5 Stone Buildings

DAC 6

Amanda Hardy QC
Oliver Marre

13 July 2020

Tel: 0207 242 6201 www.5sblaw.com

5 Stone Buildings

What is DAC 6?

EU reporting rules under the Directive on Administrative Cooperation.

In short, the rules require the reporting of some historic cross-boarder transactions and many future ones.

5 Stone Buildings

When did it come into force?

The Directive was amended in 2018. The amending directive (2018/822) came into force on 25 June 2018.

The rules are applicable from 1 July 2020 but apply retrospective to transactions entered into since 25 June 2018.

When did it come into force?

Reporting initially required by 31 August 2020.

> Historical footnote: the UK was late to transpose into national law because parliament was dissolved in December 2019.

COVID-19 has resulted in delays to these reporting dates.

When must reports be made?

IEIM800000

DAC 6 Implementation and Reporting and Covid 19

HMRC recognises the challenges taxpayers and intermediaries face in implementing DAC6 because of Covid 19 and the unprecedented measures introduced to tackle it. In particular, we understand the various challenges in developing and introducing the necessary IT systems, processes and procedures, training staff and identifying reportable arrangements for periods back to June 2018.

When must reports be made?

IEIM800000

… Where reports are made late, no penalties are due where there is a reasonable excuse for the delay and reports are made without unreasonable delay once that excuse has ceased.

But see new published deadlines.

When must reports be made?

IEIM800000

Because of the Covid 19 situation HMRC accepts that any taxpayer or intermediary who makes a report late because of these difficulties will have a reasonable excuse (and so will not be liable to any penalties for that delay) provided the report is made without unreasonable delay after those difficulties are resolved.

When must reports be made?

New regs

HMRC now say (24 June):
“The Government is deferring the first reporting deadlines under the International Tax Enforcement (Disclosable Arrangements) Regulations 2020 by six months.
This will provide taxpayers and intermediaries dealing with the impacts of the covid-19 pandemic with additional time to ensure that they can comply with their obligations.”

When must reports be made?

"For arrangements where the first step in the implementation took place between 25 June 2018 and 30 June 2020, reports must be made by 28 February 2021, instead of by 31 August.

For arrangements which were made available for implementation, or which were ready for implementation, or where the first step in the implementation took place between 1 July 2020, and 31 December 2020, reports must be made within the period of 30 days beginning on 1 January 2021."

When must reports be made?

"For arrangements in respect of which a UK intermediary provided aid, assistance or advice between 1 July 2020 and 31 December 2020, reports must be made within the period of 30 days beginning on 1 January 2021.

Arrangements which become reportable on or after 1 January 2021 must be reported as normal.
Where periodic reports are required in relation to marketable arrangements, the first such report must be made by 30 April 2021."

Systems delays

The Government will amend the Regulations to give effect to this deferral. The amended Regulations may not be in force by 1 July 2020, but no action will be taken for non-reporting during the period between 1 July and the date the amended Regulations come into force.

The IT systems for reporting will be available ahead of the revised reporting deadlines.

This follows the European Commission's proposal to extend the reporting deadline, which was agreed in the European Parliament on 19 June 2020.

Arrangements with multiple steps

HMRC's view is that "arrangements" are not to be broken down into steps but to be viewed as composite.

This is relevant to when the arrangements were entered into.

What is reportable?

“Reportable cross-border arrangements” must be disclosed.

Rather like domestic DOTAS, this requires:

(a) establishing whether there is a cross-border arrangement and

(b) determining whether any such arrangement falls within one of five hallmarks specified in Annex 4 of the Directive.

5 Stone Buildings

What is a cross-border arrangement?

Any arrangement which “concerns” an EU member state and either another EU member state or a third country is a “cross-border arrangement”.

A third country is a country to which relevant EU treaty provisions do not apply.

So, wholly internal matters do not fall to be reported.

What is wholly internal?

The question of what is wholly internal has been discussed in cases (re the UK) in relation to the Isle of Man, the Channel Islands and Gibraltar.

