The International Tax Enforcement (Disclosable Arrangements) Regulations 2020

Guidance for CIOT and ATT Members and Students

Introduction

1. This guidance is for use by members and students of the Chartered Institute of Taxation (CIOT) and the Association of Taxation Technicians (ATT) ('members and students') to help them understand when they might be classified as an '*intermediary*' within the meaning of the International Tax Enforcement (Disclosable Arrangements) Regulations 2020 (as amended by the International Tax Enforcement (Disclosable Arrangements) (Amendment) (No.2) (EU Exit) Regulations 2020) ('the regulations' or 'the UK regulations') due to being '*registered with a professional association related to legal, taxation or consultancy services in a State*' and when, as a possible consequence of that, they might be required to make a report to HMRC.

2. The regulations brought into UK law the provisions of EU Directive 2018/822 amending Directive 2011/16/EU (otherwise known as DAC6). DAC6 provides for the mandatory disclosure of '*reportable cross-border arrangements*' by intermediaries, or individual or corporate taxpayers, to the tax authorities and the mandatory automatic exchange of this information amongst EU member states. DAC6 has general rules on who must report and when, and what information must be reported. There are then '*hallmarks*' which define the types of reportable arrangements; basically, those that are considered to be an aggressive tax planning risk, or a risk for tax avoidance or evasion.

3. Following the UK/EU Free Trade Agreement announced in December 2020, DAC6 (that is the EU Directive) has ceased to apply to the UK. The UK regulations were amended on 31 December 2020 so that reporting will only be required for a limited time but only for arrangements which meet hallmarks under Category D, including for the period from 25 June 2018. In addition, there will be consultation which may bring further changes to the type and extent of reporting in due course. We will then amend this guidance, as necessary. HMRC are updating their guidance to reflect the December 2020 changes and to provide further clarification.

4. This document has been shared with HMRC in advance of publication and has been updated to reflect HMRC's comments. However, HMRC do not endorse external guidance, and the guidance in their International Exchange of Information Manual should be consulted for HMRC's interpretation of the legislation.

5. This guidance should be read alongside the decision tree which we have produced to assist members and students in determining whether they need to make a report to HMRC (see page 7).

6. A glossary of the following terms used in this guidance is provided in the appendix.

    A. International Tax Enforcement (Disclosable Arrangements) Regulations 2020
    B. UK/EU Free Trade Agreement and end of the Brexit transition period
    C. Intermediary
    D. Registered with a professional association related to legal, taxation or consultancy services in a Member State
    E. Reportable cross-border arrangement
    F. Hallmarks

Who should read this guidance?

7. This guidance focuses on areas where a member or student may be an intermediary and have an obligation to make a report. This is relevant to the minority of CIOT and ATT members or students who provide taxation services as employees or principals working in firms located outside the UK or EU. By 'located outside the UK', we mean that the firms they are working in are resident and incorporated outside the UK or EU and do not have a permanent establishment in the UK or EU. Examples of members in this category include:

    - Those who are in employment or practice (as sole practitioners or partners in a partnership) with firms located outside the EU or UK and who work on a 'reportable cross-border arrangement'.
    - Those who are employed by a UK firm (or an EU firm) in a global network of firms, but who work on a reportable cross-border arrangement while on a temporary secondment to a network firm that does not have a UK (or EU) nexus.

8. It is relevant to members and students (who are individuals). It does not comprehensively cover the obligations of firms, but it is relevant to individual members acting as principals of firms outside the UK or EU.

9. 'Intermediary' is defined in Article 3(21) of the DAC and comprises two limbs. The first limb explains that an intermediary can be either a promoter or a service provider; and contains a lengthy test, dependent on facts and circumstances. The second limb explains that to be an intermediary a person shall meet at least one of four conditions. An individual must satisfy both limbs to be an intermediary. For the purposes of this guidance, when we refer to the meaning of 'intermediary', we describe the first limb as 'the basic test' and the second limb as 'the additional test'.

