Disclosure on the borderline

New disclosure rules will force tax intermediaries to report on many more types of arrangements, as Caroline Biebuyck finds out

The EU has been gearing up in its fight against cross-border tax avoidance. One of the major weapons in its armoury is the Anti-Tax Avoidance Directive (ATAD), which includes provisions on controlled foreign companies, hybrids and exit taxation, much of which comes into force in UK law from January 2019.

Lesser publicised, but just as important, are new provisions over the administration of tax planning. The EU's revised mandatory disclosure regime, in the directive known as DAC 6, aims to close gaps in tax reporting by making intermediaries, such as tax advisers, disclose certain cross-border arrangements to their national tax authorities.

The new rules from both directives will apply to the UK, as they come into effect before the end of the Brexit transitional period during which the UK has to implement EU law.

The UK already has a national scheme in place, with the Disclosure of Tax Avoidance Schemes (DOTAS) rules. DAC 6, though, requires a change in approach. Partly this is because it extends the remit to cross-border schemes while also amending the rules. But, more importantly, it puts the onus on tax advisers to disclose certain schemes which were designed for commercial rather than tax reasons.

REPORTING PERIOD

UK legislation introducing the DAC 6 rules will take effect from 1 July 2020: tax advisers and other intermediaries will have to file their first reports just two months later, by 31 August. Representative bodies, including ICAEW, are part of the DAC 6 Working Group, which will discuss the practical, operational and legal issues in advance of more formal consultation on the regulations next year.

Tax Faculty technical manager Ian Young is concerned that new anti-avoidance provisions are being introduced before others have had a chance to bed down. "The UK has put a lot of anti-avoidance measures in place: we've introduced the general anti-abuse rule and the professional institutes have recently revised professional conduct in relation to tax, which covers ethical principles and standards of tax planning," he says. "The whole landscape has changed markedly in recent times with tax planning far more circumscribed than previously. But there's never time to take stock and see how the latest provisions play out before new arrangements are introduced."

Members who advise on tax could feel caught between a rock and a hard place, given that some of the arrangements they are advising on now will be

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reportable under the new rules - even though no one yet knows the exact form the law and regulations will take.

"Members have already got to keep a tally of the schemes that they think might be disclosable under rules which are not yet precisely known," says Young. "This is just the thing to put off businesses thinking of coming to operate in a country. The UK is one of the main recipients of foreign direct investment in the EU, so this could have a greater impact on us than on other countries."

They also need to ensure that none of the arrangements they have been involved with fall between the cracks. "A wider group of intermediaries will have obligations under DAC 6 than under DOTAS," says an HMRC spokesperson. "Unless they have proof that another intermediary has already reported the same information, they will be required to report it themselves."

DRILLING DOWN DETAIL

Under the DAC 6 rules, cross-border arrangements involving more than one EU member state, or an EU member state and a third country, will need to be disclosed if they fall into one of a number of categories, which the directive refers to as hallmarks.

Many of the hallmarks only apply when they meet the tax main benefit test - where one of the main benefits of the arrangement is to obtain a tax advantage. Arrangements which fall into this category include those which feature confidentiality, with the intermediary asking the client to keep the details confidential; and payment of a premium fee, such as a fee that is contingent on the planning achieving a certain tax result.

Standardised tax planning, normally contrived schemes that require very precise documentation, also falls into this category.

Next come some specific hallmarks with a tax main benefit. These include acquiring a loss-making company, says Adrian Rudd, PwC tax director. "This is the case if the main benefit were to acquire the tax loss rather than because the buyer wanted the underlying business," he explains. Other specific categories include converting taxable income into a capital gain or exempt income, and circular or offsetting transactions.

Then there are specific cross-border transactions. These cover deductible cross-border payments where

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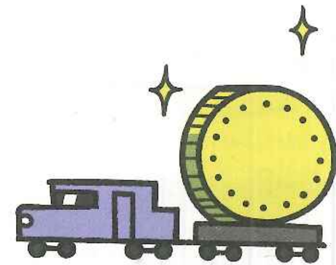

the recipient is resident in a state where the corporate tax rate is zero or 'almost zero', or the recipient is exempt or the payments fall into a preferential tax regime. What is an 'almost zero' rate? A proposal that would have meant that this included countries with a corporate tax rate less than 35% of the statutory EU average was rejected by finance ministers and not included in the final directive. "The UK regulations may define this lower rate, but we don't know what it will be yet," says Rudd.

Arrangements that fall outside the tax main benefit test come next. These are harder to categorise as many are very specific, says Rudd. "If intermediaries are working on any cross-border arrangements they need to get a full list of the hallmarks and work through them to see if any apply. You can't apply a general tax avoidance test as the rules don't work that way."

He cites an example that is already causing some concern. "Say you transfer assets or functions cross border within a group, not for a tax benefit, but the effect is to reduce the profits of the transferor company to 50% or less of what they would otherwise have been. That is reportable under one of the non-tax-main-benefit hallmarks, even though there might be a number of commercial reasons why the group would want to do this."

CROSSING CONTINENTS

The EU rules introduced DAC 6 just a few months after the OECD published its own model disclosure rules (MDR), which was put in place to ensure reporting under the OECD's Common Reporting Standard is as full and transparent as possible.

The OECD recommended that countries should introduce national disclosure regimes as well, says Young. "Cross border regimes are much more difficult to achieve; it's also hard to strike a balance between the requirements to get information and the impact that will have on a business."

The problem is that the EU cannot tell individual member states what to do in connection with their tax rules since tax is a matter for each jurisdiction. "This is why the European Commission decided to opt for a cross-border regime - it felt this was the only option," says Young.

However, he feels it was premature to introduce a cross-border regime when there weren't already many domestic regimes (Ireland and Portugal join the UK as the only three EU member states to have one). "You're going to have some standard categories for international tax planning but the regime should really revolve around what the specific rules are in each individual country."

KEEPING RECORDS

HMRC recommends that members familiarise themselves with DAC 6 and the OECD's MDR, which is covered in Hallmark D of the directive. "We will implement the rules in a reasonable and proportionate way, but we do expect compliance," says the spokesperson. "We recommend that you have a means of flagging potentially relevant information in your systems so that you are able to retrieve it once the regulations become law and so that you can establish whether or not you are required to report it."

Rudd's advice is to stay informed on the debate while putting systems in place to collect the details of what the firm is doing. "If you advise clients on cross-border transactions, you need to think this through. You can't apply a simple test of saying that because an arrangement isn't being done for tax purposes, it won't need to be disclosed. And remember that schemes which fall under DOTAS could potentially fall within the DAC 6 rules as well."

And keep everyone informed, says Young. "No client is going to thank you for having failed to advise them that there is a new disclosure regime and that you have failed to comply with it for their tax affairs." ●

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