

# EU mandatory disclosure rules

## UK draft regulations published

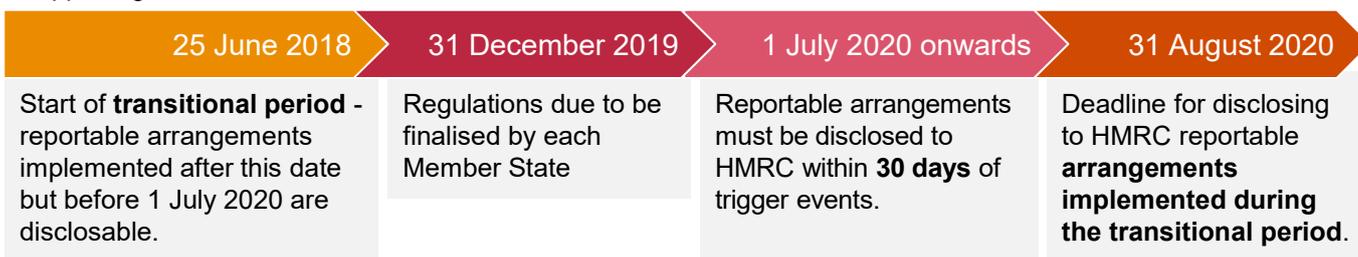
On 22 July 2019, HMRC published a consultation document and draft regulations to implement the EU Directive on the mandatory disclosure and exchange of cross-border tax arrangements, also known as DAC6, which was published last year. HMRC has said that it expects to introduce these regulations by 31 December 2019 regardless of what happens on Brexit.

### Summary

The draft UK regulations follow DAC6 closely, and require **disclosure to HMRC of cross-border arrangements** entered into by taxpayers which fall within certain **hallmarks**. These hallmarks are very broadly-defined and **many commercial transactions will be within the scope of the rules**. The disclosures will be shared between the tax authorities of all EU Member States quarterly.

The consultation document sets out the approach HMRC intends to take in interpreting DAC6 and elaborates on how the rules will operate in practice. HMRC will provide further guidance alongside the finalised regulations.

The regulations enter into force on **1 July 2020**, but **transitional rules** mean that they can apply to transactions happening now:



The **obligation to disclose** to HMRC falls on **UK-based intermediaries** (unless or to the extent that legal professional privilege applies). Where there are no UK-based intermediaries with a reporting obligation, the obligation to disclose may fall to UK-based **relevant taxpayers**. There are **penalties for non-compliance** with the rules.

The main points to note from the consultation document and draft regulations are set out in further detail below.

### Scope

In line with DAC6, the draft regulations apply to **cross-border arrangements** concerning **at least one EU Member State** (purely domestic arrangements are excluded). HMRC is of the view that in order for an arrangement to 'concern' multiple jurisdictions, those jurisdictions must be of some material relevance to the arrangement.

### Hallmarks

Cross-border arrangements are reportable if they fall within one or more of the hallmarks. We have summarised the hallmarks and HMRC's clarifications on them in the Appendix. Some hallmarks only apply where the "**main benefit test**" is met - i.e. where a tax advantage is one of the main benefits which someone could expect to derive from the arrangement. However others have no such requirement and so are potentially much broader in application.

## HMRC clarifications

HMRC has clarified their interpretation in relation to a number of hallmarks (please see Appendix for details) and have also defined “**tax advantage**” in a manner which may reduce the number of arrangements disclosable under hallmarks subject to the main benefit test. With the caveat that these are subject to consultation and so could change in final regulations and guidance, the key points are:

- HMRC have defined “**tax advantage**” so as to limit this to situations where the relevant tax benefit is not consistent with the principles on which the tax provisions are based or the policy

objectives of such provisions. Accordingly, when undertaking a main benefit test analysis, this would mean that any tax benefits which are consistent with the principles and policy objectives underlying the relevant tax law can be excluded.

- HMRC have defined “**tax advantage**” to cover relevant tax benefits in any territory worldwide and not, for example, just UK or EU taxes. The types of taxes in scope are those covered by the DAC generally - so direct taxes are in scope, but not indirect taxes, duties, etc.

## Who needs to make the disclosure?

All **UK-based intermediaries** involved in the reportable arrangement are required to report specified information in their knowledge, possession or control about the arrangement to HMRC, unless they have the relevant (UK or non-UK) arrangement number obtained by another intermediary **and** proof that the required information has already been filed.

An intermediary is anyone who helps to design, market or implement a reportable cross-border arrangement (**promoter**), or who provides aid, assistance or advice in relation to the design, marketing, organisation or implementation of a reportable cross-border arrangement (**service provider**). However, a service provider will not be an intermediary if they did not know, or could not reasonably be expected to know, that they were involved in a reportable arrangement.

