compliance since 2010. Alongside this, the UK has also introduced the Disclosure of Tax Avoidance Schemes (DOTAS) and Enablers of Tax Avoidance legislation, which require the promoters and users of tax avoidance schemes to provide HMRC with specific information about those schemes. All of this information helps HMRC to identify and challenge tax avoidance and evasion.

1.4 Despite these measures, we recognise that more needs to be done, as HMRC continues to see evidence of companies and individuals entering into tax avoidance and evasion arrangements which are intended to reduce their tax liabilities, both in the UK and abroad, and arrangements intended to hide ownership of assets from tax authorities.

1.5 The UK has worked closely with other jurisdictions to find ways to effectively identify and tackle these kinds of arrangements. In particular, the government worked with the Organisation for Economic Cooperation and Development (the OECD), the EU Commission and other EU member states to introduce the Directive on Administrative Cooperation (DAC) in 2011, and the subsequent amendments to the DAC, which have introduced measures including the Common Reporting Standard and Country-by-Country reporting.

1.6 The latest amendment to the DAC is EU Directive 2018/822, commonly known as DAC 6, which entered into force on 25 May 2018. Member states are required to put in place legislation giving effect to the provisions of the Directive by 31 December 2019.

1.7 Leaving the EU will not reduce the UK's resolve to tackle international tax avoidance and evasion. The UK is committed to international tax transparency and will continue to apply international standards on tax aimed at tackling avoidance and evasion. We will remain an active and influential member of the OECD and the G20, and will support efforts in these international fora to develop multilateral responses to cross-border tax transparency issues.

1.8 The government is now consulting on draft Regulations to implement DAC 6. The Regulations will require promoters, intermediaries and taxpayers to report details of certain types of cross-border arrangements to HMRC, where those arrangements meet certain hallmarks or criteria. HMRC will share information received in these reports with other EU member states, who will in turn share reports they receive with HMRC. This will provide HMRC with early information about new schemes which could be used to avoid or evade tax, enabling timely compliance action to be taken.

1.9 The draft Regulations draw directly on definitions and concepts contained in DAC 6. This consultation document sets out the approach HMRC intends to take in interpreting DAC 6, and elaborates on how the rules will operate in practice. HMRC will provide guidance on DAC 6 alongside the finalised Regulations.

1.10 The consultation sets out HMRC's current views on the various elements of DAC 6 and seeks your views to help us refine our interpretation of the Directive and understand how best to frame the guidance. We welcome views from a wide range of stakeholders.

2. Reportable cross-border arrangements

2.1 The DAC provides that a cross-border arrangement is reportable if it meets one or more of the hallmarks set out in Annex 4 of the DAC. The hallmarks are discussed in subsequent chapters of this consultation document.

2.2 An arrangement is a cross border arrangement if it concerns either:

- More than one EU member state, or
- An EU member state and a third country

2.3 And, if one of the following conditions is met:

a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;

(b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;

(c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;

(d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;

(e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

Meaning of "Concerns"

2.4 Whether or not an arrangement 'concerns' multiple jurisdictions will be crucial in determining whether there is a reportable cross border arrangement. HMRC is of the view that in order for the arrangement to 'concern' multiple jurisdictions, those jurisdictions must be of some material relevance to the arrangement.

2.5 For example, consider a company, resident in one jurisdiction but carrying on a trade through a permanent establishment in another jurisdiction. The company may enter into an arrangement through its permanent establishment, which only concerns the permanent establishment (and counterparties resident in the jurisdiction where the permanent establishment is) and has no implications for other jurisdictions. In this example, the fact that the company is tax resident in a different jurisdiction to the counterparties does not mean that the arrangement itself "concerns" multiple jurisdictions. The arrangement in this example would be between a permanent establishment in jurisdiction X and other parties also resident in jurisdiction X and the jurisdiction where the company is tax resident will not be of material relevance to the arrangement.

2.6 Whether any particular arrangement concerns multiple jurisdictions will be a question of fact and degree.

Q1. Do you have any suggestions about how HMRC can provide more clarity about when an arrangement will concern multiple jurisdictions?

3. Intermediaries

3.1 The regulations define intermediaries by reference to the definition in Article 3 point 21 of the DAC. This reads:

> *"intermediary" means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.*
>
> *It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, 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. Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding.*
>
> *In order to be an intermediary, a person shall meet at least one of the following additional conditions:*
>
> *(a) be resident for tax purposes in a Member State;*
>
> *(b) have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;*
>
> *(c) be incorporated in, or governed by the laws of, a Member State;*
>
> *(d) be registered with a professional association related to legal, taxation or consultancy services in a Member State.*

3.2 The definition thus envisages two distinct types of intermediaries: those who design, market, organise, make available for implementation or manage the implementation of a reportable cross border arrangement (in this document they are referred to as 'promoters'), and those who provide aid, assistance or advice in relation to the designing, marketing, organising or implementing of reportable cross border arrangements (in this document they are referred to as 'service providers').

Promoters and Service Providers

3.3 Regardless of whether an intermediary is a 'promoter' or a 'service provider', the reporting obligation is fundamentally the same: they must make reports about any reportable cross-border arrangement that they are involved in. There are two key differences:

1. A 'service provider' can argue that they are not an intermediary because they did not know and could not reasonably have been expected to know that they

were involved in a reportable arrangement, and so the obligation to report does not arise in respect of that person.

2. There is an additional reporting trigger for service providers which requires them to report within 30 days of providing aid, assistance or advice in respect of a reportable cross border arrangement.

Did not know

3.4 The defence for service providers that they did not know and could not reasonably be expected to know that they were part of a reportable arrangement exists because a service provider might only be involved in a particular part of a wider arrangement, such as a bank providing finance. It might, therefore, not have knowledge of the wider arrangements, and crucially whether the arrangement triggered any hallmarks. In such a scenario, it is reasonable that the bank is not expected to make a report, because it did not know, and could not reasonably be expected to know, that it was involved in a reportable arrangement.

3.5 In contrast, there is no equivalent defence in the DAC for promoters. Someone who is involved in designing, marketing, organising, or managing the implementation of an arrangement, can reasonably be assumed to have an understanding of how that arrangement as a whole works, and what the effect of that arrangement will be. As such, there is no defence that a promoter did not know, or could not reasonably be expected to know that they were involved in a reportable arrangement.

Reasonably be expected to know

3.6 HMRC does not expect service providers to do significant extra due diligence to establish whether there is a reportable arrangement. A service provider should do the normal due diligence it would for the type of transaction and the client(s) in question. If a service provider failed to do its normal due diligence or found ways to be wilfully ignorant by purposefully not asking particular questions then it may still meet the test that it could reasonably be expected to know.

Who is a Service Provider?