10. Members and students should also be aware that there are some exemptions from an intermediary needing to report, which include: if disclosing the information would breach legal professional privilege; and if someone else has already reported the information.

11. An intermediary is only required to make a report to HMRC when there is a reportable cross-border arrangement. This guidance explains that whether a reportable cross-border arrangement exists or not depends on whether it meets either Hallmark D1 or Hallmark D2 as set out in Annex IV of the DAC. It should be noted that HMRC do not expect service providers to do additional external due diligence to establish whether there is a reportable arrangement.

Are the CIOT and ATT 'professional associations related to legal, taxation or consultancy services'?

12. Yes. Both the CIOT and ATT are professional associations within the meaning of Article 3(21) of the DAC, and we have confirmed with HMRC that this is the position.

13. HMRC's guidance IEIM 621140 Registration with a professional association is reproduced in the appendix. Whilst membership of the CIOT and ATT is not a pre-requisite to practise, so that the CIOT and ATT are not able to prevent a person registered with them from practising, both are able to impose monetary sanctions and both have supervisory functions in respect of anti-money laundering (AML) legislation. The fact that enforcement of the rules of membership and the disciplinary functions of AML supervision is done by an independent body, the Taxation Disciplinary Board (TDB), does not change the analysis that the CIOT or ATT are professional associations within the meaning of Article 3(21) of the DAC.

What does 'registered' with the CIOT and ATT mean?

14. The following individuals are subject to the CIOT or ATT's professional and supervisory rules which means that they 'registered' with the CIOT or ATT for the purposes of the definition in HMRC's guidance:

    - Members of the CIOT holding the Chartered Tax Adviser (CTA or ATII) qualification
    - Fellows of the CIOT (CTA (Fellow) or ATII (Fellow))
    - Students of the CIOT, including Joint Programme students and Tax Pathway students
    - International Tax Affiliates of the CIOT holding the Advanced Diploma in International Tax (ADIT) qualification
    - Members of the ATT holding the ATT qualification
    - Fellows of the ATT (ATT (Fellow))
    - Students of the ATT, including Tax Pathway students

15. The following three categories of students are registered with CIOT / ATT but they are not subject to the CIOT or ATT's professional or supervisory rules. This means that they are not 'registered' with the CIOT or ATT for the purposes of the definition in HMRC's Guidance.

    - ADIT students
    - ATT Foundation students
    - ATT VAT and Transfer Pricing Diploma students

I am a member or student and I'm based outside the UK and EU. Could I be an intermediary?

16. Yes, you could be an intermediary. You will meet the additional test in the definition of 'intermediary' (see para 9) above) by being a CIOT or ATT member or in one of the other groups listed in para 14 above, and so 'registered with' CIOT or ATT. You may meet the basic test in the definition, depending on the facts (see paras 17 - 20). As mentioned in para 7, we have identified two categories of members and students likely to need to consider these issues due to being registered with either the CIOT or ATT. These are:

    - Those who are in employment or practice outside the EU or UK (the 'in employment or practice' example).
    - Those who are employed by a UK firm (or an EU firm) in a global network of firms, but who are on a temporary secondment to a network firm that does not have a UK (or EU) nexus (the 'secondee' example).

Definition of an intermediary – the basic test

17. Members and students should consider carefully whether they meet the basic definition of an intermediary and therefore potentially have an obligation to make a report. It will be a question of fact whether a person meets the elements of the basic definition of an intermediary, or not.

18. A person might fail to meet the factual requirements that he or she '*designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement' (the* 'promoter' test) or that he or she has *'undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement'* (the 'service provider' test). For example, an employee who played no role in the generation of the advisory project or the contracting with the client and whose work is always subject to review before being offered to the client might fail, on the facts, every element of this basic test of the definition of intermediary. However the tests must be applied on the facts, there is no 'in principle' safe harbour exemption for, for example, employees without a certain seniority in their formal grade. On the other hand, the employee needs to consider whether the definition applies to themselves as indivduals: he or she does not meet the basic test merely because their employer or the firm they are seconded to would meet it, were they UK resident. It may be possible on the facts to say that a key employee 'manages the implementation of a cross border arrangement', and so is a 'promoter', but that may not be particularly common. It is perhaps more likely that an employee has (in virtue of their contract of employment and any specific discussions on taking on work in relation to a transaction) 'undertaken to provide…aid, assistance or advice…' in relation to it in the way defined and so is a 'service provider', but not every employee who has some job responsibilities relating to such a transaction will meet this factual test.