Where information relating to an arrangement is covered by **legal professional privilege** (LPP), the intermediary is not required to report that information to HMRC, but in HMRC’s view may still need to report other information that is not legally privileged (e.g. factual information). Where an

intermediary does not report information to HMRC because of LPP, the reporting obligation in relation to that information may pass to other UK-based intermediaries or, if there are none, to the taxpayer (see below).

If no UK-based intermediaries are required to report the transaction, the obligation to report to HMRC passes to UK-based **relevant taxpayers**, unless they or another relevant taxpayer have already reported in another country. A relevant taxpayer is any person to whom a reportable arrangement is made available for implementation, or who is ready to implement or has implemented the first step of a reportable arrangement.

It’s important to remember that intermediaries based in other EU Member States may have an obligation to report to their local tax authorities under their local implementation of DAC6. Similarly, UK-based intermediaries and taxpayers may also have reporting obligations in other EU Member States (e.g. Poland).

## What information must be disclosed?

The information which must be disclosed includes:

- Names, place and date of birth (for individuals), residence and taxpayer identification number for all relevant taxpayers
- Details of relevant associated persons
- A description of the arrangements
- The date on which the first step was, or will be, made available
- The value of the transaction

In addition to the initial disclosure under the rules, relevant taxpayers will be required to disclose details in their tax returns for each period during which the arrangement has a tax effect.

The disclosure will be made electronically. No details are given of the reporting system to be used, although it is expected to be in XML format.

## Penalties for non-compliance

There are **financial penalties** of up to £600 per day for failure to make a report, or £5000 for other failures to comply. Further penalties of up to £600 per day may be imposed if the failure continues after the initial penalty was imposed. Penalties will not be charged where a person has a reasonable excuse for failure to comply, including situations where the first step of implementation pre-dates 22 July 2019 (date of publication of the consultation document and draft regulations), and the failure was due to a lack of clarity around the obligations or interpretation of the rules.

## Taxpayers' approach to compliance

Taxpayers will need a strategy for managing their compliance with the rules, both in the UK and in other EU territories in which they operate. We recommend a **systematic five step approach** to identify how the rules might impact transactions and what processes there should be in place to identify, analyse and report relevant arrangements.

1 Risk and impact assessment	2 Governance framework	3 Education and training	4 Assessment, recording and reporting	5 Testing and compliance
<b>Suggested approach</b>				
Understand the type of transactions which could be in scope. Identify and risk assess which parts of the business are likely to undertake reportable transactions.	Ensure that all your advisers are aware of their responsibilities. Understand what is being reported about your business throughout the EU.	Educate senior management on the new rules. Develop training for business units/teams that need to identify reportable transactions.	Develop an approach to assess, record and report arrangements within deadlines.	Demonstrate good ongoing controls and procedures to ensure compliance.
<b>How can PwC help?</b>				
Assessment of key risk areas and readiness to comply.	Development of a governance framework to identify and manage risks, define roles and responsibilities, and monitor compliance.	Writing and delivery of training materials. Our <b>Learning Lab</b> app has a module on these rules which can be tailored to your specific requirements.	<b>DAC6 Smart Reporting</b> is a PwC developed online reporting tool that provides a central digital record of disclosable transactions with data visualisation.	Development of testing plans and key control analysis. Specialist support for internal audit or external review.

PwC can also help you to comply by analysing the impact of arrangements which you have implemented, especially where there is no UK-based intermediary. Please look out for our **DAC6 Compare Tool** which will enable you to compare the way the Directive is being implemented in each of the Member States.

## Further information

For further information, see [the EU MDR page on PwC Suite](#) or speak to Andy Olymbios, Rob Gooding, Kate Cornelius, or your usual PwC contact.

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## Appendix



### The hallmarks

Category A	General hallmarks linked to the main benefit test
<b>A1. An arrangement where participation is subject to conditions of confidentiality</b> <i>HMRC has not made any significant comments on this hallmark.</i>	This is subject to main benefit test.
<b>A2. An arrangement where the intermediary is entitled to receive remuneration related to a tax advantage</b> <i>HMRC has not made any significant comments on this hallmark.</i>	This is subject to main benefit test.
<b>A3. An arrangement that has substantially standardised documentation/structure</b> <i>HMRC has not made any significant comments on this hallmark.</i>	This is subject to main benefit test.
Category B	Specific hallmarks linked to the main benefit test
<b>B1. An arrangement which involves loss buying</b> <i>HMRC has not made any significant comments on this hallmark.</i>	This is subject to main benefit test.
<b>B2. An arrangement which has the effect of converting taxable income into capital gains or exempt/lower-taxed income</b> <i>HMRC has not made any significant comments on this hallmark.</i>	This is subject to main benefit test.
<b>B3. An arrangement which includes circular transactions</b> <i>HMRC has not made any significant comments on this hallmark.</i>	This is subject to main benefit test.

