International Tax Enforcement: disclosable arrangements
Consultation response
October 2019
Preface

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Introduction

1. We are pleased to have this opportunity to submit representations on the Government’s proposed implementation of the EU Directive 2018/822 (DAC 6) amending EU Directive 2011/16 (Host Directive). References in this paper to the Condoc are to the consultation document dated 22 July 2019, entitled International Tax Enforcement: disclosable arrangements, and references to the Regulations are to the draft International Tax Enforcement (Disclosable Arrangements) Regulations 2019. References to Guidance are to the guidance expected to be published by HMRC in connection with the Regulations. References to Articles are to the relevant Articles of the Host Directive, as amended by DAC 6.

2. Our comments and the views expressed in this response first highlight a selection of key points in executive summary form, then make important submissions firstly on proportionality (Part A) and then on legal professional privilege (Part B), before responding to the specific consultation questions on issues of concern to those of our members who have to operate these rules (Part C).

Executive summary of key points

3. Here is an executive summary of selected key points:

   a. The Regulations should be self-contained rather than cross-referring to DAC 6. This would give clarity for intermediaries and provide an opportunity to set out explicitly the necessary proportionate interpretation of the directive. Such an interpretation could avoid simply creating significant uncertainty and compliance traps for the unwary, which would have to be addressed by the courts.

   b. As discussed in detail below, we disagree with the application of the rules to, and the interpretation of the legal position in respect of, legal professional privilege. This is a very real problem, not merely a theoretical one, from the perspective of lawyers’ ability to comply with their obligations to their clients while also satisfying these disclosure rules.

   c. The Regulations and Guidance should clarify the knowledge condition in the definition of intermediary. A person who is unaware that what they are doing relates to a cross-border reportable arrangement should not be treated as a “promoter” intermediary and should be able to rely on the “service provider” intermediary “did not know” exemption.

   d. The Regulations and Guidance should be explicit that the “did not know” exemption is a subjective test, subject to the intermediary doing the usual due diligence it would have carried out absent DAC 6 and not being wilfully blind. In the case of an intermediary organisation, the exemption should apply unless an individual within the organisation has the requisite knowledge and this should be clarified in the Regulations.

   e. Partners of, and free-lance lawyers or “lawyers on demand” providing services to, law firms should be covered by the same exemption as is currently included in the Regulations for employees. It should be the firm that is the intermediary and not an individual. The precise legal form of the firm should not be relevant.

   f. The Regulations should include a defence to penalties where an intermediary has taken reasonable steps to ensure compliance with their disclosure obligations. DAC 6 requires wide disclosure of benign arrangements (unlike the DOTAS rules which target only tax avoidance arrangements) and poses very significant compliance challenges. The proposed defence would be a proportionate approach to penalties, which we consider to be compliant and precedented.
g. The Regulations and Guidance should seek to obtain sufficient disclosure (or enable HMRC to request additional disclosure) to achieve the purpose of DAC 6 (to discourage the use of aggressive cross-border tax-planning arrangements) with the minimum compliance burden. The current proposed approach to transposing DAC 6 will go further than required by the directive thereby significantly increasing the compliance burden and (legally or practically) requiring multiple disclosures of information.

Part A: Introduce self-contained regulations that implement DAC 6 in a clear and proportionate manner

4. The Regulations should be amended so that they are clear and self-contained by removing the cross-references to DAC 6. As detailed elsewhere in this response, the Regulations and Guidance also require amendments to ensure that DAC 6 is effective in achieving its goals in a proportionate way. The impact assessment for DAC 6 in the UK should fully reflect its very significant costs to business. These changes should be made for the following reasons:

a. The application of DAC 6 in the UK will place an enormous compliance burden upon law firms, lawyers, and other intermediaries with a UK connection, both in the UK and around the world. There are a number of “problem areas” in DAC 6, which have been raised in numerous stakeholder meetings with HMRC since its publication. For intermediaries to be able to comply with the Regulations, it will be essential that its scope and the transactions affected should be clear. We do not currently consider this to be the case.

b. The draft Regulations cross refer to definitions within DAC 6 itself which are vague in their scope, and have not been drafted with a view to how legislation is generally interpreted in the UK. A self-contained set of regulations could and should clarify these points, so that intermediaries are able to understand and comply with their legal obligations. It will not be sufficient to rely on the Guidance.

c. Given the range of potential people to which the Regulations will apply, it is highly desirable to have a single instrument to which they can refer. Having a mixture of UK and EU legislation, which is found in different places, is very unwieldy, and given that all advisers on cross border arrangements will have to consider the application of these Regulations to every transaction they undertake, it is important that the rules are easily accessible. Having self-contained regulations might also be a more helpful approach if the UK ceases to be part of the EU.

d. Self-contained UK regulations could implement DAC 6 in a way that is proportionate. Proportionality is a key principle of EU law. EU instruments should also be given a purposive interpretation.

e. The stated purpose of DAC 6 is “to improve the functioning of the internal market by discouraging the use of aggressive cross-border tax-planning arrangements” (see paragraph 19 of the Preamble to DAC 6). At the time of the original EU-level consultation the Commission stated that part of its aim was to assist intermediaries who might otherwise face a patchwork of disclosure rules.

f. Some possible interpretations of the “literal words on the page” of DAC 6 would have entirely disproportionate results. Such interpretations could result in DAC 6 entirely failing in its aim, instead sowing uncertainty and confusion for legitimate businesses, and prompting significant over-disclosure (or multiple unconnected disclosures) which will result in the real targets of this legislation being overlooked. Self-contained UK regulations should transpose DAC 6 into UK law in a way that is proportionate and in keeping with its purpose.
Part B: Legal professional privilege (LPP)

5. The Regulations and Guidance should implement DAC 6 in a way that fully respects LPP. This is critical because LPP is a fundamental right that enables access to legal advice and underpins the rule of law.

