ICAEW
REPRESENTATION 108/19

INTERNATIONAL TAX ENFORCEMENT: DISCLOSABLE ARRANGEMENTS

Issued 10 October 2019

ICAEW welcomes the opportunity to comment on the International Tax Enforcement: disclosable arrangements consultation in particular the draft guidance and legislation published by HMRC on 22 July 2019, copies of which are available from this link.

This response of 10 October 2019 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 150,000 chartered accountant members in over 160 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

ICAEW Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
T +44 (0)20 7920 8100 **icaew.com**

GENERAL COMMENTS AND OVERVIEW

1. In principle we support measures to increase transparency to revenue authorities about tax arrangements that involve tax avoidance. The UK has, of course, had its own disclosure of tax avoidance scheme rules since 2004 and we have worked with HMRC since their introduction to help refine them and ensure that they are properly targeted and work as intended, while not imposing excessive admin burdens and costs on the 'ordinarily compliant', namely the majority of advisers and their clients who are not engaged in such activity.
2. We are concerned that these proposals are too widely targeted and likely to impose considerable extra admin burdens and costs on the ordinarily compliant. We are receiving consistent feedback that the scope of 'an arrangement' is not clear. This coupled with the fact that the hurdle for when an arrangement is 'made available' is so low means that the impact of the new regime is likely to be very wide-ranging and not as targeted as we would expect of anti-avoidance provisions. It also means that even exploratory discussions with advisors about arrangements that are not the policy target, could be reportable.
3. Because this measure is too widely targeted, the number of reports submitted is likely to be far in excess of those that are the intended target. Further, we anticipate that there will be multiple reporting of the same transactions, not only across different jurisdictions but by multiple UK advisors who are 'intermediaries'. This is largely because the wording of the exemption to report where an arrangement has been notified already is too prescriptive and it is unlikely that intermediaries will be confident that the criteria are met. It will be more straightforward for affected entities to simply report the transaction themselves in multiple and not rely on the exemption.
4. We consider that the amount of information received by HMRC is likely to be far in excess of what should be required and this will not be helpful in achieving the policy objective as it will make it far more difficult to identify the arrangements that really should be reportable.
5. Again, the wide targetting of this measure will result in a significant compliance cost and burden to implementing the new rules. Given that this requires investment from intermediaries (which in most cases is well underway), members are seeking to understand whether the rules will be implemented as drafted irrespective of the political outcomes around Brexit. In light of the fact that members are consistently finding the rules unduly onerous to implement, this uncertainty is causing concern.
6. There is a wider point that a good tax system relies on transparency both with advisors and HMRC. The rules are so widely drawn that it could lead to the reticence of sharing of information and dialogue between advisors and clients for fear of 'being reported' to HMRC or triggering a reportable event, especially given the reports are required to 'name' parties to the arrangements. Such a development would be unhelpful, especially as we expect the legislation will capture numerous benign arrangements. We understand that HMRC would like intermediaries to cooperate in regard to reporting, but professional advisers are generally wary of such activity, which may be misinterpreted as anti-competitive behaviour.
7. Much of the feedback has raised general points and draws on Members practical experiences of how the rules might apply. This commentary didn't always logically fit into one of the consultation document questions. The response therefore initially talks through comments received under general headings. We have then addressed the consultation document questions at the rear of this document.

SPECIFIC POINTS

Scope of arrangement

8. We consider there is likely to be confusion over the scope of an 'arrangement'. It is perhaps best to illustrate this point through practical examples. Members are suggesting where they provide advice in connection with transactions involving private equity ("PE") funds, they may only act for a single company owned by the fund (a 'portfolio company') as opposed to the

ultimate owners / investors. Within the scope of their specific engagement with the portfolio company, there may not be a disclosable arrangement. However, in the context of the entire fund, the transaction (upon which they are advising on a very confined part) may trigger a reportable arrangement involving the investors or elsewhere. It is not clear whether they are liable to report in this context. This is because the scope of where an arrangement starts and finishes is not clear.

9. Another example to highlight issues around scope is where an advisor might be acting on a confined part of a major international re-organisation. Within their remit, they may have sight of various documents and advice which goes beyond their specific engagement, involving multiple jurisdictions. They are unlikely to have significant oversight of these aspects but certainly an awareness could be realistic. What would their duty to report cover? For example, if as part of this international reorganisation, there was a loan between a tax haven and the UK, would it be just the loan that was disclosable or the entire re-organisation to the extent the UK advisor has an awareness?