3.7 Whereas a promoter would generally be expected to have knowledge of the arrangement, being necessarily involved in its design, marketing or implementation, a service provider may be to some degree more removed, in that it only provides aid, advice or assistance in respect of those activities. Nonetheless the definition of an intermediary in the ‘service provider’ category is intentionally broad to ensure all types of intermediaries involved in reportable arrangements are required to report. ‘Advice, aid or assistance’ could include providing finance, expertise or knowledge, sharing experience or offering accounting advice.

3.8 If a person provides aid, assistance or advice, there is then the question of whether it is provided with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. For example, a bank providing finance to a company that was carrying out an arrangement that was being implemented by a third party promoter would be providing aid in relation to the managing of the implementation of the arrangement.

3.9 However, the definition of ‘intermediary’ does not include as a ‘service provider’ a person who subsequently becomes aware of an arrangement, for example if an auditor, examining a company’s accounting records, identifies a transaction which is reportable. In such a case, the auditor would not be an intermediary simply by virtue of having knowledge of an arrangement, provided that they did not do anything else which would bring them into the intermediary category. This is because the auditor will not have provided “aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement”. The auditor will only have become aware of the arrangement after it was implemented so will not have helped in its design, making it available etc.

Who is the intermediary?

3.10 Where an individual employed by a firm (company, partnership etc.) takes actions on behalf of the firm, which fall within the definition of intermediary in DAC 6, it is the employing firm, and not the individual employee, who is the intermediary, and who is required to make the report as necessary. Individuals may still have to make reports if they are sole-traders and are not employed by a firm.

3.11 Where there is a failure to comply with the requirements in the regulations, it will be the firm, rather than an employee of the firm, who is liable for the penalty.

Knowledge, possession or control

3.12 To be reportable by an intermediary, information must be in its knowledge, possession or control. Any person, in fulfilling their reporting obligations, should take account of the information they know, and information that is available to them. They should review documents and information in relation to the arrangement to identify the information that is reportable. .

3.13 An intermediary would not have to trawl through all of an organisation’s computer systems to try and find all information held in relation to a relevant taxpayer just to see if it was relevant. However, where there is a deliberate effort to split work and knowledge between people working on a particular arrangement, to try and avoid certain pieces of information being reported, HMRC would nonetheless consider that the information was in the intermediary’s knowledge, possession or control.

Residence

3.14 An intermediary will have to make a report to HMRC if it meets any of the following conditions:

- It is resident for tax purposes in the UK,
- It has a permanent establishment in the UK, through which it provides the services in respect of the arrangement,
- It is incorporated in the UK, or governed by the laws of the UK, or
- It is registered with a professional association relating to legal, taxation or consultancy services in the UK.

3.15 Where an intermediary has connections with a number of member states, which fall within the categories above, the report should be made in the member state where the intermediary is tax resident. If there is no such state, the report should be made in the location of the permanent establishment through which they provided the relevant services. If this condition is not met, they should report in the member state where the intermediary is incorporated, or the member state by the laws of which it is governed. Only if none of those conditions is met, should the report be made to the member state where the professional association with which the intermediary is registered is located.

3.16 An intermediary does not need to make a report in the UK if it has made a report in another member state which is higher up on the above list than the UK in relation to that intermediary, and has evidence that the report has been made elsewhere.

3.17 Being registered with a professional association can mean a number of different things. Simply being on a mailing list, for example, would not be sufficient for this requirement to be met, but where the registration involved more than that, and particularly where it involves any form of governance or oversight, the condition will be met.

Legal Professional Privilege

3.18 Lawyers may be prevented from disclosing certain information about their clients due to legal professional privilege. Where information relating to a reportable arrangement is covered by legal professional privilege, the lawyer is not required to report that information to HMRC. However, this does not exempt lawyers from making reports at all, as other information that is not legally privileged may still need to be reported. In providing aid, advice or assistance in relation to an arrangement, it is likely that much of the information that would need to be reported will not be covered by legal professional privilege, because it will be factual in nature.

3.19 For example, the names of relevant taxpayers and other intermediaries are highly unlikely to be legally privileged and so a lawyer would still need to make a report covering that information. Similarly a description of the transactions that are to be undertaken as part of the arrangements would not normally be subject to legal professional privilege, and so would have to be reported, even if certain elements of the advice the lawyer provided were exempt from reporting due to legal professional privilege.

3.20 Where a lawyer does not disclose information because of legal professional privilege, the lawyer must inform other intermediaries or relevant taxpayers of their reporting obligations in respect of the legally privileged information, and the reporting obligation passes to the other intermediary or relevant taxpayer as the case may be. That person must then report on the arrangements, subject to the rules in the country where they are resident.

Q2. Are there any persons or arrangements who might be caught by this approach to defining ‘intermediary’ who you think should not be caught?

Q3. Does this definition of intermediary risk not catching certain types of intermediary who should be caught?

Q4. Can you identify any particular practical challenges with regard to HMRC's approach to identifying intermediaries, and what information they have in their knowledge, possession or control?

Q5: Do you have any other comments about the definition of intermediary and who will be caught under the proposed rules?

4. Relevant Taxpayer

Definition

4.1 Relevant taxpayer is defined according to the DAC as:

"relevant taxpayer" means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement.

4.2 A relevant taxpayer does not have to be resident in the UK, or paying UK tax, to fall within this definition. 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.

4.3 An arrangement can be made available to a relevant taxpayer in many different ways. A taxpayer could approach a promoter seeking advice or ideas, and the promoter could make available an arrangement in response to that request. Equally, an arrangement could be made available in the course of other work between an intermediary and a client, if, for example, the intermediary identifies a potential need, and suggests the arrangement as a solution.

4.4 The 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. The full details of the arrangement do not need to be finalised in order for the arrangement to be made available, as long as the essence of the arrangement is identifiable. For example, if an arrangement has been developed and is offered to a client, but the client backs out of implementing it, the arrangement has still been 'made available' and so is reportable.

4.5 A person is ready to implement an arrangement if they are in a position where they could enter into the first step of an arrangement, with a view to the arrangement being implemented thereafter.

4.6 The requirement for a relevant taxpayer to report an arrangement to HMRC only applies if there is no intermediary who is required to report the required information in relation to the arrangement, which could be because there is no intermediary, or because the intermediary does not have to report certain information due to legal professional privilege.

4.7 Where a relevant taxpayer has obligations to file information in multiple jurisdictions, they are only required to file the information in the member state which appears first on the list below:

(a) *the Member State where the relevant taxpayer is resident for tax purposes;*

(b) *the Member State where the relevant taxpayer has a permanent establishment benefiting from the arrangement;*

(c) the Member State where the relevant taxpayer receives income or generates profits, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State;

(d) the Member State where the relevant taxpayer carries on an activity, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State.

4.8 Where a relevant taxpayer has reported in another country which appears higher on this list than the UK, and has evidence to support this, the taxpayer is not required to report in the UK.