6. Several important points arise from the need to respect this fundamental right in transposing DAC including:

   a. The reference to “HMRC” in Regulation 7(1) should be replaced with “any person” in order to ensure there is no attempted abrogation of LPP. Regulation 7(2) should be made expressly “subject to Regulation 7(1)”. These changes clarify that LPP is protected not only vis-à-vis revenue authorities but also vis-a-vis other intermediaries (and in some circumstances relevant taxpayers). We consider these changes to the Regulations would be the most logical, purposive and proportionate interpretation and transposition of the DAC 6 scheme. The changes are important to ensure that the obligation to notify persons who are not their client (such as other intermediaries or – in many circumstances – the relevant taxpayer) of the obligation to report does not breach LPP. We do not consider that a reading of regulation 7 that obliged a lawyer to breach LPP would be within the scope of the enabling legislation in section 84 of the Finance Act 2019.

   b. Regulation 7 should also be re-drafted to ensure that where all intermediaries are unable to report or notify due to LPP, someone who is able to do so without breaching LPP is required to notify the relevant taxpayer. At present, the obligation to notify is satisfied by notifying other intermediaries which is circular and cannot be what HMRC intend.

   c. We do not agree with the statements made in paragraph 3.18-3.20 of the Condoc about the scope of LPP. In particular, factual information (including, for example, a description of transactions to be undertaken) on which advice is to be based and which is confidentially communicated by a client to a lawyer, is subject to LPP. Disclosure of this information by the lawyer cannot be compelled, even though the same information may well not be privileged in the hands of the client. Furthermore, in many or most cases, any disclosure will tend to reveal the nature of advice given by the lawyer, because the disclosure will necessarily imply that a cross-border reportable transaction has been discussed or undertaken. For example, disclosure of the name of a lawyer’s client will tend to reveal more than just that in the context of the DAC 6 rules, and would also attract LPP in these circumstances. Under professional conduct rules and the common law it is a primary obligation of a lawyer to preserve LPP. As a result, lawyers are likely to be required under the rules either to make very limited reports or to make no reports at all.

   d. The Regulations should be amended to exclude lawyers from a reporting obligation to the extent that any of the information is privileged. We note that the DOTAS rules adopt this position (see regulation 4 of the Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004, which exempts a person from being a promoter where they are not required to provide all the information prescribed by virtue of LPP. The lawyer’s obligation would then be to notify its own client of its obligations under DAC 6. This would protect the boundaries of LPP and the rule of law. It would reduce administration burdens on lawyers and HMRC to more proportionate levels: the compounded compliance burden on lawyers and HMRC in managing the interaction of the DAC 6 and the LPP rules disproportionately outweighs the benefits of the extremely limited disclosures that are likely to result. It is unrealistic to expect lawyers to do a detailed analysis of whether particular information is privileged (which can be a complex and fact specific exercise) as well as whether an arrangement is within a Hallmark within the 30 day deadline for reporting. There is not likely to be an adverse effect of excluding...
lawyers from the reporting obligation as this would then fall to the client or other intermediaries. We would also note that information that a lawyer obtains in the marketing of arrangements developed by them is not obtained in the course of providing legal advice and so LPP would not apply to lawyers engaging in this type of intermediary activity.

e. As mentioned below, it will also be necessary to provide a mechanism for lawyers to be able to demonstrate that they did not know that they were involved in a cross-border reportable arrangement without breaching LPP. This is vital for the fair and appropriate operation of the rules. An arrangement similar to that used in the “enablers” rules could be considered here.

f. Regulation 10(b) should be removed (or if not at least re-drafted to remove the words “to the satisfaction of an officer of Revenue and Customs”) so that it is possible to comply and have evidence for the purpose for the purposes of Regulations 3(2) and 4(3) without breaching LPP.

Part C: Responses to consultation questions

Section 2: Reportable cross-border arrangements

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

7. Given the constraints of the Directive, the proposal to interpret ‘concerning’ more than one country as requiring those countries to be of some material relevance to the arrangement appears to be helpful. Presumably this would be set out and expanded upon in guidance with examples.

Section 3: Intermediaries

Q2. Are there any persons or arrangement who might be caught by this approach to defining “intermediary” who you think should not be caught?

Promoters and Service Providers

8. The Regulations and Guidance should clearly define and distinguish between the two categories of intermediary in Article 3(21). In particular, where a person is involved in the design, organisation or management of the implementation of a reportable cross-border arrangement, it must be clear whether they fall within the first paragraph of Article 3(21) (a Promoter) or the second (a Service Provider). We believe law firms usually act as Service Providers rather than Promoters, but the broad drafting of the Promoter definition creates uncertainty, which adds to the risk and compliance burden.

9. The following changes in the Regulations and Guidance would help make this clearer:

   a. Clarification that a person is not a Promoter if they are unaware that what they are doing relates to a cross-border reportable arrangement.

   b. Confirmation that a person doing the usual due diligence that a reasonable person would do absent the provisions of DAC 6 and not being wilfully blind would not be a Promoter and could avail themselves of the Service Provider “did not know” exemption.

10. In relation to the first of these proposals, in our view such a clarification would be consistent with a correct reading of the first paragraph of Article 3(21). We consider this is the only proportionate interpretation of that provision, as it cannot be the case that DAC 6 was intended to introduce a
“strict liability” regime. Paragraph 3.5 of the Condoc appears to recognise this (although from the other end of the telescope, as it appears to assume knowledge). Our interpretation is also consistent with the approach to information that should be disclosed – this is limited to information within an intermediary’s knowledge possession and control, and 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": Condoc paragraph 3.13. Since a person is only an Intermediary if there is a "reportable cross border arrangement", such a trawl should equally not be required to confirm there is a reportable cross border arrangement; and therefore some form of knowledge must be implicit also in Promoter Intermediaries.

11. If this clarification is not made, it will significantly exacerbate the compliance difficulties:

a. For example, a lawyer might undertake the corporate implementation steps for a transaction presented to them by a client or by a third party adviser to the client. The lawyer would often have instructions that are limited to those corporate implementation steps, or have their retainer otherwise limited, in which case they may not know whether the arrangements involve a reportable cross-border arrangement. Nevertheless, it might be argued that they are managing the implementation of the transaction. In such cases, the rules should be made clear so that they are not treated as a Promoter.

b. Similar arguments could be made where a person contributes to the design of an arrangement where their contribution relates to entirely benign transactions, but the wider arrangement (of which they might not even be aware) contains or amounts to a cross-border reportable arrangement.