Concerns

10. At 2.2 "*An arrangement is a cross border arrangement if it concerns either more than one EU member state or an EU member state and a third country.*" It is not clear what 'concerns' means here. For example does this mean there has to be a tax impact or could this apply where there is a legal or economic impact? It would be helpful to understand whether this measure seeking to capture activity broader than just tax?
11. An example which might highlight the above is where there is a transaction involving France and Germany and the UK adviser is in effect acting as project manager coordinating this activity. The transactions themselves do not actually touch the UK. Would this be reportable under UK domestic law? For those acting in larger accounting firms with large multi-national clients this sort of situation would not be uncommon.
12. Is it relevant if the transactions simply pass through a jurisdiction? For example if the UK provides a loan to facilitate a French – German transaction which would be reportable, would this be caught under UK law?
13. It is therefore important to understand how 'intended' the arrangement must be to be caught? We consider that the objectives of the new rules should be clearer to assist members in understanding them.
14. Members have also raised questions around materiality and would like to understand in the context of reviewing arrangements, is it acceptable to take a view on how material they are and indeed what sort of levels might be acceptable for these purposes? At 2.4 in the guidance it is indicated that the jurisdictions must be of 'material relevance' to the arrangement, however, it is not clear how this might be defined. Whilst one practical example is welcome, we consider that more guidance here would be useful. As a further example, if an investment fund is established and then marketed to potential investors, does the fact that one of the investors happens to be based in a haven jurisdiction bring the whole fund arrangement within DAC 6? Given the legislation is so broad, intermediaries will be looking to understand if any transactions can be disregarded. This would seem helpful to all parties as we do not think HMRC will want considerable amounts of insignificant arrangements reported.

Intermediaries

15. It will not always be obvious whether you are an intermediary and the distinction between a 'promoter' and a 'service provider' will not always be clear. This is potentially problematic given the differing obligations between the two classes of intermediary. For example, if the engagement is being led from a US perspective but the US consult with the UK on an aspect, is this sufficient to meet the definition of an intermediary by the UK? Would the UK advisor fall to be a 'service provider' or 'promoter'. Whilst we are aware that the outcome of such questions will depend on the facts, we consider more guidance will be important to enable

members to make more informed decisions around these issues as we anticipate the outcomes will not always be clear-cut.

16. It is possible that certain advisors may find themselves meeting the definition of an intermediary despite the fact that they are not tax professionals. An example where we think this is likely is corporate finance professionals. They may be privy to a number of tax advice and structure documents and may have even assisted in the design and implementation of certain structures to meet commercial requirements. However, it is unlikely that they would understand the tax ramifications to any meaningful degree. To what extent are these types of professionals 'intermediaries'? Are organisations expected to train these individuals to spot such issues? In practice we think it would be very difficult to equip non-tax professionals with the necessary skills to ensure relevant transactions are routinely identified and consulted on even where there is a tax department within the organisation.

17. Similarly, investment funds and investment managers are expressing concerns given that standardised documents and products are routinely used. However, their mandate is purely to provide investment advice, with tax advice often expressly excluded. However, certain transactions could still be caught by these rules and there may be a requirement to report. There is also a risk that they could fall into the definition of a 'promoter' and then there would be no defence should a reportable transaction be missed. See point 19 below.

18. In-house tax teams are also expressing concern around the ability to identify reportable arrangements. For example, there are disclosure requirements around moving assets and some teams are telling us they would not necessarily have oversight of this type of transaction, particularly where there is limited UK footprint. Even if tax teams are comfortable that they would identify transactions caught by the rules, we are advised that the 30 day limit required for reporting would be challenging for many organisations. The information powers proposed in the regulations are different from powers existing in other areas (e.g. DOTAS, Enablers of Avoidance). In particular, 14 days is an unrealistic timeframe for many organisations and the powers appear to lack the normal taxpayer protections around time limits, rights of appeal etc.

19. Some problems may arise with the definition of an intermediary concerning international professional firms where they are separate legal entities across different countries with shared branding. Typically, member firms tend to share a great deal of information between each other where they are involved in a transaction. However, there is a concern that there may be a reticence to operate in the same way under the new rules of DAC 6. Firms are concerned that by sharing information they may trigger further disclosure requirements within the other jurisdiction. For example, if the other jurisdiction is not aware of the entire transaction or structure, a full advice report or structure diagram could trigger reporting requirements which might not otherwise exist. The directive may therefore create a conflict between providing the most holistic advice to clients, consulting extensively with various jurisdictions and minimising the extent of the disclosure requirements under the Directive. If information is not within an entity's knowledge, possession or control then it will not be reportable.