19. Where a member or student is an employee based outside the UK and EU, it is likely that in practice HMRC will accept reports from the employing firm, but only if the firm is a UK intermediary (see para 22 below), so there will be some instances where the individual themselves will need to make the report. There is no overarching rule that employees in either of the two scenarios in para 16 cannot be intermediaries.

20. There is a further element to the 'service provider' part of the definition of an intermediary which members and students will also need to consider. This is that a person is not an intermediary if they did not know and could not reasonably be expected to know that they were involved in a reportable cross-border arrangement, and they are able to provide evidence to that effect if challenged. A person in this position would not be under an obligation to make a report to HMRC. This 'insufficient knowledge exemption' (or 'knowledge test' as HMRC refer to it) applies only to intermediaries who are 'service providers' rather than 'promoters' - see HMRC's guidance IEIM 621010 Definition of Intermediary and IEIM 621050 Knowledge test. It will be a question of fact whether a person meets the 'insufficient knowledge exemption', or not.

The hallmarks

21. It should be remembered that even if a member or student meets the definition of an intermediary, they will only be required to make a report to HMRC when there is a reportable cross-border arrangement. Whether a reportable cross-border arrangement exists or not depends on whether it meets Hallmark D as set out in Annex IV of the DAC. For example, the second of two parts of this (Hallmark D2) concerns transactions that may be 'obscuring beneficial ownership' which might in certain circumstances include the use of trusts to obscure the identity of those benefitting from them. HMRC's guidance makes clear that such 'normal' provisions as including classes of beneficiaries using descriptive terms (such as the lineal descendants of a particular individual) is not of itself regarded as reportable under this hallmark. It will be helpful to members

and students to consider Hallmark D, and the HMRC guidance, in relation to their job responsibilities to understand how likely it is that they will in practice need to consider whether transactions are reportable under the regulations. For further information about this hallmark and HMRC's guidance in relation to trusts, you should refer to the appendix.

The employee exemption

22. There is an exemption for employees (which will be of most relevance to UK-based employees and members). Regulation 13 of the regulations provides that a person is not to be treated as an intermediary where:

    - the person is an employee of an employer, and
    - the employer, or another firm connected with the employer, is an intermediary (and will therefore have the reporting obligation instead).

23. It is because employers of member and students employed outside the UK and EU will typically not be UK intermediaries, that it is possible that such employees will themselves be intermediaries. Further information and definitions are provided in HMRC's guidance – see IEIM621080 Employees.

24. It is unlikely that the categories of members and students in the 'employment or practice' and 'secondee' examples (see para 16) will benefit from the 'employee' exemption in Regulation 13.

25. In the 'employment or practice' example, even if the individuals are employees of a firm, the employing firm may not be required to make a report in either the UK or another EU member state so will not be an intermediary itself. In this scenario, the reporting obligation will fall on the individual subject to the individual themselves meeting the definition of 'intermediary' (but note HMRC's guidance – see paras 27 to 30 below as regards how this would work in practice).

26. In the 'secondee' example, because the employer would typically bear no responsibility for and would often be unaware of the secondee's work, the UK or EU employer may not be an intermediary with respect to such work (but see paras 33 & 34 below as regards how this would work in practice).

How will this work in practice?

27. HMRC's guidance provides some further clarification about the practical application of the rules for overseas intermediaries who may have a reporting obligation as a result of being registered with a professional association in the UK – see IEIM621110 Practical application of rules for overseas intermediaries.

28. This guidance is intended to reflect, and to an extent address, the potential challenges that the regulations could create for overseas intermediaries.