5. Reporting triggers and timing

5.1 There is a requirement to make a report of a cross-border arrangement which meets one or more of the hallmarks within thirty days of the earliest of the following:

(a) *the day after the reportable cross-border arrangement is made available for implementation; or*

(b) *the day after the reportable cross-border arrangement is ready for implementation; or*

(c) *when the first step in the implementation of the reportable cross-border arrangement has been made,*

5.2 There is an additional reporting trigger for intermediaries who are 'service providers', who are required to file a report within the period of 30 days beginning on the day after they provide the aid, assistance or advice in respect of the arrangement.

5.3 The point when an arrangement is made available for implementation or is ready for implementation is discussed in the 'relevant taxpayer' chapter in this consultation document.

5.4 Where the first step of a reportable arrangement is implemented on or after 25 June 2018 and prior to 1 July 2020, any report must be submitted by 31 August 2020.

5.5 Where an arrangement is a marketable arrangement, as defined in Article 8(24) of the DAC, there is an ongoing obligation on the intermediaries to provide further returns every three months with any new reportable information in respect of:

- the details of relevant taxpayers and associated enterprises
- the date on which the first steps of the arrangement were implemented by the various relevant taxpayers
- the EU member state(s) where the relevant taxpayers are resident, and any other member states that the arrangement is likely to concern
- the identification of any other persons in EU member states that are likely to be affected by the arrangement.

5.6 Relevant taxpayers who are resident or taxable in the UK have an obligation to report to HMRC for each accounting period or tax year that the taxpayer participates in the reportable arrangement. The taxpayer must report to HMRC the period or year involved and the relevant arrangement reference number provided following the initial report.

5.7 We envisage that the reference number will need to be provided in the white space on income and corporation tax returns. Further accompanying detail may be required alongside the tax return. We have not yet decided on the process where other taxes, such as inheritance tax, are involved, and would welcome views on the appropriate process.

5.8 Our current view is that a relevant taxpayer will be participating in an arrangement in any year where there is a tax effect as a result of the arrangement, or in any year where there could reasonably be expected to be a tax effect in any subsequent year.

Q6. For the purposes of the ongoing requirement on relevant taxpayers, do you agree that a relevant taxpayer should be regarded as participating in the arrangement in any year where there is a tax effect or where it could reasonably be expected that there would be a tax effect in a subsequent year?

6. Reporting obligations

6.1 Where multiple intermediaries or relevant taxpayers have an obligation to make reports under these regulations, or the legislation of other EU member states implementing DAC 6, they will be exempt from the obligation to file a report if they have evidence that the reportable information that they would have been required to report has been reported by another intermediary or relevant taxpayer.

6.2 In order for the exemption to apply, the intermediary or taxpayer will need to satisfy themselves that a report has been made, and that the information that they would have to report has already been reported. HMRC currently is of the view that where an intermediary is provided with a correct arrangement reference number, that will be sufficient evidence that a report has been made. However, the potential reporter will also need to be satisfied that the information they would report has been captured in the report made. For example, where the intermediary who made the report was only involved in a part of the wider arrangement, they might not have knowledge of the detail of the arrangement as a whole. Therefore another intermediary, who had knowledge that the first reporting intermediary did not have, would still need to report.

Q7. Do you agree that the amount of evidence required for intermediaries and taxpayers to satisfy themselves and HMRC that all the necessary information has been reported is appropriate?

6.3 The information that reporters will need to provide is set out in the directive. It includes:

(a) *the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual), residence for tax purposes, TIN and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;*

(b) *details of the hallmarks set out in Annex IV that make the cross-border arrangement reportable;*

(c) *a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;*

(d) *the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;*

(e) *details of the national provisions that form the basis of the reportable cross-border arrangement;*

(f) *the value of the reportable cross-border arrangement;*

(g) *the identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned by the reportable cross-border arrangement;*

(h) *the identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked.*

6.4 This is the information that will be shared by HMRC with other EU member states. We anticipate that there will be a standard schema or template on which reports will need to be made. The storage and use of data reported under these regulations will be in accordance with GDPR.

7. Hallmarks: Main benefit test

7.1 In order for a cross-border arrangement to be reportable under these regulations, one or more of the hallmarks set out in Annex IV of the DAC must apply to the arrangement. The hallmarks are grouped under 5 broad categories, A – E, and are features or characteristics which are commonly seen in aggressive tax planning arrangements.

7.2 The presence of any of these hallmarks will not necessarily mean that an arrangement represents unacceptable tax planning, but if any of the hallmarks is present in a cross-border arrangement, that arrangement will be reportable under these regulations.

Application

7.3 The main benefit test must be satisfied for any arrangement for hallmarks under categories A, B and subcategories 1(b)(i), 1(c) and 1(d) of category C to apply. The main benefit test does not have to be satisfied for arrangements under any of the other hallmarks.

7.4 The DAC states that:

> *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.*

7.5 The test is an objective one. It is not necessary to examine the specific motives or intentions of a person entering into an arrangement. In other words it does not matter if the person was seeking a tax advantage from the arrangement, or what other reasons they might have had for entering into the arrangement, what matters is whether the arrangement is such that a tax advantage is the main benefit or one of the main benefits that the person entering into the arrangement would reasonably be expected to obtain from the arrangement.

Tax advantage

7.6 Tax advantage is defined for the purpose of the draft UK Regulations as follows:

“tax advantage” includes—

- *(i) relief or increased relief from tax,*
- *(ii) repayment or increased repayment of tax,*
- *(iii) avoidance or reduction of a charge to tax or an assessment to tax,*
- *(iv) avoidance of a possible assessment to tax,*
- *(v) deferral of a payment of tax or advancement of a repayment of tax, and*
- *(vi) avoidance of an 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 reportable cross-border arrangement are based and the policy objectives of those provisions;

7.7 The main benefit of an arrangement, for the purposes of the Regulations, will therefore not be to obtain a tax advantage if the tax consequences of the arrangement are entirely in line with the policy intent of the legislation upon which the arrangement relies. This will mean that the use of certain products which are 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. However, it is important to note that these products could be included as part of a wider arrangement designed to generate a tax outcome outside that intended by the legislation. Such an outcome would still be a ‘tax advantage’ and so the main benefit test could still be triggered.

7.8 The DAC applies to all taxes of any kind levied by a member state, or its administrative subdivisions, apart from VAT, customs duties, excise duties covered by other EU legislation on administrative cooperation, and compulsory social security contributions.

7.9 However, for the purposes of defining ‘tax advantage’ in the Regulations, tax is defined more broadly, and does not only include taxes levied by EU member states, but also equivalent taxes levied in other jurisdictions. This means that the tax advantage derived from any arrangement does not have to be realised in the EU, and so an arrangement could still generate a tax advantage, and meet the main benefit test even if the tax advantage arises in a non-EU member state.

Q8. Do you think that the approach to defining the main benefit test and tax advantage is proportionate?