20. At 3.4 and 3.5 of the consultation document it is clear that there is no defence for promoters that they did not know they were part of a reportable arrangement. Members are providing consistent feedback that in the context of complex structures or international groups (eg. funds or large multinational transactions involving several jurisdictions), it is entirely possible that they would not know they were part of a reportable transaction. This again comes back to some of the points made under the scope of an arrangement section earlier. Whist advisors might have total oversight over their specific part of the transaction, it is often the case that the same degree of oversight is not in place for the wider transaction. It therefore appears unfair that the advisors could find themselves in good faith unaware of their obligations under the new rules and unable to put forward a defence to HMRC. It appears that more clarity is required to ensure that only those involved in marketed avoidance could be considered a 'promoter'.

Made available

21. At 4.3 and 4.4 of the consultation document, more detail is provided about what it means for an arrangement to be ‘made available’ to a taxpayer. There has been a number of concerns raised around this. The largest concern is the fact that the hurdle for making an arrangement available is very low and is unaffected by the client’s interest in implementation. For example, if an advisor spoke to a client or a potential client about a tax planning solution but that client declined to pursue implementation of such planning, a report could be required to be made and under the current rules the client or target client would have to be named. Commercially this is very difficult to reconcile and many businesses will feel unhappy that they are receiving unwanted HMRC scrutiny for doing what they consider to be the ‘right’ thing in the context of tax. It also feels unnecessarily intrusive and onerous if an informal business development chat which is not pursued could lead to formal reporting requirements.

22. There is also the issue that a ‘good’ tax system is underpinned by comprehensive competent tax advice which starts with clients and advisors being able to communicate effectively around tax issues. As drafted the legislation could create a situation where consultation and transparency with advisors is deterred for fear of being ‘reported’ to HMRC by your advisors.

23. Many tax reliefs and incentives to save clients tax have been implemented as part of a wider policy decision to encourage certain behaviours and investment in the UK but these often rely on clients and advisors being able to talk through the issues. This sort of legislation could affect this type of dialogue and exploratory advice.

24. Furthermore, 10.15, the consultation document indicates that patent box regimes or special economic zones could be caught by hallmark C1. This seems unhelpful in achieving wider policy objectives. We appreciate that this hallmark is subject to the main benefit test and the ‘policy intent’ point at 7.7 of the guidance, however, the fact that genuine tax incentives which are both acceptable and actively encouraged are within the scope of a specific hallmark is not helpful, particularly in the context of encouraging investment in the UK. There is the risk that extra time and compliance costs are incurred in deciding whether an arrangement is reportable. This appears unnecessary, especially where the arrangements are established tax incentives.

25. There is a danger that the amount of arrangements that have to be reported is far in excess of what should be reported that in policy terms the outcome could be counter-productive. As it stands the rules are so widely drawn that even high-level exploratory discussions around tax planning, which might even be viewed as acceptable and are not even pursued by the client, could be caught. The issue with excessive numbers of claims is exacerbated by the fact we suspect there will be multiple reporting of the same arrangement (see point 25) which will lead to even more information for member state authorities to navigate, a large proportion of which might be irrelevant or benign. For the rules to be effective in meeting the policy intent (which in principle we support), we consider they should be properly targeted and we would encourage further guidance to facilitate more tailored reporting. We recommend that there should be a particular focus on what is means for an arrangement to be ‘made available’.

Reporting obligations

26. Section 6 of the consultation document indicates that there will be an exemption to report if the intermediaries or relevant taxpayers have evidence that an appropriate report has been made. However, the evidence requirement is set so high that we consider it is highly unlikely that this exemption will ever be relied upon, which will mean that there will be a substantial amount of duplicate reporting between jurisdictions. Please see our earlier comments at 24.

27. At 6.2 the consultation document states that for the exemption to apply the intermediary or taxpayer must be satisfied that all of the information which they would have reported has been reported. In practice we think it will be very difficult for this condition to be met. If you are on the other side of a transaction, it is unlikely that the information available on your files will mirror that of the other party and we suspect most taxpayers and intermediaries will not be comfortable relying on this exemption. If there is a genuine desire to reduce duplicate

reporting, the exemption will need to apply where specific conditions are met and these will need to be much less broad than what is currently in place.

