STEP Policy Points

The EU Directive Regarding the Mandatory Automatic Exchange of Information in Relation to Reportable Cross Border Arrangements

Executive summary

Officially finalised in May 2018, the Directive amended the EU’s Directive on Administrative Cooperation in the Field of Taxation (DAC). It requires intermediaries that design or promote tax planning schemes which can be considered aggressive to report them. Any information received by Member States will be automatically exchanged with other EU countries through a centralised database.


Key messages

• STEP condemns tax evasion and those attempting to facilitate it.
• STEP advocates simpler tax laws as a method of curbing aggressive or abusive schemes which usually exploit complexity.
• The hallmarks must be drafted in a clear and narrowly focused way to ensure they do not cause confusion or risk catching legal behaviour.

Context

The rules, similarly to the OECD’s Mandatory Disclosure Rules, are based on the BEPs Action 12 report.

The EU provides detail on what it deems to be an intermediary and, in cases when they cannot disclose information due to legal privilege, a relevant taxpayer. The rules differentiate between two different types of scheme: a marketable arrangement (one which is designed, marketed and made available without substantial customization) and a bespoke arrangement (anything not deemed to be a marketable arrangement). The legislation outlines the information that should be disclosed in relevant instances as well as the time limit for doing so. Individual Member States are made responsible for introducing penalties for those who fail to abide by the rules in their own jurisdictions.

In an annex, the Directive sets out a number of hallmarks which include a main benefit test for establishing whether a scheme is aimed at obtaining a tax advantage.
In addition, it includes a similar hallmark to the OECD’s hallmark on CRS Avoidance Arrangements – automatic exchange of information and beneficial ownership and one which resembles the OECD’s hallmark on Opaque Offshore Structures – arrangements involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures.

The Directive has been translated into the official languages of the EU and was published in the Official Journal of the European Union on 5 June 2018, it entered into force from 25 June 2018. The deadline for the Directive’s transposition into national law was set at 31 December 2019 and the first exchanges took place from 1 July 2020, with the first exchange completions on the 31 October 2020. From this point, Member States will be obliged to exchange information every three months.

**UK context**

In the UK, the International Tax Enforcement (Disclosable Arrangements) Regulations 2020 came into force on 1 July 2020 and requires reporting of any persons involved in cross-border arrangements, including loan agreements, payments from a resident of one country to a resident of another, or putting funds in an offshore trust, if one of the hallmarks apply.

Following the conclusion of negotiations between the UK and the EU on a Free Trade Agreement (FTA) on 24 December 2020. HMRC confirmed that only arrangements that meet hallmarks under category D of DAC6 need to be reported in the UK, in accordance with the OECD’s Mandatory Disclosure Rules (MDR).

The regulations have been amended and laid before Parliament to ensure the rules work correctly post-Brexit, including ensuring that references to EU member States refer to the UK or an EU member State after the end of the transition period. The rules will now only apply to two types of arrangements captured within the category D hallmarks.

The replacement of DAC6 will significantly reduce reporting requirements although the disclosure of tax avoidance schemes (DOTAS) will continue to apply in the UK. It is also clear that under the terms of the FTA, the UK must not reduce the level of protection in its legislation below the level of protection afforded by the OECD’s MDR. While the UK has not implemented MDR in its domestic legislation the rules provide a ‘level of protection’ which in certain respects is equivalent to that in the OECD’s MDR, and in other respects goes beyond it.

The government will begin to repeal the legislation implementing DAC6 in the UK and will implement the OECD’s MDR as soon as practicable, in order to replace DAC6 and transition from European to international standards on tax transparency.
HMRC has confirmed to STEP that only arrangements which meet the hallmarks under Category D will now need to be reported, therefore historic reporting (for arrangements up to 31 December 2020) in respect of the other hallmarks will no longer be required.

Guidance from the UK government can be found here:

- HMRC International Exchange of Information Manual (IEIM)
- HMRC guidance on reporting on cross-border arrangements

**STEP response**

STEP’s Public Policy Committee is monitoring developments. STEP’s Technical Counsel has prepared an update for the STEP blog outlining the key points of the legislation, which can be found here: [https://blog.step.org/tag/intermediaries/](https://blog.step.org/tag/intermediaries/)

STEP’s Policy Team will continue to provide updates where appropriate. STEP’s UK Technical Committee has produced a paper commenting on the relevant issues surrounding the implementation of DAC6 as a result of statutory instrument 25/2020, the *International Tax Enforcement (Disclosable Arrangements) Regulations 2020* and HMRC’s IEIM, in the context of trusts and trust structures. The paper can be found [here](https://www.step.org.uk/)

The government intends to consult on draft legislation to introduce MDR, and STEP will keep members apprised of the situation accordingly.

STEP is liaising with Government to provide further clarity on issues such as whether HMRC will still be expecting historic reporting (for transactions up to 31/12/2020) in respect of the other hallmarks (apart from Hallmark D), as it is currently not clear whether there will now be no reporting at all for any of the hallmarks other than Hallmark D.

**Stakeholders**

During the transposition phase both the Commission and Member States were the core stakeholders.

Following the transposition of the Directive the Member States became the main stakeholders. With the HMRC being the relevant body in the UK.

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