8. Hallmarks: Category A

8.1 Hallmarks under category A (the "generic hallmarks") are subject to the main benefit test. Therefore, arrangements will not trigger these hallmarks unless the main benefit, or one of the main benefit that a person may reasonably expect to derive from the arrangements is the obtaining of a tax advantage that cannot reasonably be regarded as consistent with the policy intention of the legislation upon which the arrangement relies.

8.2 There are similar equivalents to the Category A hallmarks under the UK's domestic law for disclosure of tax avoidance schemes (DOTAS). HMRC intends to take a similar approach to interpretation of Hallmarks A(1)-(3) as it does in interpreting DOTAS. HMRC recognises that there are differences between the DOTAS legislation and the DAC, but does not take the view that they affect the interpretation of the hallmarks. In particular, references to a promoter in DOTAS are similar to references to an intermediary for DAC 6 purposes, which includes 'service providers' as well as 'promoters'. Guidance on DOTAS can be found here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701190/DOTAS-March.pdf

Hallmark A(1) – Confidentiality

8.3 An arrangement will meet hallmark A(1) where "*the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.*"

8.4 An intermediary may want to keep certain details of the operation of the arrangements (or a part of the arrangements confidential) from HMRC, or another tax authority, in order to reduce the risk of challenge or enquiry, or to prevent HMRC from taking legislative or other steps to prevent the arrangements from working. Equally an intermediary may wish to keep details of the arrangements secret from other intermediaries to protect their competitive advantage, reduce competition from other intermediaries who might set up similar schemes and reduce the risk of details of the scheme being reported to HMRC by others.

8.5 Any confidentiality condition does not have to explicitly specify that it applies to HMRC or to other intermediaries or types of intermediary – a general confidentiality condition which prevented disclosure to anyone would equally be caught.

8.6 The condition particularly looks at confidentiality around how the arrangements could secure a tax advantage. Commercial confidentiality conditions that do not relate to how the arrangement secures a tax advantage will not be caught under this hallmark, but wide-ranging confidentiality clauses which prevent disclosure of how the arrangement could obtain a tax advantage as well as other matters, would still be caught.

8.7 Evidence of a confidentiality condition includes:

- non-disclosure agreements,

- written correspondence including a requirement, which may be explicit or implicit, that details of the arrangement should not be disclosed or shared more widely, or
- evidence from users or potential users or verbal or other agreements, implied or otherwise, of confidentiality requirements.

8.8 However, evidence may also be more circumstantial. It could include:

- discouraging users or potential users from retaining promotional material or other details of the arrangement's operation,
- requirements that all correspondence, especially with HMRC, be directed to the promoter or other nominated person,
- discouraging potential users from taking external advice,
- prohibitions on responding to HMRC requests for information, unless the request is made under a statutory notice,
- promotional material with reference to non-disclosure
- evidence of pressure from the promoter not to disclose details of the arrangements, including possible sanctions, such as restricting access to legal advice or support.

8.9 The above list is not exhaustive, and other evidence of the existence of confidentiality requirements should also be taken into account in considering whether hallmark A(1) is triggered.

Hallmark A(2) – Remuneration related to tax advantage

8.10 Hallmark A2 will capture any arrangement where "*the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:*

(a) the amount of the tax advantage derived from the arrangement; or

(b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved."

8.11 This hallmark can only apply where there is an intermediary in a scheme. Intermediaries could be either promoters or service providers.

8.12 The hallmark is deliberately broad in nature, to ensure all types of fees and other financial arrangements including interest, remuneration and other charges are captured.

Hallmark A(3) – Standardised documentation

8.13 This hallmark captures an arrangement "*that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation*."

8.14 Under the equivalent DOTAS rules, a number of types of arrangements are specifically excluded, such as ISAs, and enterprise investment schemes. While these types of arrangements are not specifically excluded in the DAC 6 regulations, in practice these arrangements are not caught, in and of themselves, under hallmark A(3). This is because A(3) is subject to the main benefit test, which, as noted above, only applies, where one of the main benefits of the arrangements is the obtaining of a tax advantage which is inconsistent with the policy intent of the legislation. As a result, these kinds of products are not inherently caught by the main benefit test, as the tax outcome they achieve is consistent with the purpose of the legislation.

8.15 However, it is important to recognise that if these kinds of products are used as part of a wider arrangement, the outcome of which is not consistent with the underlying legislative intent, then those arrangements may still be caught under DAC 6 as the main benefit test could be met.

Financial products and the code of practice on taxation for banks

8.16 Many common financial products and instruments use largely standardised documentation, and are widely available to multiple customers. However, arrangements which use these products will only be caught under hallmark A3 where the tax outcome of the arrangements is inconsistent with the intent of the underlying legislation upon which the arrangements rely. Otherwise, the main benefit test will not be met and the arrangement will not be reportable under hallmark A3.

8.17 However, the DAC is wider than the code of practice on taxation for banks, and so the fact that a bank is compliant with the code will not, in and of itself, mean that a bank has no obligations under the DAC. For example, arrangements which meet hallmarks under Category D may not have any tax effect, and so would not necessarily contravene the code of practice on taxation for banks.

Q9. Do you have any comments on the approach set out for hallmarks under Category A?

9. Hallmarks: Category B

9.1 Hallmarks under category B are subject to the main benefit test, and so will not capture arrangements unless one of the main benefits expected to derive from the arrangements is the obtaining of a tax advantage which is not in line with the policy intent of the legislation upon which the arrangement relies.

Hallmark B(1) – Loss buying

9.2 This hallmark applies to any arrangement

> *whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.*

9.3 In evaluating whether steps are contrived, it is necessary to consider the steps from the point of view of a hypothetical, informed observer. Would such a person reasonably conclude that the steps taken are straightforward and serve a commercial purpose, or are they complex for no evident commercial reason, having regard to all the facts?

Hallmark B(2) – Income into capital

9.4 This hallmark will capture arrangements which have the effect of

> *converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.*

9.5 Because the main benefit test applies to this hallmark, the conversion of income into capital in ways which are entirely consistent with the underlying intent of the legislation upon which such conversions rely will not produce a tax advantage as defined in the regulations, and so this hallmark will not apply.

9.6 The key test here will often be whether there is a *conversion* of income into capital. Whether or not this is the case must be evaluated from the point of view of a hypothetical informed observer, and whether they would reasonably conclude that income had been converted into some other non-taxable, or low tax, form.

9.7 Where a person is employed by a company that is resident in a different jurisdiction, and as part of their remuneration package they are given share options, exercisable at a later date, any increase in value could be taxed as a capital gain, depending on the jurisdiction of residence. In this example, although the remuneration package could have consisted entirely of salary income, share options are a legitimate commercial choice to remunerate employees. There is no conversion of income into capital, there has simply been a choice made between different options, which are widely used and have an underlying commercial rationale.