28. The legislation at Section 10(b) is also not helpful as this states that:

"…evidence that reportable information has been filed must comprise the following:-

…such information which demonstrates to the satisfaction of an officer of Revenue and Customs that the intermediary or relevant taxpayer, as the case maybe, does not have knowledge, possession or control of any other reportable information in relation to the reportable cross- border arrangement."

To rely on an exemption, the terms of which are so broad and entirely dependent on the discretion of a HMRC officer, is unlikely to be a position that affected parties will be comfortable with, especially in light of the fact that the potential penalties for errors can be severe (see paragraph 35 below).

29. We consider it might be worthwhile pre-approving some structures and providing an exemption for reporting, in other words a 'white list'. For example, a plain vanilla private equity deal will likely be caught under these rules and as the rules currently stand we would expect multiple reports along these lines:-

a) A report from each lawyer (buyer, seller and management)

b) A report from each accountant (possibly buyer, seller and management)

c) Private equity house report

d) Any banks involved in the transaction will likely report

This will result in excessive reports on the same transaction. If simple deal structures were pre-approved and confirmed as outside the scope of the rules, this would reduce duplicate reporting. There are likely to be other scenarios where this might assist and the principle of 'pre-approval' will be relevant.

30. Concern has also been raised that some jurisdictions (for example Poland) appear to have gone beyond the requirements of the directive in their domestic legislation. This has led to questions about what is the corresponding UK obligation? If the UK is aware that there is an arrangement reference number in another Member State, should this be reported in the UK? Is it appropriate not to report if it can be concluded that under UK law there would be no requirement? Although it could be argued that this is the outcome of the legislation as it currently stands, it might be helpful to make this clear in guidance.

31. Members have also raised concerns regarding the 30 day time limit to report, suggesting that in many cases this will be too short. This is exacerbated by the fact that the hurdle for an arrangement being 'made available' is very low – please see earlier comments at 20. We suspect that where non-tax staff are involved in arrangements, this time limit will be even more challenging to meet as there is likely to be more consultation and review required to identify reportable arrangements and some of this may happen retrospectively.

Main benefit test

32. The guidance indicates that the main benefit of an arrangement will not be to obtain a tax advantage if the tax consequences of the arrangement are entirely in line with the policy intent of the legislation upon which the arrangement relies. We understand why this has been included and it is welcomed that HMRC has sought to include a provision which enables 'acceptable' tax planning to be excluded from some of the hallmarks. However, members are raising concerns that the inclusion of a 'policy intent' provision/exemption is open to interpretation and possible abuse. An example might be where a deduction is achieved in two jurisdictions for a cross-border transaction and it could be argued that the deduction is in line with the policy intent for both Member States? Arguably the double deduction might not be caught by the main benefit test and therefore not reportable. In other words, a tax advantage may arise from an arbitrage between two tax codes and there is no 'policy' that deals with this interaction.

Knowledge, possession and control

33. The legislation indicates that an entity must report all information within its '*knowledge possession or control*.' However, guidance at 3.13 states that *an intermediary would not have to trawl through all of an organisation's computer systems to try and find all information held in relation to a relevant taxpayer just to see if it was relevant*. While we appreciate HMRC's pragmatism here, this guidance appears at odds with the legislation and we are receiving feedback that intermediaries are unclear what their duty is in relation to reporting. There is also unease that the guidance is open to a significant degree of discretion by HMRC as there is unlikely to be one clear view as to what is acceptable due diligence based on different scenarios. These comments are also relevant to our comments at para 25. Intermediaries are not going to be comfortable that this requirement is met in connection with a member state making a report about an arrangement they are privy to hence our view that duplicate reporting is inevitable, based on the current drafting of the legislation.

34. It has also been brought to our attention by members that some clients are very protective over their client due diligence information. While this is not common practice, many advisors do have a minority of a clients who take this view. Typically these are high-profile individuals, quite often non-domiciled and with sensitive non-UK appointments. Clearly the relevant information will be obtained for anti-money laundering purposes but this is often only shared with the client due diligence teams (many larger firms have a specialised team to undertake this role). The engagement team may therefore only be aware of the client's affairs to the extent it is required under the specific project they are undertaking. This sort of situation is leading to questions around what would be reportable because the staff involved in any planning arrangements would not be aware of the information available to the client due-diligence teams (who would be under strict instruction not to share this information with anyone). Our understanding is that information obtained for client due diligence purposes is held on the basis that it will not be used for any purpose or available to the rest of the business. It should therefore be excluded from any information powers. There are also concerns over 'Chinese walls', i.e. where a firm has separate teams to manage a potential conflict of interest, it must not be expected that one client team would be able to report information that is on the 'other side' of the wall.