12. We also refer you to the guidance that was published in relation to the enablers rules which dealt with similar concerns for lawyers providing non-tax advice in relation to, or engaged in the documentation of, transactions (see the second example under the heading ‘The knowledge condition’ here: https://www.gov.uk/guidance/tax-avoidance-enablers-who-is-classed-an-enabler#knowledge-condition).

13. Concerning the second related proposal set out above, it would be helpful if HMRC could confirm specifically that if the person concerned does the usual due diligence that a reasonable person would do absent the provisions of DAC 6 and is not being wilfully blind, in HMRC’s view the person would not be a Promoter and could avail themselves of the Service Provider “did not know” exemption.

14. Absent such confirmation, there is a risk that compliance would be impossible. For example, if a promoter makes available an arrangement and, 30 days or more later, the client decides to take the arrangement to a law firm to implement, and the law firm is a Promoter rather than a Service Provider, it would never be able to make a report in time.

Who is the intermediary?

15. We request clarification in the rules that it is the firm and not individual partners or self-employed individuals who support a firm in providing legal services that will be treated as an intermediary.

16. We consider that the circumstances in which individuals have reporting obligations under the Regulations should be minimised as far as possible. We welcome the confirmation in the Condoc that an employing firm rather than individual employees of that firm is the intermediary. Other individuals working for an organisation that is an intermediary should likewise not be treated as intermediaries.

17. This is a major issue for law firms that are set up as partnerships and LLPs. It cannot be sensible to require partners in large professional services firms (being typically partners of general
partnerships or members of LLPs) to have separate reporting obligations from their firms (nor indeed to be exposed to high levels of penalties in a personal capacity). Similarly, some law firms and in-house legal functions increasingly use freelance lawyers or “lawyers on demand” type services that engage self-employed lawyers on a contract basis to help deliver legal services. It would be a very significant burden to impose on these individuals if they were required to make their own notifications (or to verify that such notifications are being made and obtain the required evidence of this), when a notification by the organisation by which they are contracted should be sufficient.

18. We do not think there is a logical distinction to be made between partnerships and LLPs for the purpose of the requested clarification, which we think is necessary. Due to the variety of entity types used by intermediaries with UK businesses for entirely commercial reasons, many of which are not established under UK law, we would caution against the legislation identifying the forms of firms which can qualify as the intermediary (rather than the individuals working as part of or for that firm being the intermediary) in a narrowly prescriptive manner (by simple reference to companies, partnerships and LLPs, for example). We do not believe that a broader approach would raise any material risk of non-compliance but rather assist compliance through providing clarity, and that it would meet the requirements of DAC 6. This defines an intermediary as any “person” with a relevant activity, “person” itself being a term defined broadly in the Host Directive and not requiring legal personality (see Article 3.11).

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

19. As explained above, the Promoter intermediary definition is very wide and unclear in scope. We consider that it would be more likely to catch the right group of intermediaries if it is defined in the Regulations in accordance with a proportionate and purposive reading of the Directive that provides additional clarity in an English law context.

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?

20. The Regulations and Guidance should provide that a disclosure obligation only arises where an individual within an organisation subjectively has the knowledge necessary for the organisation to be an intermediary.

21. The point is that, where it is accepted that an organisation (as opposed to an individual) is the intermediary, it will be necessary to provide for when the organisation has sufficient knowledge to be caught by the rules. The potential problem is where different pieces of information are available in different departments (and potentially across borders) within the organisation, but no one has put them all together. In previous discussions with HMRC, it was accepted that the rules should not apply unless a single person in the organisation had all the relevant “pieces of the jigsaw”. We understand this principle is broadly accepted (as per 3.13 of the Condorc in relation to when information is within a person’s knowledge, information or control for reporting purposes) but specific provisions will be needed within the intermediary definition to ensure that a disclosure obligation only arises where that single person has knowledge. (In other words, this requirement of the knowledge being with one person should limit the concept of intermediary and not just the information required to be disclosed.).

22. There will often be good reasons or obligations under law or regulation (e.g. to protect the privacy and confidentiality of data, or to comply with insider information rules for listed entities) to segment information. Taking steps to do so for such reasons should not prevent the availability of a lack of knowledge defence. While we recognise HMRC’s concern in relation to deliberate fragmentation of information to avoid a reporting obligation, we would suggest that this is very
unlikely to arise in practice because it would normally require a single individual to have awareness that the information needs to be fragmented.

23. It would be helpful to have some acknowledgement in the Guidance that knowledge is primarily a subjective question. As a practical matter, advisers may be sent huge amounts of material, not all of which is relevant to the task that they may be instructed to carry out and which they may therefore not review. In addition, if the material does not relate to their area of specialism, even if they do review it they may not wholly appreciate its implications for the purposes of DAC 6. The “could not reasonably be expected to know” limb of the knowledge defence should acknowledge this reality and focus on the position where the adviser had the relevant information in their mind and any reasonable person in their situation would have “put two and two together”.

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

24. Where an organisation is the intermediary, it should be clarified that it is the organisation, and not the relevant individuals working for it, that must satisfy the jurisdictional conditions in Article 3(21). In this regard, we had been expecting the Regulations to contain clarification that a UK partnership should be treated as resident in the UK by virtue of its establishment there, rather than its being necessary to trace through to the residence of the partners. Equally, an organisation that is outside the scope of disclosure may employ (outside the EU), or have as a partner or member, an individual who is professionally regulated in the UK. It would be helpful to clarify that that individual does not face separate DAC 6 disclosure obligations in the UK.

25. We would recommend that, where a UK entity is providing services through a non-EU permanent establishment, and there is no involvement by the UK “head office” there should not be a UK reporting obligation. We understand that this is the approach currently taken in the draft Dutch rules. Otherwise, the rules disadvantage those firms set up as single partnerships, rather than those with other structures (such as vereins) where foreign offices are contained in separate entities.

26. A non-EU firm that has a branch in the EU will have a reporting obligation for transactions conducted through the branch (Article 3(21)(b)). If the firm is registered with a professional association in an EU jurisdiction, then it is arguably ambiguous whether the firm should only be within the scope of the rules for matters carried out through the relevant branch that gives rise to the requirement to be registered (due to Article 3(21)(d)). For a US firm with a London branch, which is registered with the Solicitors Regulation Authority (SRA), it would be wholly disproportionate to require its lawyers operating in San Francisco to comply with the requirements of DAC 6 in relation to matters that do not involve the UK branch at all. We believe that it would be a proportionate interpretation of DAC 6 to apply limb (d) of the definition of intermediary to a firm which is considered an intermediary only to the extent that the matters are carried out pursuant to its regulatory permission.