9.8 In contrast, where arrangements are contrived, or are not normal commercial practice, it is more likely to be the case that, viewed objectively, amounts would have been paid as income and the arrangements have the effect of converting that income into capital. In the previous example, if instead of the employee being partly remunerated through share options, the arrangement involved additional, artificial steps which had the result of making the payments non-taxable, then it is likely that hallmark B(2) would be met, at there has been the conversion of income into a non-taxable form.

9.9 There does not have to be pre-existing entitlement to income, in order for there to be a conversion of income into capital, although where there is a right to income, that would be taken into account in reaching a conclusion on whether the test is met.

Hallmark B(3) – Circular transactions

9.10 This hallmarks covers arrangements which include

> *circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.*

9.11 For this hallmark to be in point, firstly, there must be circular transactions resulting in the round tripping of funds, and then any one of three additional conditions must be met:

- There are interposed entities without primary commercial function, or
- There are transactions that offset or cancel each other, or
- There are other similar features to these.

9.12 This hallmark will commonly apply to arrangements whereby funds are routed via an offshore jurisdiction, despite having a domestic origin, in order to benefit from preferential tax treaty terms or other similar benefits. This is commonly seen with respect to foreign direct investment (FDI), where funds may appear to be FDI from an overseas jurisdiction, but in fact have been round tripped and actually originate from the ultimate destination jurisdiction. The round tripping of the funds serves little or no commercial purpose, and is done primarily to achieve the beneficial treatment that may be available.

9.13 Whether or not entities have a primary commercial function will depend on the facts of the case. However, it is clear that to not be caught by this hallmark, the commercial function must be a primary one, so even if there is a minor or subsidiary commercial purpose the arrangement would still be reportable.

Q10. Do you have any comments on the approach set out for hallmarks under Category B?

10. Hallmarks: Category C

10.1 Hallmarks under category C cover certain specific types of cross border transactions. The main benefit test only applies to certain hallmarks under category C, namely paragraph 1(b)(i), 1(c) and 1(d). For other hallmarks under this category, whether the effect of an arrangement is to generate a tax advantage, and whether or not any such tax advantage represents the whole or main benefit of the arrangement, will not be relevant in determining whether the hallmark is met.

10.2 The DAC makes clear that for hallmarks C1(b)(i), (c) and (d), the presence of those features described in the hallmarks in an arrangement, will not inherently mean that the main benefit test is met. In other words, there must be further evidence beyond the simple presence of those hallmarks in an arrangement, to make the arrangement reportable.

Hallmark C(1) – Deductible cross-border payments

10.3 This hallmark captures arrangements where there is a deductible cross border payment made between two associated enterprises where any of the following conditions is met:

(a) the recipient is not resident for tax purposes in any tax jurisdiction;

(b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:

(i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or

(ii) is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative;

(c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;

(d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes;

10.4 Associated enterprises has the same meaning as given in the DAC:

“associated enterprise” means a person who is related to another person in at least one of the following ways:

(a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;

(b) a person participates in the control of another person through a holding that exceeds 25 % of the voting rights;

(c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25 % of the capital;

(d) a person is entitled to 25 % or more of the profits of another person.

If more than one person participates, as referred to in points (a) to (d), in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises.

If the same persons participate, as referred to in points (a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises.

For the purposes of this point, a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

In indirect participations, the fulfilment of requirements under point (c) shall be determined by multiplying the rates of holding through the successive tiers. A person holding more than 50 % of the voting rights shall be deemed to hold 100 %.

10.5 We think that the meaning of associated enterprise is clear here and do not think particular guidance on what it means is required.

Q11. Are there any points in the definition of associated enterprise which you think require clarification or explanation in guidance?

10.6 Whether or not a payment is deductible will depend on the full facts of the situation, and the application of relevant law in the payer's jurisdiction. An intermediary will not always know whether a payment is deductible, particularly an intermediary which is a 'service provider'. If an intermediary does not know, and could not reasonably be expected to know, what the effect of a payment will be, then it will not be required to make a report under these regulations. Whether an intermediary could reasonably be expected to know the effect of a transaction will always depend on the facts and circumstances of the situation. This is discussed in more detail in the Intermediaries section of this document.

10.7 In HMRC's view, the recipient will generally be the person (or people) who is taxable on the receipt. In the case of transparent vehicles such general partnerships, it will be the partners, rather than the partnership, who are taxable on the receipt, and so it will be the partners who are the recipients for the purposes of judging whether the hallmark is met.

10.8 For widely held partnerships, there may be situations where the tax residence of all the partners is not known to an intermediary. Where an intermediary who is a 'promoter' does not know the residence of the partners who are party to the arrangement, it is unlikely that the arrangement can be said to concern other jurisdictions. If the residence of the partners was material to the arrangement, it is likely that the 'promoter' would need to know that in order to effectively design, promote or implement the arrangement. However, HMRC would not consider it to be acceptable for a promoter to attempt to remain wilfully ignorant of the residence of participants in the arrangement to try to avoid a reporting obligation, where the residence of those participants was of material relevance to the arrangement. In such cases the arrangement would still be a reportable cross-border arrangement and the promoter would be required to make a report.

10.9 Where an intermediary who is a service provider does not know, and could not reasonably be expected to know whether an arrangement is a reportable cross-border arrangement, because they do not know whether the arrangement ‘concerns’ multiple countries, or whether the hallmark is met, the person is not an intermediary for the purposes of the DAC and therefore there is no obligation to file a report. The section on promoters in this consultation document provides more detail on what is meant by ‘reasonably expected to know’.

10.10 A relevant taxpayer may need to make a report if there is no intermediary, or the intermediary is not required to make a report due to legal professional privilege. Relevant taxpayers should know where they are resident for tax purposes, and so should be able to make an assessment as to whether there is a reportable cross border arrangement.

Q12. Do you think the above approach will prevent unnecessary reporting of benign activities, while avoiding loopholes that could enable intermediaries and/or relevant taxpayers to avoid their reporting obligations? If you foresee problems with this approach, please provide details of possible solutions.

Q13. Do you think that this approach will also work for dealing with Collective Investment Schemes? Alternatively, what other approaches do you think would be better?

10.11 For the purposes of hallmark C(1)(b)(i), in HMRC’s view a tax rate is ‘almost zero’ if it is less than 1%. This applies to the headline rate of tax, rather than to the effective tax rate a company faces.

10.12 In assessing whether hallmark C(1)(b)(ii) applies, the relevant list of non-cooperative states should be examined on the date that the reporting obligation arises. Where the countries on the lists subsequently change, there is no need to re-evaluate whether or not the hallmark is met.

10.13 Hallmark C(1)(c) and (d) are subject to the main benefit test. In assessing whether there is a tax advantage, full consideration must be given to the arrangement as a whole, and whether one of the main benefits a person may reasonably expect to derive from the arrangement is a tax advantage that is inconsistent with the overall intention of the relevant legislation.

10.14 In assessing whether (1)(c) applies, it is the nature of the payments, rather than the status of the recipient that must be exempt. This means that an exempt body such as a pension fund will not automatically be caught.