The 'employment or practice' example

29. In the 'employment or practice' example, in practice HMRC's guidance (IEIM 621100 Practical application of rules of overseas intermediaries) says that they would not usually expect a report to be made where doing so would contravene domestic legislation on data protection in the jurisdiction in which they were based (a 'conflict of law') and as a consequence prevent the individual from making a report to HMRC. The CIOT and ATT are looking closely at the position as regards data protection in the Crown Dependencies - Jersey, Guernsey and the Isle of Man – which are the jurisdictions in which most of our non-UK based members work and expect to be able to clarify the position further shortly.

30. There may be other laws which create particular challenges and conflicts for overseas intermediaries who may have a reporting obligation as a result of being registered with a professional association in the UK.

31. If a member or student wishes to discuss the data protection issue referred to in para 29 or identifies other laws which create particular challenges and conflicts in the jurisdiction in which they are based, they should contact the CIOT (ciot@technical.org.uk) or ATT (atttechnical@att.org.uk) for further advice (which is likely to involve us bringing it to the attention of HMRC for their view). It is recommended that members and students contact us well in advance of any reporting obligations potentially crystallising as it is unlikely that a view from HMRC could be obtained at short notice. It should be noted that there is no guarantee that HMRC will be able to provide a view.

32. It is likely that a failure to make a disclosure to HMRC because that disclosure would have contravened domestic legislation in the jurisdiction in which the individual is based would provide a reasonable excuse defence (see IEIM660090 Reasonable excuse) in the event that HMRC were to charge a penalty for non-compliance with the regulations. However, where an individual had contrived to put themselves into a 'conflict of law' situation, this would be likely to put a reasonable excuse argument at risk.