27. It would be helpful if further practical examples could be provided as to what it means to be “registered with a professional association” (see paragraphs 3.17 of the Consultation Document). For example, some law firms which do not have a UK presence but which employ England & Wales qualified solicitors who practise outside the UK are allocated ID numbers by the SRA. This does not involve any level of SRA authorisation or regulation of the firm but is an administrative step on the SRA’s part to keep a record of the employers of the relevant solicitors, facilitating block practising certificate renewal for example. Regardless of the point in the paragraph above, it would be helpful if it could be confirmed that the issuance of an SRA ID alone in this manner does not amount to “registration” causing the activities of the entire relevant firm to be potentially subject to DAC 6.
28. Also, in international law firm structures it is common for non-UK lawyers who are senior members of an international firm to become passive partners or members of an affiliated UK firm entity, purely as part of the governance or profit sharing arrangements of the international firm. Although these individuals may not be practising law in the UK, in order to become a partner or member of the UK firm they must first be registered as “registered foreign lawyers” with the SRA. It would be helpful for it to be confirmed that registration in this capacity, without active legal practice on behalf of the UK firm, would not in itself potentially bring an individual within the definition of “intermediary” for the purposes of the UK implementation of DAC 6 due to Article 3(21)(d). (The UK firm itself could of course be an intermediary for the purposes of DAC 6 – the concern relates to the status of the non-UK individuals themselves when acting otherwise than as a partner or member of the UK firm.)

29. A further practical issue for intermediaries is that they may have no knowledge of who all the other intermediaries are in relation to an arrangement, which could make it impossible to comply with their obligations under Regulation 8. This could be a particular problem for Service Provider intermediaries who will often be the first to be provided with a reference number. We would suggest that Regulation 8(2) is amended so that the obligation is to notify those intermediaries known to the recipient of the arrangement reference number and to clarify that it only arises on receipt of the number from HMRC rather than from another intermediary.

Section 5: Reporting triggers and timing

When is “aid and assistance” provided?

30. We recommend the rules should provide that the provision of aid and assistance is tested at a single clear point by reference to implementable transactions.

31. This would help by clarifying the time at which aid and assistance is provided by a Service Provider intermediary. An advisory instruction is often a continuing one with a number of interactions between the adviser and the client. Where an adviser has a limited role on a transaction, it will often be the case that the transaction changes materially between the times at which they provide advice. Equally the adviser’s knowledge of the transaction may develop over time.

32. In previous discussions with HMRC, it has been suggested that there should be a single clear point from which the 30-day clock would start to run and at which the question of knowledge should be tested. It would not be necessary for the adviser subsequently to make a report if they acquired the relevant knowledge later, which would seem unduly onerous for both the adviser and the tax authority. We would welcome clarity of this kind.

33. We suggest that the provision of aid or assistance should be linked to a cross-border reportable transaction that will or is reasonably likely to take place in (or substantially in) that form. That would restrict reports to implementable transactions. We consider that this is justifiable on the drafting of the Directive, on the basis that you can only provide aid or assistance in relation to an arrangement if that arrangement is sufficiently concrete as opposed to being theoretical.

Reporting of transactions that are made available for implementation

34. The Guidance should make it clear that an arrangement is not made available for implementation until it can said to be fully designed, agreed, and capable of implementation in practice.

35. While we understand tax authorities' desire to be warned of “tax technology” even if it is not implemented, we do not think it is appropriate to link a specific taxpayer to that technology unless that taxpayer was sufficiently ready to implement it. This is implicit from Article 8ab(10), which provides that the relevant taxpayer with the reporting obligation is the one who “agreed” the
reportable cross-border arrangement with the intermediary or who managed its implementation. This clearly implies that the arrangement has either been carried out or has got to a sufficiently advanced stage that it can be said to be agreed. Any other interpretation is likely to result in redundant enquiries for the taxpayer and would be disproportionate.

36. We would also refer you to paragraph 3.5 of the HMRC guidance relating to DOTAS which discusses when a scheme is available for implementation. This requires it to be fully designed, and capable of implementation in practice, which requires all the elements of the design to have been put into place "on the ground". For example a professional services firm may discuss with a multi-national corporate client an idea that it has had about how a tax problem in a particular jurisdiction might be overcome. Such an idea would inevitably have to be adapted to deal with the client’s particular circumstances, and there may be many other hurdles that the client would have to clear in order to consider potential implementation. Until the client has made the decision that the transaction is implementable in their circumstance in practice, we do not think that it should be said to be capable of implementation, and we do not think that it would be correct to report the client's identity.

37. This is of particular importance in the context of the Service Provider disclosure obligations given the earlier trigger for reporting, as their advice will commonly be provided in the feasibility stage, when it would be inappropriate to require disclosure of the details of their client.

38. On the basis of the guidance currently in the Condoc (and in particular the references to the “essence of the arrangement” being identifiable), we would be concerned that a “brainstorming” session between a client and professional advisers about, say, streamlining their regulatory obligations, where one of the options discussed involved a cross-border merger of one of the client’s businesses into a company in another jurisdiction (which appears to fall within Hallmark E3) would trigger a reporting obligation with disclosure of the client’s details. This would be of no practical use to any tax authority, and it is therefore highly probable that the relevant intermediary would not even realise that a reporting obligation had been triggered in these circumstances. An overbroad interpretation of the legislation simply serves to create potential compliance traps for the unwary with no discernible benefit.

Intermediary becoming involved after a trigger date

39. We consider that there should be a carve out from regulation 3(3)(c) so that an intermediary cannot be required to make a report on a date earlier than 30 days after it first becomes an intermediary or becomes aware that it is an intermediary, whichever is later. For example, a Service Provider may receive an arrangement reference number from another intermediary. Prior to that receipt, it may have been completely unaware that it was involved in a cross-border reportable arrangement. It may have been providing aid and assistance for some time. Unless there is a clear cut off point (as recommended above and as previously suggested in discussions with HMRC) after which it is not necessary to retest knowledge, the Service Provider may acquire a disclosure obligation at this point, but will by definition have missed the deadline for making the report.