Hallmarks

35. Hallmark E3 is very broad and is not subject to the main benefit test. There is concern that a number of commercial transactions could be caught. For example, the liquidation of a subsidiary with a foreign parent could meet this hallmark. More guidance around this hallmark would therefore be beneficial.

36. Other Hallmarks are also not subject to a "main benefit" test albeit they may not characterise any significant tax risk (examples are C2 C3 C4 E1 E3). The consultation gives an example at paragraph 10.18 in relation to C2, but many other examples will arise in practice. The issue is that, without an effective filter for reports required by these hallmarks, HMRC may be swamped with reports which do not denote an objective indication of tax risk. More detail is contained in the consultation document questions at the rear of the document.

37. In relation to Hallmark A (confidentiality) the consultation document appears to suggest that a 'general' confidentiality provision would trigger a reporting obligation. Given that all client engagement terms would contain such provisions, we assume that this has limits, and these should be made explicit in any future guidance.

Penalties

38. Penalties for those failures undecided at Tribunal can still reach amounts such as £5,000 - £10,000 and are set at severe levels - £600 per day. For those decided at Tribunal the penalty can be up to £1m. The errors that might arise under these provisions could be relatively minor, particularly if the failure to disclose relates to benign planning arrangements which are widely accepted. We know from experience of legislation such as the senior accounting officer (SAO) provisions that, where penalty outcomes are binary, HMRC are

bound to enforce the penalty regime irrespective of proportionality. For example the penalties to disclose a dormant company on the SAO return can result in penalties of up to £10,000. This is widely agreed to be disproportionate by HMRC and businesses alike but it has not been possible to amend the legislation or consider proportionality. We are concerned that the implementation of the regime as it currently stands could lead to similar issues. This legislation will also apply to intermediaries of all sizes so the financial effect of penalties on some businesses could be marked.

39. We would therefore urge inclusion of a provision which enables proportionality to be considered and offers flexibility to HMRC whilst also enabling intermediaries to put forward a defence. For example opportunities for mitigation or suspension depending on the behaviour leading to the omissions. We are aware that the legislation includes a ‘reasonable excuse’ provision but based on extensive precedent and guidance this is very difficult for a taxpayer to ever achieve and also does not deal with the issue of proportionality.

40. We consider it is imperative that proportionality can be considered outside of a Tribunal. This is because in many instances the quantum of costs associated with a Tribunal hearing will mean that an appeal is not a viable option.

41. We note that the legislation as it stands enables the Tribunal to consider proportionality and increase those penalties that ‘*appear inappropriately low*’. In the interests of being fair and reasonable we consider HMRC must consider proportionality and whether penalty outcomes are indeed too punitive given the circumstances leading to the failures.

Conflict with other laws

42. Further thought needs to be given as to how these rules will interact with other areas of law. For example compliance under this regime could lead to ‘tipping off’ under the Proceeds of Crime Act 2002. We would expect that any regulatory or other legal obligations would take precedent over the directive but it would helpful to have this made clear.

ANSWERS TO SPECIFIC QUESTIONS

Q1. Do you have any suggestions about how HMRC can provide more clarity about when an arrangement will concern multiple jurisdictions?

Please see our above commentary at paras 9 -13.

Q2. Are there any people who might be caught by this approach to defining 'intermediary', who you think should not be caught?

As discussed above we consider the definition will capture a wide variety of advisers including non-tax professionals and we discuss the challenges of this.

Q3. Does this definition of intermediary risk not catching certain types of intermediary who should be caught?

No detailed comment but we consider that the definition is very widely drawn such that this is unlikely.

Q4. Do you identify any particular practical challenges with regard to HMRC's approach to identifying intermediaries, and what information they have in their knowledge, possession or control?

Please see commentary at paras 32-33.

Q5: Do you have any other comments about the definition of intermediary and who will be caught under the proposed rules?

