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Demystifying the complex world of DAC6

Background

In 2018, the European Union issued Council Directive 2018/822 of 25 May 2018 on administrative cooperation ("**DAC6**") to introduce mandatory disclosure rules for "intermediaries" in respect of cross-border tax arrangements. These are intended to assist the EU Member States to identify potentially aggressive tax arrangements.

At the UK level, the original intention was to retain all the provisions of DAC6 and the International Tax Enforcement (Disclosable Arrangements) Regulations 2020 (the "**UK DAC Regulations**") came into force on 1 July 2020 to that effect. However, the position changed on 1 January 2021 when the UK amended the UK DAC Regulations so that the only arrangements which need to be reported in the UK are those that relate to the avoidance of obligations to report information on financial accounts or those that obscure beneficial ownership (Hallmark D of DAC6). These are only interim measures though as they are intended to be replaced with new legislation in due course.

Why am I receiving communications from legal advisers on DAC6 or the UK DAC Regulations in respect of historical and new transactions?

You may have noticed that your legal advisers have started sending you emails about DAC6 or the UK DAC Regulations in the last weeks.

This is because legal advisers regulated in the EU or the UK are likely to constitute "intermediaries" for the purpose of their local legislation implementing administrative cooperation ("**DAC**") regulations. As an example, we, as a law firm, regularly provide advice in respect of a transaction and aid implementation of an arrangement by drafting and negotiating the documentation for it and organising completion. On this basis, Stephenson Harwood LLP constitutes a "service provider" (which is a category of "intermediary"). As such and under the UK DAC Regulations, we are required to disclose relevant

Why are ship finance transactions more at risk of being considered as reportable arrangements under DAC6 or the UK DAC Regulations?

These regulations target cross-border transactions that have an EU or a UK element and that fall within the scope of certain hallmarks. The hallmark that applies under the UK DAC Regulations is known as Hallmark D.

EU cross-border element in ship finance

Most ship finance transactions will contain a cross-border element as it is very rare that all the parties and assets involved are incorporated / registered / located in the same jurisdiction. Ship finance transactions also frequently include an EU or a UK element (for example, one of the lenders may be lending from a branch based in the EU or the UK or a vessel may be registered in the UK). As such, ship finance transactions are more likely to trigger Hallmark D.

Hallmark D in ship finance - a lawyer's perspective

The key test in assessing whether a cross-border transaction is potentially reportable is to assess whether it (i) involves an arrangement undermining reporting obligations (which is in essence an arrangement that has the effect of circumventing the Common Reporting Standard of the Organisation for Economic Cooperation and Development) or (ii) obscures the identity of the beneficial owner(s) of the taxpayer.

In ship finance transactions, the regular and frequent involvement of obligors that are incorporated in jurisdictions where, for example, a public record of shareholders or beneficial owners does not exist, coupled with the limited information that legal advisers usually receive in respect of the parties involved, either as part of their *Know Your Customer* processes or in the life of the relevant transaction, will often lead to the legal advisers concluding that such a transaction may be reportable under the applicable DAC regulations.

arrangements to the UK tax authorities (Her Majesty's Revenue and Customs (HMRC)).

In the UK, the transactions that need to be reviewed by us on the basis of the UK DAC Regulations are transactions that started between 25 June 2018 and 31 December 2020. There is also an on-going obligation to consider any transactions that started on or after 1 January 2021.

I have received an email from a legal adviser saying that one of my transactions may be reportable, what should I do?

While your legal advisers have the obligation to assess each relevant historical transaction that they have worked on, as well as each new transaction, in order to determine whether it is potentially reportable under the applicable DAC regulations, they are largely not able to file a report with their local tax authorities if the transaction is protected by legal professional privilege, unless such privilege is expressly waived. This means that any communications and information provided to your legal advisers for the purpose of seeking legal advice are confidential and prevents them from disclosing these to third parties (such as local authorities and the courts). The only obligation your legal advisers usually have in such a situation is to inform their client that the transaction may be reportable.

As it is not advisable for you to waive such legal professional privilege (and, even if this was waived, you may still be required to report as an "intermediary" yourself), the best course of action is for you to assess whether DAC6 or the UK DAC Regulations apply to you and whether you can be considered to be an "intermediary" (primarily if you are a lender or finance party) or a taxpayer (primarily if you are a borrower) for the purpose of the applicable DAC regulations. If the answer to both these questions is yes, you will need to assess whether the applicable hallmarks are triggered (for example, the full range of hallmarks, if you are regulated in an EU jurisdiction, or Hallmark D, if you are regulated in the UK) and whether you need to report the transaction to your local regulators / tax authorities.

We expect that you can turn to your compliance or tax teams or to external tax advisers to guide you through this process.

Key contacts

Do not hesitate to contact us if you have any questions or need the help of our tax specialists.



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