First reports

40. We consider that the first reports under the regulations should not be required to be made before 31 August 2020. Under the draft regulations, reporting would be required before that date for arrangements which, broadly, are made available, or are ready for, implementation or begin to be implemented (or in relation to which a service provider provides relevant aid, assistance or advice) during July 2020. However, for earlier arrangements, no reports are required until 31 August 2020. This counterintuitive requirement to report later arrangements before earlier ones is likely to give rise to practical difficulties and confusion, as well as increasing the risk of inadvertent non-compliance.
Notification

41. When an intermediary’s obligation is to make a notification to its client or to other intermediaries/the relevant taxpayer, there should be clarity as to when this obligation arises. In particular, it should not arise earlier than the point at which a reporting obligation would have arisen.

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?

42. We do not consider that there should be an ongoing reporting requirement on relevant taxpayers. This is not required by DAC 6. Given the breadth of the hallmarks it would be very difficult to ascertain whether there is an ongoing tax effect.

43. For example, if a transaction within Hallmark E3 is carried out, this is likely to have permanent ongoing effects (in that income that would have been earned in jurisdiction X is now earned in jurisdiction Y). An ongoing requirement would potentially require a taxpayer to include a reference number in its returns indefinitely.

44. We consider that a reporting obligation for the relevant taxpayer should be confined to arrangements actually implemented by them and should be limited to the year in which the arrangement was entered into.

Section 6: Reporting obligations

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?

45. For the reasons explained below, Regulation 10 should provide for the evidence to comprise (a) a confirmation provided by the intermediary making the report that a report has been made to a tax authority in a member state, and (b) once the arrangement reference number has been issued by HMRC or another member state, a copy of that number. An alignment of disclosure triggers may also be required.

46. As a practical matter, we do not consider that the current timing provisions of Regulation 10 are workable to avoid multiple disclosures or to result in disclosures that can be linked with the same reference number. Intermediaries are likely to require most of their 30 day reporting window to assess whether an arrangement is reportable, and to finalise the form of any report (especially where, as is likely frequently to be the case, their client wishes to input on the form of any disclosure). By the time that a reference number is produced, the reporting window for other intermediaries may well have expired, and they will already have made their reports.

47. HMRC’s systems will have to be quite sophisticated to avoid them giving different reference numbers to different intermediaries on the same transaction. If the other intermediary’s report is to another member state, then it is almost inevitable that there will be multiple reports. Further, without an alignment of disclosure triggers, a Service Provider disclosure may be required before a Promoter disclosure, which is inefficient since Service Provider intermediaries may be less likely to be able to disclose all required information. Accordingly, the intermediary should not have to have received the arrangement reference number within its 30 day reporting window. Even if HMRC commits to a quick turnaround for the production of arrangement reference numbers, it has no influence on the time periods that will be adhered to by other member states.
48. Even once an intermediary receives an arrangement reference number from another intermediary, it is not clear how firms will be able to satisfy themselves and provide HMRC with evidence to satisfy Regulation 10(b) when they will not necessarily have sight of what others have reported, which may not be in English. Many intermediaries will not be prepared to share their reports with other intermediaries for data protection, insider information rules or other regulatory reasons.

49. To make the system workable, intermediaries should be able to rely on the fact that an arrangement reference number has been issued under 10(a) without doing anything more. We understand the Netherlands has taken this narrower approach on the requirement of proof in order for an intermediary to be excepted from reporting because another intermediary has reported. It is enough in The Netherlands that an arrangement number has been issued – the other intermediaries do not have to read the report and determine if there are any items of reportable information missing (contrast this with 10(b) of the draft UK regulations).

50. We consider this a practicable approach, as any report is likely to contain the material features that make the arrangement reportable, and the incremental benefit for HMRC in receiving multiple reports is likely to be low when compared with the burden of reporting on all the relevant intermediaries. If HMRC then identify any major problems with the report they should be able to follow up with other intermediaries but as a starting point HMRC should not expect to receive multiple reports just because different advisers take differing views on minor points.

51. The key point here would be for HMRC to be aware of the identity of the other relevant intermediaries. This could be ensured by putting an obligation on an intermediary who receives an arrangement reference number to inform HMRC of that fact (subject to LPP) unless the intermediary giving it the number confirms that it has been identified in that intermediary’s return to HMRC.

52. If this is not considered to be sufficient protection against deliberate manipulation of the extent of disclosure (and provided that the clear distinction is made between Promoter and Service Provider intermediaries as noted above, so that an intermediary can unambiguously determine into which category it falls), there could be an obligation on Promoters to make a disclosure unless they have evidence that satisfies regulation 10(b), but Service Providers should be able to rely on a reference number.

53. If regulation 10(b) is retained, it gives rise to significant difficulties for lawyers who are obliged to assert LPP. In this case, it should be amended to remove the words “to the satisfaction of an officer of Revenue and Customs” so that it is possible to comply and have evidence for the purpose for the purposes of Regulations 3(2) and 4(3) without breaching LPP. Additionally, another mechanism for lawyers will be required to enable them to be able to demonstrate that they did not have this information without breaching privilege (as would be consistent with the directive). A self-certification arrangement similar to that used in the enablers rules could be considered here.

54. In addition, we suggest that it would be proportionate to provide that once a reference number is given (irrespective of how many days beyond the 30 day period it is given) there should not be a penalty for another intermediary not disclosing.

Section 7: Hallmarks: main benefit test

Q8. Do you think that the approach to defining the main benefit test and tax advantage is proportionate?
55. For the reasons set out below, we recommend a review of the tax advantage definition, a definition of taxes that does not go beyond what is required by DAC 6, and guidance on how tax policy intent is to be established.

56. First, we consider that HMRC should review the definition of tax advantage. It is defined non-exhaustively in the Regulations, so may not as helpful as the Condoc suggests. In addition, the definition should be amended so that it is made clear that the condition that the advantage cannot reasonably be regarded as consistent with the principles of the relevant underlying provisions applies to all advantages that would otherwise fall within the definition of tax advantage (i.e. whether or not in the non-exhaustive list).

