



Response from ICAS

International Tax Enforcement: disclosable arrangements and The Draft International Tax Enforcement (Disclosable Arrangements) Regulations 2019

10 October 2019

About ICAS

1. The following submission has been prepared by the ICAS Tax Board. The Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants working across the UK and beyond, and it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 22,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General comments

2. ICAS welcomes the opportunity to respond to the consultation, International Tax Enforcement: disclosable arrangements, issued by HMRC on 22 July 2019 – and to comment on the related draft regulations. We appreciated the opportunity to discuss the consultation and draft regulations with HMRC at the meeting of the MDR Working Group on 22 August. The earlier meetings of the MDR Working Group were also helpful in providing opportunities to discuss issues with HMRC.
3. We envisage that some problems may arise because different member states adopt different interpretations of the Directive (or deliberately go beyond the Directive). Additionally, an arrangement may not be reportable in the UK under the UK regulations, because it is in line with UK policy intent, but could be reportable in another jurisdiction where the position is less clear. This could lead to uncertainty about where to report and about whether jurisdictions will recognise a report filed elsewhere (in line with the order of priority for filing) as satisfying the requirements. HMRC is clearly not in a position to solve such problems unilaterally but could usefully raise any difficulties at the meetings it holds with the EU/other jurisdictions.

Specific questions

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?

4. Paragraph 2.4 of the consultation notes that 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. The example given in paragraph 2.5 of the consultation document seems very clear cut. It would be helpful if the guidance could include examples where the position is less obvious.
5. Expanding on the permanent establishment example in paragraph 2.5, it would be useful to understand HMRC's view of arrangements which affect two domestic regimes, where they are part of a wider arrangement, even though the cross border relationship has no material relevance to the arrangement.
6. For example, if shares of two companies located in territory A were to be moved underneath a common UK parent company, and it was then decided to merge the businesses of the two companies in territory A with only one company surviving, would the fact that the transfer of shares took place in one territory prior to the merger in another territory result in the arrangement “concerning” multiple jurisdictions? Does the analysis change if both steps can be undertaken without creating a tax liability as a result of domestic reorganisation rules?
7. It is also unclear how HMRC would interpret “concerning multiple jurisdictions” in the context of collective investment vehicles, so it would be helpful for HMRC to include examples in the guidance to provide some clarity; we suggest the following:
8. Mainstream widely held funds have many investors who wish to pool their money and diversify risk. The intentions of the investors are primarily driven by their risk appetite and investment strategy, rather than by tax considerations. The structure of the fund in this context is not tailored to any one particular investor. We would not therefore expect there to be a cross border arrangement (meaning that all the hallmarks would need to be considered), merely because the mainstream fund has a foreign investor, regardless of whether that foreign investor obtained some tax benefit through their investment.
9. It would also not seem reasonable for a UK investor who hold their interests in an overseas fund (for example, a Luxembourg SICAV fund) through a pension plan, to be regarded as automatically giving rise to a cross border arrangement. Although different jurisdictions are present in the arrangement, they

are of no relevance to any tax advantage achieved by the UK investor. The tax advantage arises to the UK investor because they are holding their investments in a pension plan – and the advantage would have arisen regardless of whether the fund being invested in was a UK fund or an overseas fund. We believe that in order for an arrangement to “concern multiple jurisdictions” the tax advantage should be linked to the cross border relationship.