10.15 There is no definitive list of what constitutes a ‘preferential tax regime’ for the purposes of 1(d). It could include patent box regimes or special economic zones which provide certain tax incentives.

Hallmark C(2) – Depreciation

10.16 This hallmark applies where

> *Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.*

10.17 The UK's tax regime does not permit deductions for depreciation. Instead, the capital allowances regime effectively stands in place of depreciation, and so for the purposes of these regulations, we consider that where capital allowances are claimed these must be treated as being equivalent to deductions for depreciation. Similarly, amortisation of intangible fixed assets should be viewed as the equivalent of depreciation for the purposes of these regulations.

10.18 HMRC does not consider that arrangements will be reportable where there is a corresponding taxation of profits from the asset in the same jurisdiction. Therefore the hallmark would not apply where a deduction for depreciation was claimed in both a jurisdiction where there was a permanent establishment (in which the asset was used), and in the jurisdiction where the company was resident, provided that the profits from the permanent establishment are taxed in both jurisdictions (subject to any double taxation relief).

Hallmark C(3) – Relief from double taxation

10.19 This hallmark applies where

> *Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.*

10.20 We do not consider that this hallmark requires substantial elaboration or explanation, but welcome suggestions as to what guidance if any is needed.

Q14. Do you think particular guidance is needed in respect of hallmark C(3)?

Hallmark C(4) – Transfer of assets

10.21 This hallmark deals with arrangements which include

> *transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.*

10.22 We take the view that the amount 'treated as payable in consideration' is the amount treated as payable for tax purposes, rather than the amount treated as payable for accountancy purposes.

Q15. Do you agree that this hallmark should refer to the amount treated as payable for tax purposes? What do you think are the advantages and disadvantages of this approach, and of any other suggested approaches?

Q16. Do you have any general comments about the approach to hallmarks under category C?

11. Hallmarks: Category D

11.1 Hallmarks under category D share substantial common ground with the Mandatory Disclosure Rules (MDR) developed by the OECD. DAC 6 and the MDR are entirely separate instruments and there are different rules, for example around the period for which reports are required prior to the rules entering into force. However, the preamble to DAC 6 makes clear that the MDR, and the guidance and commentary which accompany those rules, are a source of illustration and interpretation for hallmarks under Category D of DAC 6. Accordingly, where appropriate HMRC will interpret Hallmark D in line with the MDR.

11.2 Hallmarks under category D are not subject to the main benefit test, and so are still reportable if the arrangement in question is not expected to generate a tax advantage.

Hallmark D(1) – Undermining reporting obligations

11.3 Arrangements will be caught by hallmark D(1) if they have the effect of undermining or circumventing reporting obligations under the Common Reporting Standard (CRS).

11.4 Arrangements which will be caught by hallmark D(1) include those employing the following features:

(a) *the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account;*

(b) *the transfer of Financial Accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of Financial Account information with the State of residence of the relevant taxpayer;*

(c) *the reclassification of income and capital into products or payments that are not subject to the automatic exchange of Financial Account information;*

(d) *the transfer or conversion of a Financial Institution or a Financial Account or the assets therein into a Financial Institution or a Financial Account or assets not subject to reporting under the automatic exchange of Financial Account information;*

(e) *the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of Financial Account information;*

(f) *arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.*

11.5 The test in hallmark D(1) is an objective one. It does not matter whether the arrangement is intended to undermine the CRS, only whether that may be the effect of it. Of course where the intent of those implementing the arrangements is known that could offer a good indication as to whether the arrangement may have the relevant effect. In considering whether an arrangement may have the effect of undermining reporting obligations (or taking advantage of the absence of these) an intermediary will need to consider the effect of the arrangement as a whole. Where an intermediary only has knowledge of a particular step, and has no reason to consider that that step forms part of an arrangement that will undermine or circumvent the CRS, there is no obligation on that intermediary to report.

11.6 An arrangement does not have the effect of *undermining* or *circumventing* the CRS, simply because, as a consequence of the arrangement, no report under the CRS is made. For example, a UK resident using funds held in a French bank account to purchase a property in France would not in itself have the effect of undermining the CRS, because real estate is specifically excluded from reporting under the CRS. As such, the fact that a report no longer needs to be made does not mean that hallmark D(1) is triggered, as it is in line with the policy intent of the regulations. The MDR commentary makes clear that "an Arrangement is not considered to have the effect of circumventing CRS Legislation solely because it results in non-reporting under the relevant CRS Legislation, provided that it is reasonable to conclude that such non-reporting does not undermine the policy intent of such CRS Legislation."

11.7 In contrast, a promoter advising people to move funds from a jurisdiction where the CRS is in force, to one which has not implemented the CRS, in order to ensure that the funds are not reported under the CRS to the relevant tax authorities, is clearly caught under D(1). The effect of the arrangements is that the CRS reporting obligation is circumvented, in a way that is not consistent with the policy intention of the CRS. However, a person simply processing that transaction, for example a bank transferring the money from one account to another, would not normally have insight into the arrangement as a whole or its expected effect, and so would not be required to report.

Hallmark D(2) – Obscuring beneficial ownership

11.8 Hallmark D(2) applies where arrangements involve non-transparent legal or beneficial ownership chains which use persons (whether legal or real), arrangements or structures:

(a) *that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and*

(b) *that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and*

(c) *where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable.*

11.9 The test in paragraph (c) is whether beneficial owners can reasonably be identified by relevant tax authorities, including HMRC. The identity of the beneficial owners does not have to be publically available, although where such persons are listed on public registers of beneficial ownership, that will be sufficient for the hallmark not to be met.

11.10 Examples where beneficial owners are made unidentifiable include where undisclosed nominee shareholders are used, or where control is exercised indirectly, rather than by means of formal ownership.

11.11 Beneficial ownership is also likely to be obscured where arrangements use jurisdictions where there is no requirement to keep information on beneficial ownership, or no mechanism to obtain it, or where there are no obligations or mechanisms to disclose the beneficial owners of shares held by nominees, or to notify the entity of changes in the ownership or control of the entity, or shares in it.

11.12 Paragraph (c) will be met where, viewed from the standpoint of a hypothetical, informed observer, it is reasonable to conclude that the arrangements have the effect of allowing an individual to be a beneficial owner of assets while not allowing that person to be identified as such, or creating the appearance that the person is not a beneficial owner.

11.13 As with the MDR, institutional investors, and entities wholly owned by one or more institutional investors, are not considered to be structures which obscure beneficial ownership.

1.14 The MDR commentary makes clear that 'beneficial ownership' and 'beneficial owner' should be interpreted in accordance with the latest Financial Action Task Force Recommendations, and include 'any natural person who exercises control over a Legal Person or Legal Agreement'. HMRC intends to interpret these terms in accordance with the MDR commentary.

Q17. Do you have any comments about the approach to hallmarks under Category D?