57. It is recognised in the Condoc that the Host Directive only applies to taxes of member states, and excludes VAT, customs duties, excise duties and compulsory social security contributions. It is therefore not clear to us why HMRC propose to define tax advantage more broadly to cover all taxes, whether of a member state or overseas and including those taxes that are otherwise excluded under the Host Directive. This approach raises a number of issues.

a. First, DAC 6 is designed to enable tax authorities to exchange information about transactions that involve cross-border reportable arrangements. There is no such mechanism for non-EU jurisdictions. (This also strengthens our view that the definition of tax in the Host Directive is the correct definition to apply to the question of whether there is a tax advantage.)

b. Second, by including this wider definition of tax, it puts considerable pressure on the amount of knowledge that an intermediary is supposed to have. Different jurisdictions have very different types of taxes – particularly in the indirect tax area – and an intermediary should not be expected to anticipate the different taxes that might be relevant unless it has actual knowledge.

c. Third (and subject to our earlier point on the position of non-EU PEs of UK entities) it extends considerably the reporting obligations of such PEs. For example, a UK law firm with a Hong Kong office advises a PRC client on a transaction with an EU counterparty that involves one of the hallmarks subject to the main benefit test. The tax benefit relates to PRC tax. The UK firm would appear to have a reporting obligation simply because one of the counterparties was based in the EU, whereas it would not if the counterparty had been Korean. It is a very significant compliance burden to ensure that all partners and staff in offices outside the EU (which often will not have any tax specialists) are fully aware of the circumstances in which the rules are applicable, particularly as their application is not intuitive. It is inevitable that transactions will be missed, with the resulting disproportionate financial and reputational penalties. We would note that limiting the definition of “tax” here is not a silver bullet as the non-tax related hallmarks might still apply. We therefore reiterate the desirability of excluding transactions involving non-EU PEs of UK entities where the UK head office is not involved in delivering the advice.

58. The statement in the Condoc at paragraph 7.7 that a main benefit will not arise if the tax consequences of the arrangement are in line with policy intent is helpful. However, this will again be difficult to apply in practice to worldwide taxes, as anticipated in the current taxes definition. To ameliorate this we recommend a narrower definition of taxes and guidance on how intermediaries and taxpayers are expected to establish policy intent.

Section 8: Hallmarks: Category A

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

59. For the reasons below, we request clarification in guidance on the scope of the concept of the confidentiality obligation (which we think should be interpreted more narrowly), on the meaning
of the terms “intermediary” and “standardised arrangements” in the context of Category A, and on the scope of arrangements that are considered sufficiently bespoke.

60. We are concerned at the breadth of the guidance on what might constitute a confidentiality obligation. Most commercial agreements contain boiler-plate confidentiality provisions. Usually these would now permit disclosures to tax authorities (although if drafted based on older precedents might not expressly do so), but would not permit disclosures to third parties (such as persons who could be intermediaries). It will be extremely administratively onerous if every commercial transaction requires assessment against a main benefit test. For example, how is a lawyer acting on a share sale that benefits from a participation exemption from capital gains tax supposed to determine whether this falls within the main benefit test? It may be that the decision to sell at a particular level in the corporate structure is informed by the availability of the participation exemption in one jurisdiction rather than another. It will be very hard for the non-tax specialist (and even in many instances for a tax specialist) to be confident as to whether or not the main benefit test is met. It is highly desirable that the Hallmarks themselves provide bright lines as to whether they apply.

61. Another point that should be clarified in relation to Hallmark A(1) is the intended meaning of the term “intermediary”. Is it an intermediary as defined (which suggests it is limited to intermediaries acting in respect of the arrangement concerned) or any person who has a business of acting as an intermediary in respect of arrangements generally?

62. Documentation that is standardised to some degree is common in various aspects of commercial practice. Guidance on arrangements that are considered acceptable or sufficiently bespoke would greatly assist, particularly in an area where there may be significant volume of transactions, such that individual tax advantage reviews would be burdensome. Examples include loan agreements based on Loan Market Association standard forms or derivative transactions based on standard terms published by ISDA.

63. The concept of standardised structures also requires further clarification. Most transactions are structured in conventional ways. Examples include the use of multiple new holding companies in a private equity funded acquisition and the use of the typical private equity fund structure set out in the memorandum of understanding of 25 July 2003 between the British Venture Capital Association and the Inland Revenue on the income tax treatment of venture capital and private equity limited partnerships and carried interest. We do not believe that the hallmark is targeting conventional structures such as these, and this should be confirmed in the guidance.

Section 9: Hallmarks: Category B

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

64. We would welcome more guidance on what amounts to a “conversion” for the purposes of Hallmark B(2). For example, would hybrid instruments be caught here (e.g. Luxembourg CPECs, which are treated as debt for Luxembourg tax purposes and equity for US tax purposes)? These are extremely common, and if these are caught by the Hallmark, there will be huge amounts of disclosures required. What about a profit participating loan, which may be debt in the borrower, but treated as equity for the lender? Neither of these situations seems to us to be what the hallmark is really aimed at, as there is no particular reason why the recipient should be treated as receiving interest income rather than income from an equity participation, and the anti-hybrid rules already exist to counteract any resulting mismatches.

65. It would be helpful to reflect in guidance that Hallmark B(3) does not apply to arrangements where an entity intends to claim treaty benefits if the relevant treaty contains a principal purpose test. The relevant tax authority will therefore have the opportunity to consider whether the
inclusion of the relevant entity is tax motivated and, if it concludes that it is, treaty relief will be denied. There would therefore be no tax advantage.

**Section 10: Hallmarks: Category C**

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

66. Clarification of what constitutes “profits” for the purposes of paragraph (d) of the definition of “associated enterprise” would be helpful. It would also be helpful to clarify in the Regulations that a person is not associated solely by virtue of providing debt finance to another person.