Intermediaries

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

Employees

10. We support the approach to employees set out in paragraph 3.10 of the consultation document; where an individual is acting as an employee, we agree that the employer should be treated as the intermediary and subject to the requirement to report. However, draft Regulation 13 does not go far enough in implementing this approach.
11. Regulation 13 only excludes an employee from being an intermediary where their employer is an intermediary (or relevant taxpayer). This will present problems for individuals employed by some non-EU companies or firms. If the employer does not meet any of the four criteria (set out in Article 1 para 21 of the Directive) ie it is not resident in/does not have a PE in a Member State, is not incorporated in, or governed by the laws of a Member State and is not registered with a relevant professional association in a Member State, it will not be an intermediary.
12. An employee of a non-EU employer will not therefore be covered by Regulation 13 and could be treated as an intermediary solely because they are a member of a UK professional body such as ICAS. We do not consider that this is appropriate. Imposing a reporting requirement on the employee in these circumstances would cause considerable practical and legal difficulties – they would be disclosing information belonging to their employer and their employer’s clients. It is also difficult to see how this could be enforced where the employee is non-UK resident and not a UK citizen (ie their only connection is membership of a professional body).
13. Regulation 13 should be extended so that it excludes all employees from reporting. Where the employer is a non-EU intermediary the reporting requirement should fall on the relevant taxpayer – which would presumably be the case anyway where a non-EU intermediary does not have any employees who belong to EU professional bodies.

Subsequently becoming aware of arrangements

14. We also agree with the comments in paragraph 3.9 of the consultation which confirm that the definition of an intermediary does not include a service provider who subsequently becomes aware of an arrangement; the example given relates to an auditor. It would be useful to have examples from other sectors to illustrate HMRC’s approach. For example, a wealth manager might advise their client to invest in a mainstream widely held fund as part of a tax efficient arrangement. The fund would be set up and operated by a fund manager. The wealth manager with full knowledge of the arrangement would be an intermediary with a requirement to report (if the arrangement falls within a Hallmark). However, if the fund manager has no knowledge of the wealth manager’s or investor’s intentions at the time and only becomes aware of them at a later date, we don’t consider that the fund manager should be treated as an intermediary, merely because they operate the fund. Would HMRC agree?

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

15. We have not identified any additional types of intermediary who should be caught.

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

16. As set out in our response to Question 2, we do not consider that it is right or practicable to treat employees of non-EU intermediaries as intermediaries.

17. Paragraph 3.4 of the consultation document gives an example of a bank providing finance to illustrate the defence for service providers that they could not reasonably be expected to know that they were part of a reportable arrangement. Additional detailed guidance from HMRC on the meaning of “reasonably expected to know” in the context of service providers would be useful.
18. It is likely that an investment manager would be an intermediary if they created a fund structure which included a reportable arrangement; they could reasonably be expected to know that the arrangement was reportable and the information relating to it would be within their knowledge, possession or control.
19. However, in some circumstances an investment manager could be acting as a service provider to a client by offering investment management advice under a limited mandate. They would have no involvement in, or knowledge of, the client’s tax affairs, nor would they necessarily understand the detailed structure of the client.
20. In this scenario we cannot see that the investment manager could reasonably be expected to know whether there was any reportable arrangement – provided they had carried out normal due diligence (as set out in paragraph 3.6 of the consultation). Could HMRC confirm that this is its understanding? Could HMRC also advise how it would expect the service provider to demonstrate that they could not reasonably have been expected to know. What evidence could be offered to prove a negative?

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

21. There are no questions in section 4 (Relevant Taxpayer) of the consultation. However, paragraphs 4.5 and 4.6 raise several questions for relevant taxpayers (and intermediaries), which need clarifying.
22. Paragraph 4.5 of the consultation appears to suggest that if an intermediary emails prospective clients about a reportable arrangement (where the “essence of the arrangement” is identifiable) there could be a requirement for the intermediary to report, even where a prospective client does not respond, or immediately rejects the approach.
23. It seems completely inappropriate that the prospective client should be the subject of a report in these circumstances – where the email may have been sent on a speculative basis and is unsolicited and unwanted. Under the rules as currently proposed the prospective client would apparently not even have the right to see the report which had been made – we discuss access to reports further in our response to Question 7.
24. Paragraph 4.6 of the consultation notes that the relevant taxpayer would only have a requirement to report where there is no intermediary who is required to do so – presumably this would include cases where the intermediary is non-EU (and hence not an intermediary for the purposes of the directive). In the scenario outlined above, where the relevant taxpayer has rejected (or not even replied to) an unsolicited speculative approach it would be unreasonable for them to have any reporting obligation – and many taxpayers would be unlikely to realise that such an obligation could exist. HMRC should clarify the intended meaning of paragraphs 4.5 and 4.6 and confirm that a report would not be required in these circumstances.