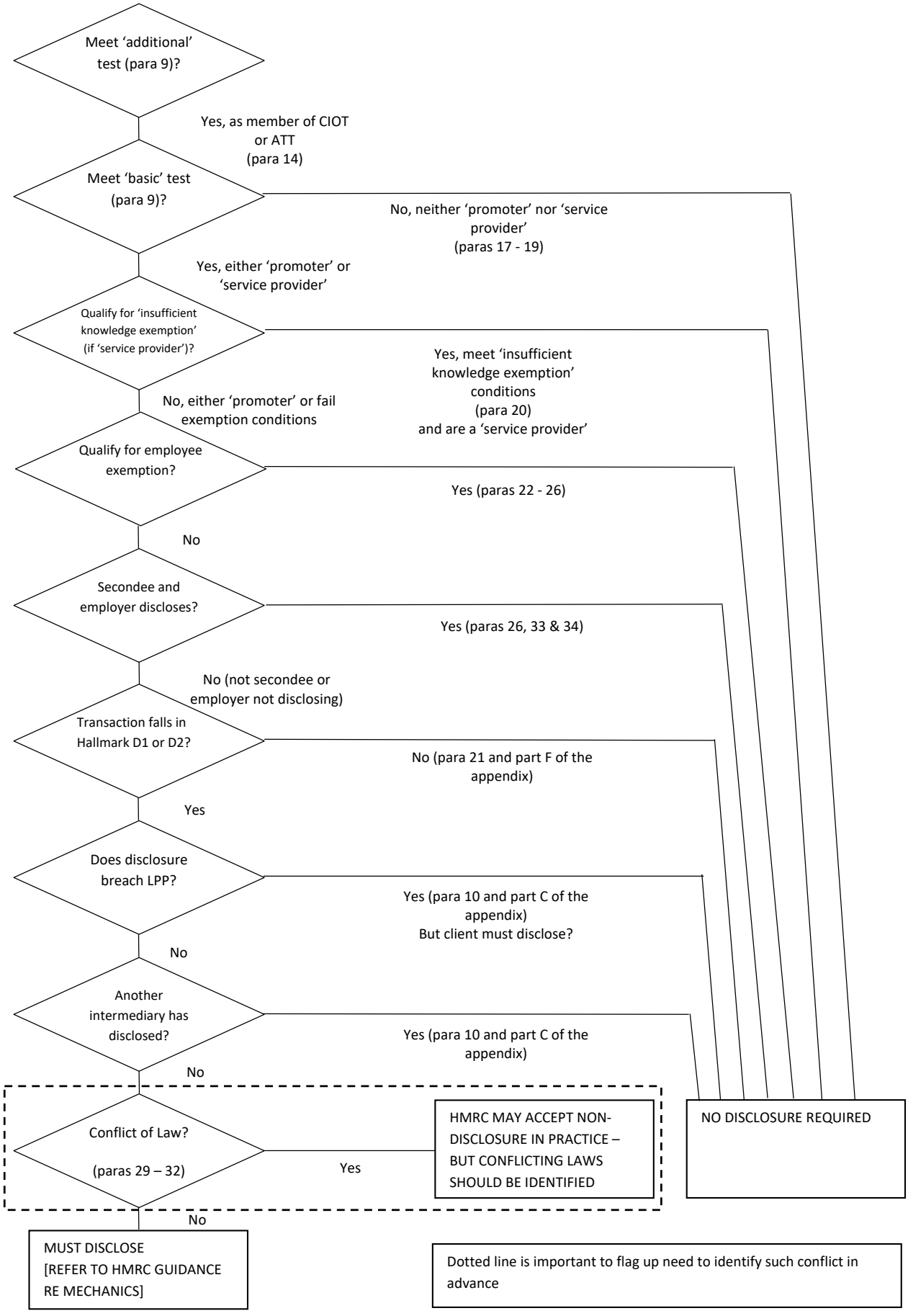
The 'secondee' example

33. In the 'secondee' example, HMRC's guidance explains that if the individual is an intermediary in relation to a reportable cross-border arrangement then HMRC would in practice accept the UK part of the organisation reporting on behalf of the secondee, in which case the individual will not be required to make a report.

34. It will clearly be important that the organisation puts adequate procedures in place to be able identify when it will be required to make a report on behalf of a secondee working on a temporary secondment to a network firm based outside the UK or EU.

DAC 6: INDIVIDUAL DECISION TREE FOR CIOT & ATT MEMBERS

It is recommended that users of this decision tree should continue through the tree if an earlier question fails to provide a clear answer. Depending on the particular facts of their case, some later questions may provide a clearer answer than earlier questions.



Appendix

Glossary of Terms

A International Tax Enforcement (Disclosable Arrangements) Regulations 2020

The regulations implemented EU Directive 2018/822 amending Directive 2011/16/EU (otherwise known as DAC 6 into UK law.

DAC 6 provides for the mandatory disclosure by intermediaries, or individual or corporate taxpayers, to the tax authorities of certain cross-border arrangements and structures that could be used to avoid or evade tax and the mandatory automatic exchange of this information amongst EU member states. A cross-border arrangement is reportable if it meets one or more hallmarks set out in Annex IV of DAC 6.

The measures were originally due to come into force on 1 July 2020, but due to the coronavirus outbreak the UK Government introduced legislation which deferred the first reporting deadlines by six months. This was in line with the approaches announced by a number of other implementing jurisdictions. HMRC's International Exchange of Information Manual explains how the deferral worked in practice - see IEIM 800010 Deferral of Reporting Deadlines for DAC6.

B UK/EU Free Trade Agreement and end of the Brexit transition period

The UK left the EU on 31 January 2020 and consequently is no longer an EU Member State. During the transition period which ended on 31 December 2020 arrangements continued to be reportable in the same way as they were prior to the UK's departure from the EU – see IEIM 630030 Meaning of cross-border – although, as noted above, the deferrals put in place as a result of the coronavirus outbreak deferred the first reporting deadlines into 2021.

Following the end of the transition period (11pm GMT on 31 December 2020), the position regarding the implementation of DAC6 in the UK has changed. Under the terms of the UK/EU Free Trade Agreement, reporting under DAC6 will be required for a limited time in the UK, but only for arrangements which meet hallmarks under Category D, including for the period from 25 June 2018. The regulations implementing this change took effect from 11pm on 31 December 2020.