- *Department of Health and Social Security v Barr and Montrose Holdings* (Case C-355/89): IOM not wholly internal.
- *Routier v HMRC* [2019] UKSC 43: Jersey not wholly internal.
- *R (The Gibraltar Betting and Gaming Association Ltd) v Revenue and Customs Comrs (Government of Gibraltar intervening)* Case C-591/15: wholly internal. (But cf. the position of non-UK nationals: *Fisher*).

5 Stone Buildings

Hallmarks

Category A to Category E.

Scope for member states to adopt wider measures.

Hallmark Categories A and B both involve a “main benefit” test.

Relevant cases on TOAA (*Fisher*) and TIS (*Allam*) recently.

5 Stone Buildings

Category A

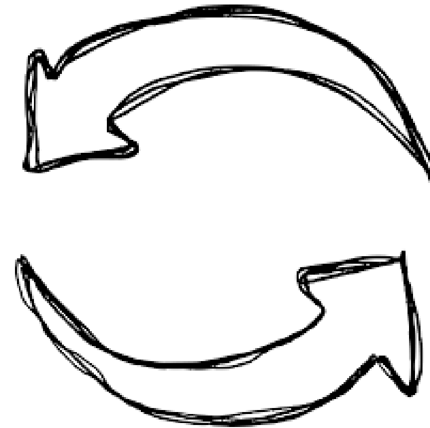
A1 – Use of confidentiality clauses.

A2 – Remuneration of an intermediary related to tax advantage (either in quantum or as a ‘success fee’).

A3 – Substantially standardized documentation and structures.

Cf. DOTAS. These are essentially aimed at arrangements which have characteristics of tax avoidance schemes.

Category B



B1 – Loss buying.

B2 – Conversion of Income to Capital - IEIM643020 states that this would include conversion from employment income into dividend income.

B3 – Circular Transactions subject to a defence when transactions have a 'primary commercial function'. Primary here is akin to a main purpose.

Category C

C1 – deductible cross-border payments between associated enterprises if any of conditions (a) to (d) is in point.

IEIM644030 notes that the recipient of a payment for these purposes is the person who is taxable on the receipt. In the case of transparent entities such as partnerships, that will mean looking to the partners to determine whether this hallmark applies.

Category C

C1(a) - The recipient is not tax resident anywhere. IEIM644040 clarifies that a jurisdiction that does not have a concept of residency within their tax regime would not be treated as an entity without a tax residence (i.e. Cayman Islands).

Category C

C1(b)(i) – The recipient is resident in a jurisdiction that imposes no CT, CT at 0% or almost 0%.

C1(b)(ii) – The recipient is resident in a jurisdiction included on a 'black list'. This brings Cayman back in! IEIM644010 clarifies that for retrospective reporting a country must be both on the EU blacklist at the time when the first step of the arrangement takes place and on 1 July 2020

Category C

C2 – Deductions for depreciation are claimed in more than one jurisdiction. IEIM644060 suggests that HMRC does not consider this hallmark to apply where there is a corresponding taxation of profits from the asset in the same jurisdiction.

C3 – Relief from Double Taxation is claimed in more than one jurisdiction.

Category C

C4 – arrangement including a transfer of assets where there is a material difference in the amount of consideration treated as payable in the different jurisdictions.

IEIM644090 states that where there is a difference in value of assets as a result of the tax law, e.g. transfer from the UK exempt under the substantial shareholding exemption, this is not caught.

Category D

D1 - Arrangements which circumvent EU legislation or agreements on the automatic exchange of information, including agreements with third countries, and that have the effect of avoiding the reporting of income to the state of residence of the taxpayer.

D2 – Arrangements which involve non-transparent ownership structures with no substantive economic activity established in a jurisdiction different from the residence of the beneficial owner of the underlying assets.

Category E

E1 - An arrangement or series of arrangements which does not conform with the arm's length principle for transfer pricing or with the OECD transfer pricing guidelines, including the allocation of profit between different members of the same corporate group.