Relevant Taxpayer

25. As noted in our response to Question 5 there are no questions in section 4 of the consultation but there are several points relating to Relevant Taxpayers which require clarification.
26. In the case of an in-house arrangement implemented by a multinational group of companies (MNE), we understand that HMRC would not regard one company within the group as acting as an intermediary for another company in the group (or potentially more than one). From the perspective of the group there would therefore be a requirement to make one report as the relevant taxpayer. Could HMRC confirm that this is its view? There might of course be service providers involved in the arrangement (banks providing finance, for example) who could potentially have a requirement to report as intermediaries, where they could reasonably be expected to know that there was a reportable arrangement.
27. It would be useful for groups to be able to nominate a group member to make reports on behalf of the entire group. If this option is not available it is likely to increase the administrative burden on groups,

potentially lead to multiple reports and could also present difficulties where penalties for failures to report arise.

28. Paragraph 5.1 of the consultation (reflecting draft Regulation (4)(4)(c)) sets out the timing for reports to be made; the report will be required within 30 days of three specified times. In the case of an in-house arrangement implemented by an MNE, where the relevant taxpayer will be making the report, bullet (a) (the day after the reportable cross border arrangement is made available for implementation) does not appear to be relevant. It seems to be aimed at promoters.
29. Our understanding is that HMRC agrees that bullet (a) is not relevant to in-house arrangements. The report from the relevant taxpayer will therefore need to be made within 30 days of the earliest of bullet (b) (the day after the reportable cross border arrangement is ready for implementation) or (c) (when the first step in the implementation of the reportable arrangement has been made). This should be made clear in the regulations or in the guidance.
30. In the context of in-house arrangements implemented by MNEs, there are also likely to be issues arising from the reporting time limits. Due to the very broad nature of some of the hallmarks it is inevitable that some normal commercial transactions will be caught – and reportable. Non-tax-specialist employees may not realise that a commercial transaction (particularly something non-material) needs to be flagged to the tax department in advance of implementation. Whilst MNEs will be implementing, or tightening, procedures to ensure that reportable arrangements are picked up, it may be impossible to ensure that all of them can be reported within 30 days.
31. It would be useful if HMRC could provide additional guidance on its interpretation of bullet (b) ie when an arrangement is ready for implementation, in the context of in-house arrangements; the comments in section 4 of the consultation seem more relevant to arrangements provided by an intermediary. Beyond that there appears to be little scope within the terms of the directive to address the issues for MNEs implementing in-house arrangements. We therefore consider that these factors should be taken into account when considering the imposition of any penalties for late reporting; this is discussed in more detail in our response to Question 20 below.

Reporting triggers and timing

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?

32. We agree that this is a reasonable approach for income tax and corporation tax returns – where an arrangement is reportable/has been reported in the UK. However, it is unclear what the position would be where the arrangement would not be reportable in the UK but is reportable in another EU jurisdiction.
33. For example, Poland has implemented requirements which go beyond the terms of the directive, so an arrangement could be reportable in Poland but not in the UK. We expect that in these circumstances a report would be filed in Poland and a Polish reference number would be allocated – even if the intermediary would usually have filed in the UK (under the order of priority set out in paragraphs 3.14 to 3.16 of the consultation). Would a UK taxpayer then be required to include the Polish reference number in their UK tax return?
34. There may be issues where the intermediary involved in the arrangements does not complete the taxpayer's tax returns. Paragraph 5.7 of the consultation notes that the taxpayer will need to provide the reference number in the white space on their return – and that further accompanying detail may be required alongside the return. The taxpayer may use another agent (ie not the intermediary responsible for the arrangements) to complete their returns.
35. Agents belonging to the main professional bodies, including ICAS, must comply with Professional Conduct in Relation to Taxation (PCRT). The guidance in PCRT [help sheet A](#), paragraphs 13 to 14 and paragraphs 38 to 39, and the FAQs [in help sheet B](#) (relating to returns where the client has implemented planning with another adviser) would require the agent to have full details of the arrangements in order to determine whether (and how) they should complete the return. It is therefore essential that the taxpayer has the right to obtain the report filed by the intermediary, so that they can provide it to the agent filing the return. As noted in our response to Question 5 above the draft regulations do not currently provide for this. We discuss this further in our response to Question 7.