**Q12. Do you think the above approach [to Hallmark C(1)] 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.**

67. From previous discussions with HMRC, we were expecting to see clarification in the Regulations that transparent entities will not be treated as not resident in any jurisdiction. This is implied by the approach proposed in the Condoc (paragraph 10.7) of treating those taxed on payments made to such an entity as the “recipients”, but it would be helpful to have the point put beyond doubt. In order for this interpretation to operate in a proportionate manner we believe that it would be sensible for it to be provided that the test of transparency be made under the fiscal law of establishment of the relevant entity (so that it is not necessary to make a report on every arrangement involving a payment to an associated US LLC, for example). We believe that this would provide a workable basis for intermediaries to then apply the approach proposed in the guidance.

68. We were also expecting to see clarification that the residence definition would be designed to cover entities incorporated or centrally managed and controlled in jurisdictions with a territorial tax regime (such as Hong Kong) or no corporation tax system (such as the Cayman Islands), which may not have a domestic concept of residence. An approach similar to that in the CFC rules (s.371TA Taxation (International and Other Provisions) Act 2010) could be adopted. It is important that such entities are not considered not to have a jurisdiction of tax residence so that it is clear whether the main benefit test is relevant.

69. It would be helpful to have clarity as to the time at which it needs to be tested whether a recipient is resident in a non-cooperative jurisdiction, given the fluid nature of this list. For example, if a transaction was carried out when a jurisdiction was not on the list, but it subsequently is put on the list before an applicable deductible payment is made, does that make the transaction reportable? As a matter of practicality, we would suggest that the position should only have to be tested once, when the arrangement is initially entered into. Any other approach is likely to lead to significant inadvertent non-compliance.

**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?**

70. A key principle of structuring collective investment schemes is that investors should not be in a worse tax position through investing via such an arrangement than if they made the investment directly. This principle is recognised by many jurisdictions (including the UK), for example through the availability of tax transparent or tax advantaged structures for use as fund vehicles. It would be helpful if the guidance made clear that, of itself, designing a structure in accordance with this principle will not breach the main benefit test.
71. A further issue is that it may not be possible to identify whether a person is an intermediary in the context of transparent collective investment schemes. If a private equity fund invests, in the conventional manner, in acquiring a UK business by subscribing for loan notes, the lawyers advising on that acquisition will not know (and cannot find out) the tax position of individual investors, so cannot identify whether the transaction is a reportable cross border arrangement within hallmark C(1).

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

Q15. Do you agree that this hallmark [C(4)] 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?

72. We agree that this should refer to the amount treated as payable for tax purposes. Differences in accounting treatment – although potentially more visible – could be the result of all kinds of considerations.

73. It would be helpful to have an express statement in the guidance that there is no need for a party to an asset sale to investigate the tax treatment of the purchase price for its counterparty. Given that the transaction will necessarily be cross-border, it would be unduly onerous for it to have to do so.

74. This hallmark should only apply when the difference in the tax treatment between the two jurisdictions is an inherent part of the arrangement. It could frequently be the case that jurisdictions take different approaches to determining the consideration – or the allocation of consideration between assets – and this should not be something that automatically prompts a reporting obligation. If tax authorities wish to investigate the extent of these differences generally, this is something that they could do as between themselves and they do not need the involvement of individual taxpayers to do so.

Q16. Do you have any comments on the approach to hallmarks under Category C?

75. We consider that HMRC’s approach on Hallmark C(2) (i.e. that the hallmark does not apply if there is a corresponding taxation of profits in the same jurisdiction) needs to be reflected in the Regulations and not solely in guidance if it is to be relied on safely by intermediaries. We support HMRC’s interpretation as a proportionate reading of the relevant hallmark, but it is manifestly the case that the plain words of the hallmark could be interpreted more broadly.

Section 11: Hallmarks: Category D

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

76. We do not consider that the guidance at paragraphs 11.5 to 11.7 of the Condoc is internally consistent. We do not consider that hallmark D(1) can be an objective test and, at the same time, that a person who processes the move of funds from a jurisdiction where the CRS is in force to one where it is not requires further information to determine whether the hallmark applies. It is clear in paragraph 11.7 that the intention of the promoter is the critical factor that makes the arrangement reportable. We agree that this is the right approach.

77. We would welcome guidance to confirm that intermediaries are not expected to have extensive knowledge of the requirements of the CRS or equivalent regimes where this is not integral to the services that they provide. For example a corporate lawyer may document an arrangement which falls within Hallmark D(1)(e) without being aware of the CRS implications of the transaction.
78. In relation to D(2), it would be helpful to have further guidance as to when information is available to tax authorities. To take an example, an investor may wish to invest economically in an EU business, but does not want its interest to be publicly known (for example for reasons of personal security). It may therefore establish an SPV structure to hold the equity in the business, and itself make a profit participating loan to the business. Assuming that there is no relevant withholding tax in the structure on either dividends payable or on the loan, there will be no reason to inform the tax authority of the ownership structure. However, there is no reason or intention actively to conceal the ownership structure from the tax authority either. In these circumstances, how can an intermediary or the relevant taxpayer be satisfied that hallmark D(2) is not engaged? It would be helpful if there could be an explicit link in Hallmark D(2) to the intention for which the structure is established as this can be identified subjectively by the taxpayer and its advisers.

Section 12: Hallmarks: Category E

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?

79. The Category E hallmarks should be limited to apply to situations where there could be manipulation of the transfer pricing rules. It is clear from the heading to the Category E hallmarks that they are intended to apply in situations where there could be such manipulation of the transfer pricing rules. We consider that this is an interpretative principle that should apply to the hallmarks themselves.

80. In particular, absent such an approach, Hallmark E(3) is likely to cover many situations which have no transfer pricing relevance. It would seem, for example, to cover any cross-border liquidation, or cross-border merger, or simple changes to a corporate holding structure which are typically excluded from transfer pricing considerations. Many groups look to tidy up corporate group structures and eliminate redundant entities, and many of these transactions could potentially be caught by this hallmark unless interpreted in the light of the heading. In fact, this is virtually certain to happen when a group is closing its operations in a particular country, for example, and transferring commercial assets to a group company in another country where the business will be continued. The EBIT test will inevitably be satisfied in a wind-down situation. These transactions are not usually done for tax reasons and may not have tax advisers involved, and it is likely that there will be examples of inadvertent non-compliance and over-compliance in this area because of the uncertainty. By contrast, where a transaction is being carried out in order to affect a group’s transfer pricing position, it is highly likely that there will be tax advisers involved who would appreciate that the transaction is reportable.