## The hallmarks.....continued

Category C	Specific hallmarks related to cross-border transactions
<p>C1. An arrangements that involves deductible cross-border payments between two or more associated enterprises where:</p>	N/A
<p><b>(a) the recipient is not resident for tax purposes in any jurisdiction</b></p> <p><i>HMRC has clarified that the recipient will generally be the person who is taxable on the receipt. In the case of transparent entities such as general partnerships, the partners will be treated as the recipients for the purposes of this hallmark.</i></p>	Not subject to main benefit test
<p><b>(b)(i) the recipient is tax resident in a jurisdiction whose corporate tax rate is zero or almost zero</b></p> <p><i>HMRC has clarified that 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.</i></p>	This is subject to main benefit test.
<p><b>(b)(ii) the recipient is tax resident in a jurisdiction which is included in an EU or OECD list of uncooperative tax jurisdictions</b></p> <p><i>HMRC has clarified that the list of non-cooperative jurisdictions should be examined on the date that the reporting obligation arises. If the list subsequently changes, there is no need to re-evaluate whether the hallmark is met.</i></p>	Not subject to main benefit test
<p><b>(c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is tax resident</b></p> <p><i>HMRC has clarified that when considering whether a receipt is exempt from tax, it is the nature of the payments, rather than the status of the recipient, that must be exempt. Thus exempt bodies such as pension funds will not automatically be caught.</i></p>	This is subject to main benefit test.
<p><b>(d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is tax resident</b></p> <p><i>HMRC has clarified that there is no definitive list of what constitutes a 'preferential tax regime' but it could include patent box regimes or special economic zones which provide certain tax incentives.</i></p>	This is subject to main benefit test.
<p><b>C2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.</b></p> <p><i>HMRC has clarified that when considering depreciation in more than one country, Arrangements should not be reportable if there is corresponding taxation of profits from the asset in the same jurisdiction.</i></p>	Not subject to main benefit test
<p><b>C3. Double tax relief in respect of the same item is claimed in more than one jurisdiction</b></p> <p><i>HMRC has not made any significant comments on this hallmark.</i></p>	Not subject to main benefit test
<p><b>C4. The arrangement includes a transfer of assets where there is a material difference in the amount being treated as payable in consideration for the assets in the jurisdictions involved.</b></p> <p><i>HMRC has clarified that the amount 'treated as payable in consideration' for the transfer of assets is the amount treated as payable for tax purposes.</i></p>	Not subject to main benefit test

## The hallmarks.....continued

Category D	Specific hallmarks concerning automatic exchange of information and beneficial ownership	
<p><b>D1. An arrangement which may have the effect of undermining reporting obligations under the Common Reporting Standard (CRS)</b></p> <p><i>HMRC has clarified that the test is an objective test. It doesn't matter whether the arrangement is intended to undermine the CRS, only whether that may be the effect of it.</i></p>		Not subject to main benefit test
<p><b>D2. An arrangement that is structured such that the beneficial owners cannot be identified</b></p> <p><i>HMRC has clarified that the test 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 publicly available, although where beneficial owners are listed on a public register that will be sufficient for the hallmark not to be met.</i></p>		Not subject to main benefit test
Category E	Specific hallmarks concerning transfer pricing	
<p><b>E1. An arrangement which involves the use of unilateral safe harbour rules</b></p> <p><i>The regulations exclude cross-border arrangements if the relevant taxpayer and its associated group companies are dormant or small or medium enterprises (SMEs) which are exempt from the basic UK transfer pricing rules. This removes a concern that the UK's SME transfer pricing exemption is a "unilateral safe harbour" thereby satisfying hallmark E1. Please note that such an exclusion may not apply in other EU Member States and hence groups benefiting from the UK's SME transfer pricing exemption may have to disclose relevant arrangements in other EU Member States.</i></p> <p><i>HMRC have also clarified that advanced pricing agreements (APAs) are not unilateral safe harbours and so are not within this hallmark.</i></p>		Not subject to main benefit test
<p><b>E2. An arrangement involving the transfer of hard-to-value intangibles</b></p> <p><i>HMRC has not made any significant comments on this hallmark.</i></p>		Not subject to main benefit test
<p><b>E3. An arrangement involving an intragroup cross-border transfer of functions, risks or assets which result in the EBIT of the transferor falling to less than 50% of what it would have been if the transfer had not been made.</b></p> <p><i>The intermediary or relevant taxpayer must consider whether the transferor's EBIT will be less than 50% of what it would have been in the absence of the transfer, from the point of view of a hypothetical informed observer. If, after the fact, it becomes apparent that the transferor's EBIT has actually fallen, there will not be a failure to comply with the Regulations if the projections used to reach a decision not to report were what a hypothetical informed observer would reasonably have expected.</i></p>		Not subject to main benefit test

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