36. In line with paragraph 3.9 of the consultation document we do not consider that the agent filing the return, in the circumstances outlined above, would be an intermediary where they only found out about the arrangements after they were implemented and had no part in setting them up or giving advice in connection with them. It would be helpful for HMRC for a regulated adviser to complete the return in accordance with PCRT, so it is important that the DAC 6 regulations facilitate this by ensuring that they can access the report made by the intermediary who implemented the arrangements.

Marketable arrangements

37. Paragraph 5.5 of the consultation deals with draft Regulation 3(4) which sets out the requirement for intermediaries to provide further returns every 3 months with any new reportable information, where an arrangement is a marketable arrangement. In the context of funds, it seems unlikely that a mainstream fund would be considered to be a marketable arrangement – would HMRC agree? However, if it could be a marketable arrangement, a further question arises because new reportable information includes details of relevant taxpayers and “associated enterprises”. The meaning of “associated enterprises” in this context is unclear. Is it the definition discussed in section 10 of the consultation (Article 1(23) of the Directive)? Could investors in a mainstream fund, where the fund is the relevant taxpayer, potentially be associated enterprises?

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?

38. Where there are multiple intermediaries/relevant taxpayers with an obligation to report an arrangement, we consider that the current proposed process will not prevent multiple reports being submitted. Draft Regulation 3(2)(b) and draft Regulation 4(3)(b) only remove the reporting requirement where the intermediary or taxpayer has evidence that someone else has filed the reportable information. However, the regulations only appear to require the sharing of the arrangement reference number – not the report, or details of the report. In many cases it will therefore be impossible for others involved in the arrangement to satisfy themselves, as set out in section 6 of the consultation document, that the information they would report has been captured in the report which has been made (and for which they have been given the reference number).
39. We suggest that HMRC should consider requiring that the report, rather than solely the reference number, should be shared with relevant taxpayers and intermediaries – subject to consideration of the GDPR implications of this approach. This might eliminate some duplicate reporting – although given the 30 day time limit it is likely that intermediaries will often be unable to wait to receive information. Intermediaries’ risk processes will often mean that they must file their own report because they will be unable to wait to receive a report from someone else, review it, and then prepare their own report if it does not include all the information they would need to file.
40. As noted in our responses to Questions 5 and 6 above, the rules as currently proposed do not appear to give taxpayers the right to see a report filed about them by an intermediary. Whether or not the regulations are amended to introduce a general requirement to share the report of a reportable transaction with all those involved – rather than solely the reference number – we strongly believe that taxpayers should be entitled to see any reports related to them.
41. We would expect that most tax and accounting firms would provide their clients with the information, but this cannot be guaranteed in all cases, unless it is required by the regulations. As set out in our response to Question 5 it appears that in some cases a report will be required even where the taxpayer has declined to discuss or adopt the arrangements; we envisage that some intermediaries might be reluctant to share the report in these circumstances, so it is essential that the regulations require that the taxpayer should be given access.
42. As discussed in our response to Question 6 a taxpayer will also need access to the report filed by an intermediary, where intermediaries involved in the arrangements do not also file the taxpayer’s tax returns. The agent who is preparing the tax return will need details of the arrangements – which the intermediary may be unwilling to provide to the taxpayer, unless obliged to do so.