International firms are raising an issue around the definition of an Intermediary, in particular with regard to their non-EU operations. The consultation document at 3.1(d) states that a person who is '*registered with a professional association related to legal, taxation or consultancy services in a Member State*' will meet the definition of an intermediary. Where larger firms have member firms in non-EU jurisdictions (structured as separate legal entities) and the only link to the UK is corporate membership or employees with membership to a UK professional body, the question is being asked – is this sufficient to meet the definition of an intermediary? Would all relevant transactions become reportable? The types of situations we are seeing is firms in the Channel Islands who are member firms of a large international networks. Other situations include, for example, a UK desk of a large international Firm located in a non-EU state, where an employee with membership to a UK professional body provides advice. It is not clear from the current guidance whether this would be caught.

Q6. For the purposes of the ongoing requirement on relevant taxpayers, do you agree that a relevant taxpayer should be regarded as participating in the arrangement in any year where there is a tax effect or where it could reasonably be expected that there would be a tax effect in a subsequent year?

No detailed comments received here. However, where the tax effect spans several years, this could be reportable each and every year for a long time which might result in excessive reports.

Q7. Do you agree that the amount of evidence required for intermediaries and taxpayers to satisfy themselves and HMRC that all the necessary information has been reported is appropriate?

Please see comments under 'Reporting obligations' at para 25 above.

Q8. Do you think that the approach to defining the main benefit test and tax advantage is proportionate?

Please see our comments around the 'policy intent' provision at para 31.

Q9. Do you have any comments on the approach set out for hallmarks under Category A?

No comments.

Q10. Do you have any comments on the approach set out for hallmarks under Category B?

Hallmarks B1 and B3 appear to be targeting aggressive arrangements. However in respect of B2, we are concerned that it could capture commercial arrangements, for example some sale and leaseback structures. Also if there is a reduction in capital – would this be caught? The feedback has been that there should be more guidance around what 'convert' means.

Q11. Are there any points in the definition of associated enterprise which you think require clarification or explanation in guidance?

No comments.

Q12. Do you think the above approach will prevent unnecessary reporting of benign activities, while avoiding loopholes that could enable intermediaries and/or relevant taxpayers to avoid their reporting obligations? If you foresee problems with this approach, please provide details of possible solutions.

No comments.

Q13. Do you think that this approach will also work for dealing with Collective Investment Schemes? Alternatively, what other approaches do you think would be better?

No comments.

Q14. Do you think particular guidance is needed in respect of hallmark C(3)?

We have received feedback that it would be helpful to have clarity around how this would apply to a dividend through a chain of companies. We would not expect this to be caught but possibly could be on the face of it. It was expected that the guidance might exclude situations where there was double income to counteract any duplicity of DTR. Whilst this might be inferred, it might be helpful to have more explicit guidance around this.

Q15. Do you agree that this hallmark should refer to the amount treated as payable for tax purposes? What do you think are the advantages and disadvantages of this approach, and of any other suggested approaches?

No comments.

Q16. Do you have any general comments about the approach to hallmarks under category C?

Members have provided feedback that C(4) could capture a number of commercial arrangements and that the wording of the hallmark is currently vague. For example, a cross border de-merger could be caught. Also there may be situations where transactions are recorded at book value or possibly market value which would lead to differences in consideration. Similarly, there might be a different allocation of consideration across a selection of assets by the buyer and the seller. The general feedback is that the current drafting of the hallmark will lead to commercial arrangements being caught and more guidance would be helpful.

Q17. Do you have any comments about the approach to hallmarks under Category D?

No comments.

Q18. Where an arrangement relates to companies which are resident for tax purposes in jurisdictions where corporate tax applies at the group level, should hallmark E(3) similarly apply at the level of the sub-group located in that jurisdiction or at the company level? What would be the particular advantages or disadvantages of applying the rules at the group level?

No comments.

Q19. Do you have any comments about the approach to hallmarks under Category E?

No comments.

Q20. Do you have any suggestions for how the penalty regime could be improved?

Please see above our comments at para 38.

Q21. Do you have any particular comments about the commencement rules, and HMRC's approach to dealing with the backdated reporting requirements?

We would hope HMRC are prepared to take a pragmatic or 'light touch' approach towards compliance in respect of this period and we note comments around arrangements where the first step of implementation pre-dates the consultation document.

From discussions with various firms we believe that many advisers are taking a very prudent approach around reporting, therefore we anticipate a vast amount of reports could be made (many involving benign arrangements), and therefore thought will need to be given as to how this will be managed by HMRC.

Q22. Are there any particular areas of DAC 6 that you would like HMRC to provide guidance on, which are not covered elsewhere in this consultation?

Other matters are discussed in the body of this response but the impact of Brexit has been of particular interest to members.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).