12. Hallmarks: Category E

12.1 Hallmarks under category E relate to transfer pricing and seek disclosure of arrangements that are contrary to the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPG), as given effect in Part 4 of Tax (International and Other Provisions) Act (TIOPA) 2010 for the purposes of UK domestic law.

12.2 Arrangements that meet the conditions set out in the Directive have to be reported. However, Hallmark E does not apply to cross-border arrangements if the relevant taxpayer and its associated group companies would be exempted from the basic transfer pricing rule by Chapter 3 of Part 4 TIOPA 2010. Chapter 3 exempts dormant and small and medium enterprises from having to apply the rules in Part 4, with certain exceptions.

12.3 If an arrangement is outside the transfer pricing rules in Part 4 for reasons other than being exempted by Chapter 3 (e.g. because the participation condition is not met), the mandatory reporting requirements can still apply. The Directive uses different tests to the UK transfer pricing rules (e.g. to determine association or participation). Therefore, an arrangement may be reportable under Hallmark E even though it is not subject to the transfer pricing rules in Part 4 TIOPA.

12.4 The main benefit test does not apply to hallmarks under this category, and so arrangements may be reportable, regardless of whether or not they produce a tax advantage that is inconsistent with the policy intent of the underlying legislation.

Hallmark E(1) – Unilateral safe harbours

12.5 Section E2 of Chapter IV of the TPG provides that a safe harbour is any rule which applies to a group of transactions or taxpayers which relieves them of certain transfer pricing requirements. In certain circumstances, unilateral safe harbours can open up potential inappropriate tax planning opportunities, which is why arrangements which rely on such safe harbours must be reported under hallmark E(1).

12.6 Advanced pricing agreements (APAs) made between tax authorities and companies or groups are not unilateral safe harbours. Rather they are agreements as to the correct pricing for transactions. As such, APAs do not, in their own right, fall to be caught under hallmark E(1).

Hallmark E(2) – Hard-to-value intangibles

12.7 Hallmark E(2) covers arrangements:

> *…involving the transfer of hard-to-value intangibles. The term "hard-to-value intangibles" covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:*
>
> *(a) no reliable comparables exist; and*
>
> *(b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the*

assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.

12.8 This hallmark therefore only applies where there is a transfer of an intangible asset or rights in intangibles between associated enterprises. Associated enterprise is defined in the DAC at article 3(23).The term ‘hard-to-value intangibles’ is defined in the TPG, and takes the same meaning here.

12.9 In order to determine whether hallmark E(2) is triggered, an intermediary (or relevant taxpayer) must view the transactions from the point of view of the hypothetical informed observer. They would need to consider whether it was reasonable to conclude, based on the relevant facts and circumstances, that there were no reasonable, reliable comparables for the transactions, and that the projections of cash flow and income were highly uncertain.

12.10 Where an intermediary or taxpayer considers that the hallmark is not met, and consequently no report is made to HMRC, it may subsequently turn out that the projections or comparables that were used prove to have been incorrect or unreliable. In such a situation, it will not necessarily follow that the decision not to make a disclosure was incorrect. The key question is whether the hallmark is met at the time the obligation to report would have arisen.

Hallmark E(3) – Cross-border transfers

12.11 This hallmark applies to arrangements:

involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 % of the projected annual EBIT of such transferor or transferors if the transfer had not been made.

12.12 HMRC currently takes the view that the test for applying hallmark E(3) must be considered at the level of the individual company, rather than at the level of the sub-group that is located within the same jurisdiction. This is because in the UK corporation tax rules apply at the company level, rather than at the group level. However, we recognise that in other jurisdictions, consolidation rules apply so that companies are taxable at the group level rather than at the individual entity level.

12.13 We will be considering the approaches taken by other jurisdictions in applying E(3) at the company level or at the group level and will consider the extent to which the rules in the UK can and should mirror those of other jurisdictions.

12.14 In applying hallmark E(3) the intermediary or relevant taxpayer must consider the arrangement from the point of view of the hypothetical informed observer. Taking account of all the available facts and the circumstances as they are at the time, would a reasonable person consider that the earnings of the transferor during the three year period after the transaction would, on the balance of probabilities, be less than 50% of what they would otherwise have been? There is evidently a degree of uncertainty in predicting both what the earnings will be, and what they would have been had the transaction(s) not gone ahead. This is why it is necessary to consider what an objective, informed observer would reasonably expect. Where, after the fact, it becomes apparent that the transferor's EBIT is less than 50% of what it would have been, there will not be a failure to comply with the obligations in the regulations if the projections used in reaching a decision not to report were what a hypothetical, informed observer would reasonably have expected.

12.15 The test looks at projected earnings over a three year period after the transfer, and the projection over the same period if the transfer had not gone ahead. In evaluating whether to carry out a transaction involving the cross-border transfer of functions, risks and assets, we consider it to be highly likely that a company, or its advisers, would produce detailed projections of the planned costs and outcomes of the transactions. In determining whether the conditions in hallmark E(3) are met, we would expect companies and intermediaries to rely on those projections, rather than producing projections specifically for the purposes of DAC 6.

12.16 The use of EBIT in E(3) is intended to give a sensible measure of the operating profit of the entity, but for certain entities this may not be the case. In such scenarios, it may be necessary to consider whether there is an equivalent measure which will gives an equivalent view of the operating profits of the entity, having regard to its particular circumstances and business.

12.17 Where an entity would be projected to make a loss if the transfer did not go ahead, and as a result of the transfer the loss is projected to become nil, E(3) will not be in point, as £0 is not less than 50% of a negative number.

Q13. Where an arrangement relates to companies which are resident for tax purposes in jurisdictions where corporate tax applies at the group level, should hallmark E(3) similarly apply at the level of the sub-group located in that jurisdiction or at the company level? What would be the particular advantages or disadvantages of applying the rules at the group level?

Q19. Do you have any comments about the approach to hallmarks under Category E?

13. Penalties

13.1 The DAC requires that member states shall have penalty rules for failure to meet the obligations set out in the regulations. Those penalties must be effective, proportionate and dissuasive. We have aimed to draw on concepts from existing penalties as far as possible, as these will be familiar to stakeholders, and are generally well understood.

13.2 The regulations draw on concepts from the DOTAS regime, and set out penalties for failures to make reports, as well as for other failures to comply with the regulations.

13.3 The penalties are designed to encourage compliance and act as an appropriate and proportionate deterrent even for wealthy individuals and large businesses.

Q20. Do you have any suggestions for how the penalty regime could be improved?

14. Commencement

14.1 The regulations will come into force on 1 July 2020 and will apply to: reportable cross border arrangements:

- which are made available for implementation on or after 1 July 2020
- which are ready for implementation on or after 1 July 2020
- in respect of which an intermediary provides aid, advice or assistance on or after 1 July 2020, in relation to designing, marketing, organising, making available for implementation or managing the implementation of the arrangements, or
- the first step in the implementation of which took place on or after 25 June 2018.