Notifying other intermediaries of arrangement reference numbers

43. Draft Regulation 8(2) requires an intermediary, who has reported an arrangement and been allocated an arrangement reference number (ARN), to notify that number to any person who is an intermediary or relevant taxpayer in relation to that arrangement, within 30 days.
44. This might be reasonably straightforward in scenarios where there is a main promoter of the arrangements, working with a number of intermediaries. However, it is far more difficult to see how it would apply in practice where there is no main promoter – particularly where the arrangement is benign but caught by one of the broadly drawn hallmarks. As indicated by our responses to the questions on intermediaries above (and discussions at the working group meetings), the intermediary who has filed the report and has an ARN may find it difficult to determine whether any, or all, of the service providers with a part in the arrangement might be considered to be intermediaries.
45. This can be illustrated by the following scenario: investment managers may deal with a large number of products involving a number of service providers (such as custodians, administrators, banks, lawyers etc). At a practical level the intermediary needs clarity on the point at which a service provider is likely to become an intermediary in relation to an arrangement – so that adequate controls can be put in place to identify those who need to be sent the ARN. We would appreciate further guidance from HMRC to clarify the position. It would be onerous for the intermediary, in this example, to notify the ARN to every service provider (because of the possibility of a penalty if they failed to identify all intermediaries) – and we do not consider it would be very helpful to HMRC. Service providers who received an ARN under such a blanket approach, but were not in fact intermediaries, might feel obliged to file their own reports, increasing the problems which are already likely to arise from over-reporting of the same arrangements.

Amending reports

46. It is not clear from the consultation document, or draft regulations, whether it will be possible to amend reports which have been submitted. Given the very tight timescale for gathering information and submitting reports we envisage that it would be useful for intermediaries and relevant taxpayers to be able to make amendments to deal with errors or omissions from the original report. Provided the amendment was made in a reasonable timeframe we would expect there would then be no (or only a minimal) penalty.
47. We would not envisage that amended reports should need to be submitted where an intermediary only later becomes aware of additional information about arrangements involving multiple intermediaries – where their report was filed correctly in line with draft Regulation 3, ie on the basis of information within their knowledge, possession and control at the time of their filing deadline. It would be useful for HMRC to confirm that it agrees that this would be the case.

Information to be included in reports

48. Paragraph 6.3 of the consultation lists the information which reports will need to include – taken from the directive. Clarification is needed on the interpretation of “the value of the reportable cross-border arrangement”. We understand that HMRC interprets this to mean the value of the transaction not the tax benefit – but this still leaves uncertainty about how to arrive at the value (for example, is it headline value or enterprise value?).

Hallmarks: Main benefit test

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

49. Draft Regulation 12(1)(a), as explained by paragraph 7.7 of the consultation document, confirms that the main benefit of an arrangement for the purposes of the regulations will not be to obtain a tax advantage if the tax consequences of the arrangement are entirely in line with the policy intent of the legislation upon which the arrangement relies. This is a welcome approach from the UK perspective – but there could still be uncertainty if other jurisdictions adopt a different approach, or where something is clearly in line with UK policy intent, but the position is less clear in another jurisdiction.
50. Draft Regulation 12(2) states that in paragraph 1(a) tax means any tax to which the DAC applies “and any equivalent tax in a jurisdiction other than a member state”. As paragraph 7.9 of the consultation notes, this means that an arrangement could still generate a tax advantage and meet the main benefit

test, even if the tax advantage arises in a non-EU member state. This is likely to present practical difficulties with backdated reporting. Records may have not been kept of relevant arrangements entered into prior to publication of the draft regulations because this approach was not anticipated.