We will provide links here to HMRC guidance once it has been updated.

C Intermediary

An intermediary for the purposes of the regulations has the meaning given by Article 3(21) of the DAC.

> *"21. "Intermediary" means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.* **[Someone meeting this test is referred to as a 'promoter']**
>
> *It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services,*

knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. **[Someone meeting this test is referred to as a 'service provider'.]** *Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding".* **[This is the 'insufficient knowledge exemption', as we have termed it – see para 20.]**

For the purposes of this guidance, when we refer to the meaning of 'intermediary', we describe the whole of the above part of the definition as 'the basic test' and the following test as 'the additional test' – see para 9.

"In order to be an intermediary, a person shall meet at least one of the following additional conditions:

(a) be resident for tax purposes in a Member State;

(b) have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;

(c) be incorporated in, or governed by the laws of, a Member State;

(d) be registered with a professional association related to legal, taxation or consultancy services in a Member State."

An intermediary must therefore make a report to HMRC (on any reportable transaction in relation to which one is an intermediary) if they are registered with a professional association relating to legal, taxation or consultancy services in the UK and none of the preceding three conditions in Article 3(21) are met. To be reportable by an intermediary, information must be in their knowledge, possession or control.

There are other exemptions from reporting, which include:

i) if disclosing the information would breach legal professional privilege (see IEIM621130 Legal professional privilege), or
ii) if someone else has already reported the information (see IEIM621120 Exclusions).

In addition, HMRC do not expect service providers to do additional external due diligence to establish whether there is a reportable arrangement (see IEIM 621060 Reasonably expected to know).

D Registered with a professional association related to legal, taxation or consultancy services in a (member*) state

This is addressed in HMRC's International Exchange of Information Manual - see IEIM 621140 Registration with a professional association where it says the following:

"*HMRC will only consider a person to be registered with a professional association where that association has a governance or supervision function in respect of that person's work.*

"*HMRC would consider this to apply where the professional association, in exercise of its supervisory functions, was able to prevent a person registered with them from carrying out the relevant professional activity, was able to impose monetary sanctions, or was carrying out anti-money laundering supervision in respect of the professional activities of the registered person.*

"*Generally, HMRC would not consider the 'governance or supervision function' test to be met where the professional association's only course of action is to expel a person from the association, unless such expulsion would prevent the person from carrying on the professional activities in question.*

"*Some overseas firms are registered with professional associations in the UK because they employ (or have as partners or members) people who themselves are registered with the professional association in question. Where the registration of the firm itself does not give rise to any governance or oversight by the UK professional association, the firm itself will not qualify as a UK intermediary*".

* the word 'state' substituted for 'member state' by the International Tax Enforcement (Disclosable Arrangements) (Amendment) (No.2) (EU Exit) Regulations 2020

E Reportable cross-border arrangement

'Reportable cross-border arrangement' has the meaning given by Article 3(19) of the DAC and means any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV of the DAC – see https://eur-lex.europa.eu/eli/dir/2018/822/oj. As noted already, under the terms of the UK/EU Free Trade Agreement, reporting under DAC6 will be required for a limited time in the UK, but only for arrangements which meet hallmarks under Category D, including for the period from 25 June 2018. 'Hallmark' means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance.

F Hallmark D

Hallmark D has two parts. Category D (1) undermining reporting obligations and Category D (2) obscuring beneficial ownership – see IEIM 645000.

In relation to Hallmark D2 'Obscuring beneficial ownership', HMRC's guidance (see final paragraph in IEIEM 645200) specifies that in relation to trusts, where the beneficiaries are named, or identified by class, the beneficiaries would not be considered to be made unidentifiable. For example, a trust where the beneficiaries were Ms X and her future lineal descendants would not automatically meet this hallmark. Similarly, where there is the possibility of beneficiaries being added to a trust in the future, this would not necessarily trigger this hallmark, unless people were deliberately excluded from the trust temporarily to try to avoid being identified.