81. We would note that there is no definition of “intragroup” in Hallmark E(3). This needs to be clarified.

82. It would be helpful if additional guidance could be provided to the meaning of “unilateral safe harbour rules” in Hallmark E(1) including a list of unilateral safe harbour territories. For example, are thin capitalisation debt/equity “safe harbours” caught by this? If so, the establishment of almost any Luxembourg holding company by non-resident shareholders will potentially be caught.

Section 13: Penalties

Q20. Do you have any suggestions for how the penalty regime could be improved?
83. For the reasons given below, we recommend that daily penalties should be removed, the maximum penalty should be decreased, mitigating features should be added to the Regulations to enable proportionate penalties to be apportioned, a defence to penalties should be introduced where an intermediary has taken reasonable steps to ensure compliance, and Regulation 20(2)(c) should be removed so as not to discourage taxpayers from seeking advice about their obligations.

84. Given the difficulties of interpretation in the rules, and the lack of intuitiveness of the application of the hallmarks (especially but not exclusively for non-tax specialists), it is inevitable that there will be situations where the rules are inadvertently overlooked. Given this, and the length of time it may take for the need for disclosure to be identified, we do not consider that daily penalties are appropriate (at least before the point at which the obligation to disclose has been notified to the intermediary by HMRC). We note that the penalties (and in particular the maximum penalty) are amongst the highest of any proposed amongst the member states.

85. While we understand that the penalty regime is based on experience under DOTAS, we do not consider this to be an appropriate comparator. DOTAS is concerned with transactions where there is a tax avoidance purpose, and the hallmarks are defined much more narrowly. There are also carve-outs from the promoter definition for persons not providing tax advice, and for those whose involvement with the arrangements is such that any of the disclosable information is covered by LPP (see the Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004). The universe of affected persons is much more narrowly targeted and in those circumstances it may be appropriate to impose stricter penalties. By contrast, DAC 6 is of much wider application, in circumstances, which might not even have tax relevance. We do not think that penalties of the scale proposed are appropriate given that the DOTAS regime remains available to HMRC. We believe that daily penalties should be removed, and the maximum penalty decreased.

86. Given the difficulty for taxpayers in relying on a reasonable excuse defence in all but exceptional circumstances, we would urge the government to include in regulation 15(4) mitigating features to enable the tribunal to determine what a proportionate penalty would be. The DOTAS guidance (at p176) contains a list of factors that would form a useful starting point for these features.

87. We would strongly suggest that there should be a defence to a penalty where the intermediary has taken reasonable steps to ensure compliance with their disclosure obligations. We would point to the defence to the corporate criminal offence in the Finance Act 2017 as a possible model for this, which takes into account evidence of the top-level commitment by the organisation to compliance, the introduction of appropriate policies, the provision of training, and ongoing monitoring of procedures, while recognising the need to apply a proportionate approach. We consider that this would comply with the government’s obligations in Article 25a.

88. We consider that the provisions of Regulation 20(2)(c) should be removed. These qualify the usual position that a person is entitled to rely on legal advice to avoid a penalty. This is the usual position for good reason – it is in the interests of taxpayers and tax authorities as it encourages taxpayers to seek advice about their obligations, which is generally likely to improve rather than reduce compliance. Equivalent provisions have been applied only in the context of the rules on “monitored promoters”, and we do not consider that they should be extended more generally.

89. It is disproportionate to require a taxpayer to obtain a second opinion in respect of whether a transaction is reportable when the best placed adviser is likely to be the intermediary itself, unless there is material to suggest that the intermediary is not likely to give unbiased advice. In the context of regulated intermediaries such as lawyers there are rules of professional conduct that require the intermediary to give unbiased advice in the best interests of the client.
90. If Regulation 20(2)(c) is not removed, then in relation to paragraph (ii), it should be made clear that this only applies if the advice was not based on a full and accurate description of the facts available to the person seeking the legal advice. Paragraph (iii) should only apply if the person relying on the advice knew or should reasonably have known that the conclusions were unreasonable. In the context of DAC 6 where there are significant uncertainties in interpretation, it may be difficult for the person relying on the advice to decide whether the conclusions are reasonable or not, and in those circumstances they should be able to rely on that advice.

Section 14: Commencement

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

91. Penalties for transactions carried out between June 2018 and July 2020, when there is no real question of deterrence, should be reduced and applied appropriately given the context, so as not to result in unduly harsh results. Anything else would be highly disruptive to business with little overall benefit for the tax authority.

92. That context includes the complexity and lack of certainty that there has been in connection with the scope and application of DAC 6, which is ongoing given the lack of final regulations and HMRC guidance. It has not been clear how it will be interpreted and implemented in the UK (or elsewhere in the EU) and whether a number of issues that have been raised with HMRC over the course of working group meetings will be resolved in a proportionate way. Adequate lead in time is needed to familiarise and educate members of the profession as to their obligations after they are reasonably settled and clear. As they become clearer, there will be a huge number of transactions to review undertaken by some of our members.

93. It will be virtually impossible for some firms to go through their backlog of transactions to identify reliably all potentially hallmarked transactions. The cost in terms of fee-earner time of familiarisation with these rules is already very considerable, and to conduct a full trawl through prior transactions would be yet more costly; we do not consider that the extent of these costs have been adequately identified in the impact assessment.

Section 15: 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?

94. As with many other initiatives which are aimed at corporate transactions, the DAC 6 rules potentially have a significant impact on private client practice. The establishment of an offshore trust by a UK resident non-domiciliary is, on the face of it, a cross border arrangement. It is unclear how the Hallmarks will apply in this situation, since there may well be an argument that a tax advantage of some sort arises in doing this. One might argue that the mere setting up of a trust is not inconsistent with the principles and policy objectives of the relevant provisions, but what if there are additional transactions? Similarly, if a US individual sets up a trust in Delaware or has accounts there, are they within Hallmark D? HMRC’s guidance on inheritance tax and the DOTAS rules did not provide assistance except on the very simplest and obviously unobjectionable arrangements. Ideally the Regulations themselves would provide clarity in relation to the application of the requirements to private client practices, as relying on guidance creates compliance risks. Nonetheless, clear guidance would be helpful.

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