51. The main benefit test is relevant to several hallmarks. It would be helpful if HMRC could confirm that the main benefit test must have direct relevance to the hallmark being considered, for the arrangement to be caught. The following scenario illustrates the point.
52. A company borrows money from a third party bank using a standardised loan term sheet and then uses that money to fund an overseas subsidiary through a separate discounted loan note, where the discount is not subject to withholding tax in the overseas jurisdiction. The loan from the third party bank involves substantially standardised documentation but it does not seem reasonable that Hallmark A(3) should apply to the arrangement because the main benefit test could only be satisfied as a result of the subsequent event, which is independent of the standardised documentation. We can see that the position would be different if the third party loan formed part of a broader marketed structure, with standardised documentation relating to the entire arrangement, rather than solely to the initial loan: this would appear to be within paragraph 8.15 of the consultation.

Hallmarks: Category A

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

53. It would be useful to have clarification of HMRC's view of the application of two aspects of Category A, in respect of funds.
54. In paragraph 8.12 of the consultation Hallmark A(2) is stated to be "deliberately broad in nature, to ensure all types of fees and other financial arrangements" are captured. However, the fee needs to be fixed by reference to the amount of the tax advantage derived from the arrangement.
55. An investment manager might receive a fee based on assets under management (ie the post-tax amount of the fund). Where the fund obtains a tax benefit (for example, reduced withholding tax rates under a treaty) we consider that the fee would not bring the arrangement within this Hallmark because the fee is based on the performance of the investments, rather than being specifically linked to any tax benefits. Could HMRC confirm that it agrees?
56. Hallmark A(3) captures an arrangement "that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation." Paragraph 8.16 of the consultation notes that many common financial products and instruments use largely standardised documentation and are widely available to multiple customers. However, these would only be caught under this Hallmark where the tax outcome of the arrangements is inconsistent with the intent of the underlying legislation upon which they rely.
57. Many funds use standardised legal documents as part of the formation process – but these would be unrelated to the activities of the fund and therefore to any tax outcome. We consider that the use of such standardised documents would not automatically bring the fund within Hallmark A(3), meaning that all of the fund's activities would need to be analysed to determine whether the main benefit test could be satisfied (which would be very onerous). Could HMRC confirm that a report would only be required if there were specific arrangements caught under another Hallmark to which the main benefit test applies?

Hallmarks: Category B

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

58. Hallmark B(2) captures arrangements which have the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax. Paragraph 9.5 of the consultation document confirms that because the main benefit test applies to this hallmark, the conversion of income into capital in ways which are consistent with the underlying intent of the legislation, upon which such conversions rely will not produce a tax advantage – so the hallmark will not apply.
59. Could HMRC confirm that where offshore funds apply for UK Reporting Fund status HMRC would not regard them as being within Hallmark B(2), so a UK report would not be required?

Hallmarks: Category C

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

60. We have no comments on this question.

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

61. We have no comments on this question.

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?

62. We have no comments on this question.

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

63. We have no comments on this question.

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

64. We have no comments on this question.

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

65. Paragraph 10.12 of the consultation states that when assessing whether Hallmark C(1)(b)(ii) applies, the relevant list of non-cooperative states should be examined on the date that the reporting obligation arises. When considering the look-back period ahead of the first reporting deadline, does HMRC agree that the list of non-cooperative states should be considered at the point of first reporting (ie 31 August 2020) rather than throughout the look-back period?

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

66. There is currently some confusion around the interaction of the Model Mandatory Disclosure Rules for CRS avoidance arrangements, approved by the OECD in 2018 (MDR) and DAC 6. Draft Regulation 12(1)(c) states that Category D must be interpreted in accordance with the MDR and its associated commentary. However, paragraph 11.1 of the consultation document states that there is “substantial common ground” but goes on to say that DAC 6 and MDR are entirely separate instruments and there are different rules. Paragraph 11.1 also refers to the preamble to DAC 6 which makes it clear that MDR (and the associated commentary) provide a source of illustration and interpretation. Could HMRC clarify its view of the interaction?

67. Paragraph 34 of the OECD Model Mandatory Disclosure Rules for CRS avoidance arrangements provides that nominee arrangements would typically not be targeted by Hallmark D because widely held entities are not within the scope of opaque offshore structures. Could HMRC confirm that this approach will also be adopted by HMRC, and include some examples in the guidance?

