Disclosing Tax Plans: New Rules for Advisers And Their Clients

Following a period of consultation, HM Revenue & Customs ("HMRC") have published the final Regulations giving effect to the sixth version of the EU Directive on Administrative Cooperation, commonly referred to as DAC 6. The provisions introduce a requirement to provide information on certain cross-border arrangements to tax authorities of the Member States, with the overall aim being to increase transparency and combat aggressive tax planning by closing existing loopholes in the tax legislation.

Scope

DAC6 imposes an obligation to identify 'reportable cross-border arrangements' – transactions involving at least one Member State falling within a set of pre-defined 'hallmarks'.

Hallmarks that would make arrangements reportable under the Directive are split into:

A. Generic ones linked to the 'main benefit test' – where the main reason, or one of the main reasons, for entering the transaction was to obtain a tax advantage. A tax advantage is widely defined to include avoidance, reduction or deferral of a tax liability as well as increased or accelerated tax repayment or relief;

B. Specific ones linked to the main benefit test;

C. Specific ones related to cross-border transactions;

D. Specific ones concerning automatic exchange of information and beneficial ownership;

E. Specific ones concerning transfer pricing.

Given that satisfying 'the main benefit test' is not a prerequisite, even a normal commercial transaction may need reporting if it triggers a tax benefit. It appears that only instances where such benefit has arisen as a result of meticulously applying tax rules and regulations and ensuring that such application is within the spirit of the law and practice in the relevant jurisdiction that may escape disclosure under DAC 6. However, as tax laws are intrinsically complex and often subject to interpretation, the position is rarely clear cut.

Reporting Responsibilities

The primary reporting obligation falls onto intermediaries – "any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement" as well as those who help or advise in connection with such an arrangement. There are complex rules to determine reporting obligations where several intermediaries are involved, and where reporting must be made; very limited exceptions apply. In some cases, the reporting responsibility may even lie with the taxpayer themselves, for example where no intermediary was involved.

REGULATORY UPDATE

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Timeline

DAC 6 applies retrospectively to arrangements entered into since 25 June 2018. Reports of activity from that date to 30 June 2020 inclusive are due for submission to HMRC by 31 August 2020. Arrangements implemented from 1 July 2020 onwards are reportable within 30 days of the earliest of the day the arrangement is advised on, made available or ready for implementation, or in fact implemented. There are ongoing discussions about postponing the deadline for reporting historical (pre-30 June 2020) arrangements to 30 November 2020 and the start of the first 30-day reporting period from 1 July 2020 to 1 October 2020.

Non-compliance is not an option: fixed penalties of between £5,000 and £10,000 can apply for failure to comply if the reporting responsibility is that of the taxpayer. For intermediaries, in some cases, in addition to the fixed £5,000 penalty, a £600 daily penalty can be charged. It is therefore important that proper consideration is given to not only when the reporting must be made but also where the responsibility for it lies.

How can Rawlinson & Hunter help?

It is rare for individuals and business living in a globalised world to not have an international angle to their affairs. The introduction of yet another compliance and reporting regime adds a further layer of complexity and administration to an already elaborate process.

Clients

Pending receipt of HMRC guidance on exact reporting requirements expected to be issued by 1 July 2020 (the date on which the legislation is scheduled to officially come into force in the UK), we are currently reviewing the provisions and considering the extent to which they impact our clients. We will be writing to you should it be considered that you may have a reporting requirement under DAC 6.

Intermediaries

For those in professional advisory industries, we can provide assistance as follows:

Stage 1: Initial review

As a starting point, we will help you:

- Identify potentially reportable arrangements and transactions;
- Ascertain entities involved in the arrangements (including intermediaries) and conclude on who has the responsibility for making the report;
- Consider, where multiple jurisdictions are involved, where the reporting needs to be made;

If it is determined that the responsibility for reporting lies with another party to the transaction or an intermediary, we will advise you on collation and retention of evidence that reporting has been made.

Stage 2: Preparing for reporting

Based on the findings of Stage 1, if the reporting responsibility is yours, we will help you prepare for making the disclosure, and specifically:

- Advise on the information required for reporting and support you throughout the information collation process;
- Evaluate the impact of a report being made for each specific transaction (the risk of a challenge by tax authorities);
- Consider opportunities for risk mitigation.

Stage 3: Making the report

Having agreed the approach based on findings of Stages 1 and 2, we will assist with the preparation and submission of the report.

Stage 4: Ongoing monitoring and reporting

We will help you with your ongoing obligation to monitor, identify and disclose reportable arrangements within the prescribed 30-day time limit.

Should you have any queries or concerns, please do get in touch with your usual R&H advisor or one of the contacts listed below.

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