E2 - An arrangement or series of arrangements which falls within the scope of the automatic exchange of information on advance cross-border rulings but which is not reported or exchanged.

5 Stone Buildings

Who reports?

Intermediaries – principal obligation.

- Promoters who design and implement the arrangements or

- Service providers who provide assistance or advice in relation to the arrangements. There is a ‘knowledge’ defence for service providers

So many professionals involved in establishing offshore structures for UK clients are ‘intermediaries’ for these purposes.

Who reports?

In the UK, intermediaries if they are

resident for tax purposes in the UK/ have a permanent establishment in the UK, through which they provide the services in respect of the arrangement;

incorporated in the UK/governed by the laws of the UK;

registered with a professional association relating to legal, taxation or consultancy services in the UK.

5 Stone Buildings

Who reports?

To be reportable by an intermediary, information must be in its knowledge, possession or control.

Who reports?

Otherwise, “relevant taxpayers”

The person to whom a reportable cross-border arrangement is made available must report an arrangement to HMRC if there is no intermediary who is required to report the required information in relation to the arrangement.

(Including where the intermediary does not have to because of privilege.)

Who reports?

Duplicate reporting?

5 Stone Buildings

When to report

In the first year in which the arrangements subsist.

In future years where there is a direct tax advantage.

It is expected that there will be a standard template.

5 Stone Buildings

Difficulties of application

The standard template!

What can an intermediary "reasonably be expected to know"?

What due diligence is expected?

How do the provisions apply to the asset management industry with overseas funds and overseas investors?

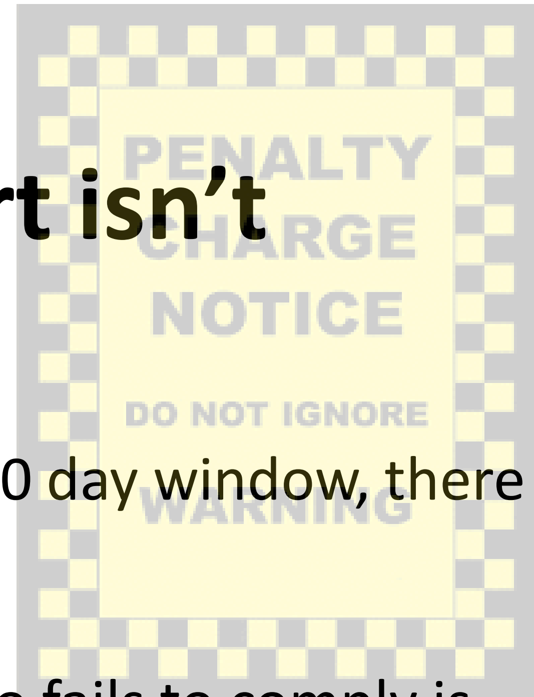
What is opaque as regards the beneficial owners?

What happens when a report is made?

HMRC issue an ARN (arrangement reference number). They say: "immediately upon receipt of a valid report."

This must then be passed on to other intermediaries and relevant taxpayers.

What happens if a report isn't made?



Subject to a reasonable excuse and the 30 day window, there are penalties for non-compliance.

An intermediary or relevant taxpayer who fails to comply is liable to a penalty not exceeding £600 per day in most cases.

These can be imposed by HMRC (subject to a right of appeal under the TMA 1970) or on application by HMRC to the FTT (with the target as a party to the proceedings).

What happens if a report isn't made?

Reliance on legal advice is a defence against a penalty unless

- the advice was given or procured by a person who is an intermediary
- the advice was not based on a full and accurate description of the facts, or
- the conclusions in the advice that the person relied upon were unreasonable.

5 Stone Buildings

Disclaimer

- DISCLAIMER: Neither these notes nor the talk based on them nor anything said in the discussion session constitute legal advice. They are simply an expression of the speaker's views, put forward for consideration and discussion. No action should be taken or refrained from in reliance on them but independent professional advice should be taken in every case. Neither the speaker nor 5 Stone Buildings accepts any legal responsibility for them.