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?

68. We have no comments on this question.

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

69. We have no comments on this question.

Penalties

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

70. We do not consider that it is appropriate to have daily penalties for failures to comply with the regime. Daily penalties are most effective when used to incentivise the filing of regular (particularly annual) returns. They are unlikely to be proportionate for a regime where an intermediary/relevant taxpayer has decided (incorrectly) that there is no requirement to report. In cases where there is a deliberate failure to comply the possibility of a maximum £1 million penalty should be an effective deterrent.
71. We recognise the need to have penalties for failure to comply with Regulation 11 (provision of information) but the 14 day time limit for complying with Regulation 11 is unrealistically short. Information may need to be gathered and advice taken; HMRC postal arrangements also mean that in some cases a notice would not even be received within 14 days. It would also be appropriate either for HMRC to have to seek Tribunal approval for the issue of a notice under Regulation 11 – or for there to be an appeal mechanism to challenge HMRC's view that the information is reasonably required.
72. As set out above (under the heading Relevant Taxpayers), the reporting time limits are likely to be challenging for MNEs in some circumstances. Due to the very broad nature of some hallmarks it is inevitable that some normal commercial transactions will be caught – and reportable. Non-tax-specialist employees may not realise that a commercial transaction (particularly something non-material) needs to be flagged to the tax department in advance of implementation. Whilst MNEs will be implementing, or tightening, procedures to ensure that reportable arrangements are picked up, it may be impossible to ensure that all of them can be reported within the time limits.
73. We suggest that HMRC should consider the possibility of permitting a “reasonable procedures” defence, where reasonable procedures have been put in place to try to ensure compliance. Alternatively, HMRC could indicate in the guidance that having reasonable procedures in place, in these circumstances, would be a strong pointer to having a reasonable excuse. It would certainly be disproportionate to impose a significant penalty for a late report of a benign commercial transaction.
74. As set out in our response to Question 2, we do not believe that any employees should be required to report (where they are acting as employees in respect of an arrangement); responsibility for reporting should rest with the employer (or potentially, where the employer is a non-EU intermediary, with the taxpayer). However, if the Regulation 13 exemption is not extended, additional consideration should be given to the penalty position, as it relates to such employees. There is a serious risk that penalties could be disproportionate. As a minimum, a special reduction would probably be appropriate in these cases and should be explicitly mentioned in the guidance.

Commencement

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

75. We welcome the recognition (in paragraph 14.4 of the consultation document) that the backdated reporting requirements pose challenges for intermediaries and taxpayers, particularly where the first step was taken prior to the publication of the regulations and guidance. It is appropriate that where a failure relates to such an arrangement and was due to a lack of clarity around the obligations or interpretation of the rules it is likely that there will be a reasonable excuse for the failure.
76. However, whilst the draft regulations have now been published, there remains a lack of clarity around some points of interpretation – which we hope will be addressed as soon as possible in the guidance. We would therefore appreciate confirmation from HMRC that this approach to reasonable excuse will cover arrangements where the first step was taken prior to the publication of the HMRC guidance.

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?

Reporting by partnerships

77. Clarification is needed from HMRC, of the reporting arrangements for partnerships which are not LLPs. It appears that for partnerships (under English rather than Scottish law) the reporting requirement

applies to individual partners. From a practical perspective it would make sense for partnerships to be able to nominate one partner to submit reports on behalf of the partnership.

78. Could HMRC also confirm how Scottish Partnerships (which do have a separate legal personality) will be required to report? Our preference would be for Scottish Partnerships also to be able to file through one representative partner.

GDPR

79. Paragraph 6.4 of the consultation document notes that the storage and use of data reported under the regulations will be in accordance with GDPR. However, concerns have been raised about possible challenges where reports are filed in good faith by professional services firms, but a client considers that no report was in fact required under the regulations.

80. It would be useful for the regulations to provide protection, where reports are filed in good faith.