14.2 The meaning of ‘made available for implementation’ and ‘ready for implementation’ were discussed in the ‘relevant taxpayer’ chapter.

14.3 The regulations require reporting of any reportable arrangement where the first step was taken after the date from which DAC 6 applied (25 June 2018), even where that step was taken prior to the regulation entering into force (1 July 2020).

14.4 HMRC recognises that this reporting requirement poses certain challenges for intermediaries and relevant taxpayers, particularly where the first step was taken prior to the publication of the regulations and guidance. As set out in the penalties regulations, we would not charge penalties where a person has a reasonable excuse for the failure under the regime. Where a failure relates to an arrangement where the first step of the implementation predates the publication of this consultation document and the draft regulations, and the failure was due to a lack of clarity around the obligations or interpretation of the rules, which could not reasonably have been inferred from the DAC itself, it is likely that the person will have a reasonable excuse for the failure. Where a person has a reasonable excuse, no penalty will be due.

Q21. Do you have any particular comments about the commencement rules, and HMRC’s approach to dealing with the backdated reporting requirements?

15. Guidance

15.1 As outlined, HMRC will provide guidance on DAC 6 alongside the finalised regulations. The approach set out in this document will provide the basis for the guidance.

Q22. Are there any particular areas of DAC 6 that you would like HMRC to provide guidance on, which are not covered elsewhere in this consultation?

16. Assessment of Impacts

A Tax Impact and Information Note will be published alongside the final regulations.

17. Summary of Consultation Questions

Q1. Do you have any suggestions about how HMRC can provide more clarity about when an arrangement will concern multiple jurisdictions?

Q2. Are there any people who might be caught by this approach to defining ‘intermediary’, who you think should not be caught?

Q3. Does this definition of intermediary risk not catching certain types of intermediary who should be caught?

Q4. Do you identify any particular practical challenges with regard to HMRC’s approach to identifying intermediaries, and what information they have in their knowledge, possession or control?

Q5: Do you have any other comments about the definition of intermediary and who will be caught under the proposed rules?

Q6. For the purposes of the ongoing requirement on relevant taxpayers, do you agree that a relevant taxpayer should be regarded as participating in the arrangement in any year where there is a tax effect or where it could reasonably be expected that there would be a tax effect in a subsequent year?

Q7. Do you agree that the amount of evidence required for intermediaries and taxpayers to satisfy themselves and HMRC that all the necessary information has been reported is appropriate?

Q8. Do you think that the approach to defining the main benefit test and tax advantage is proportionate?

Q9. Do you have any comments on the approach set out for hallmarks under Category A?

Q10. Do you have any comments on the approach set out for hallmarks under Category B?

Q11. Are there any points in the definition of associated enterprise which you think require clarification or explanation in guidance?

Q12. Do you think the above approach will prevent unnecessary reporting of benign activities, while avoiding loopholes that could enable intermediaries and/or relevant taxpayers to avoid their reporting obligations? If you foresee problems with this approach, please provide details of possible solutions.

Q13. Do you think that this approach will also work for dealing with Collective Investment Schemes? Alternatively, what other approaches do you think would be better?

Q14. Do you think particular guidance is needed in respect of hallmark C(3)?

Q15. Do you agree that this hallmark should refer to the amount treated as payable for tax purposes? What do you think are the advantages and disadvantages of this approach, and of any other suggested approaches?

Q16. Do you have any general comments about the approach to hallmarks under category C?

Q17. Do you have any comments about the approach to hallmarks under Category D?

Q18. Where an arrangement relates to companies which are resident for tax purposes in jurisdictions where corporate tax applies at the group level, should hallmark E(3) similarly apply at the level of the sub-group located in that jurisdiction or at the company level? What would be the particular advantages or disadvantages of applying the rules at the group level?

Q19. Do you have any comments about the approach to hallmarks under Category E?

Q20. Do you have any suggestions for how the penalty regime could be improved?

Q21. Do you have any particular comments about the commencement rules, and HMRC's approach to dealing with the backdated reporting requirements?

Q22. Are there any particular areas of DAC 6 that you would like HMRC to provide guidance on, which are not covered elsewhere in this consultation?

18. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

Stage 1 Setting out objectives and identifying options.

Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.

Stage 3 Drafting legislation to effect the proposed change.

Stage 4 Implementing and monitoring the change.

Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 3 of the process. The purpose of the consultation is to seek views on draft legislation in order to confirm, as far as possible, that it will achieve the intended policy effect with no unintended effects.

How to respond

A summary of the questions in this consultation is included at chapter 17.

Responses should be sent by 11 October 2019 by e-mail to mandatorydisclosure.rules@hmrc.gov.uk

or by post to:

James Marshall
Exchange of Information Policy - Business International
HM Revenue & Customs
9th Floor, Mail point 3
10 South Colonnade
Canary Wharf
NE98 1ZZ

For telephone enquiries please call James Marshall on 03000 594912

Please do not send consultation responses to the Consultation Coordinator.

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from HMRC's GOV.UK pages. All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018, General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue & Customs.

Consultation Privacy Notice

This notice sets out how we will use your personal data, and your rights. It is made under Articles 13 and/or 14 of the General Data Protection Regulation

Your Data

The data

We will process the following personal data

Name
Email address
Job title
Organisation

Purpose

The purpose(s) for which we are processing your personal data is: *the International Tax Enforcement: Disclosable Arrangements* consultation.

Legal basis of processing

The legal basis for processing your personal data is that the processing is necessary for the exercise of a function of a government department.

Recipients

Your personal data may be shared by us with HM Treasury.

Retention

Your personal data will be kept by us for six years and will then be deleted.

Your Rights

- You have the right to request information about how your personal data are processed, and to request a copy of that personal data.

- You have the right to request that any inaccuracies in your personal data are rectified without delay.

- You have the right to request that any incomplete personal data are completed, including by means of a supplementary statement.

- You have the right to request that your personal data are erased if there is no longer a justification for them to be processed.

- You have the right in certain circumstances (for example, where accuracy is contested) to request that the processing of your personal data is restricted.

Complaints

If you consider that your personal data has been misused or mishandled, you may make a complaint to the Information Commissioner, who is an independent regulator. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF
0303 123 1113
casework@ico.org.uk

Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.

Contact details

The data controller for your personal data is HM Revenue & Customs. The contact details for the data controller are:

HMRC
100 Parliament Street
Westminster
London SW1A 2BQ

The contact details for HMRC's Data Protection Officer are:
The Data Protection Officer
HM Revenue & Customs
7th Floor, 10 South Colonnade
Canary Wharf, London E14 4PU
advice.dpa@hmrc.gsi.gov.uk

Consultation Principles

This consultation is being run in accordance with the government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website: http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

If you have any comments or complaints about the consultation process please contact:

John Pay, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

Please do not send responses to the consultation to this address.