The implementation of DAC 6 in the UK

International Taxation:
DAC 6 and the new reporting duties for intermediaries and tax payers regarding cross-border transactions

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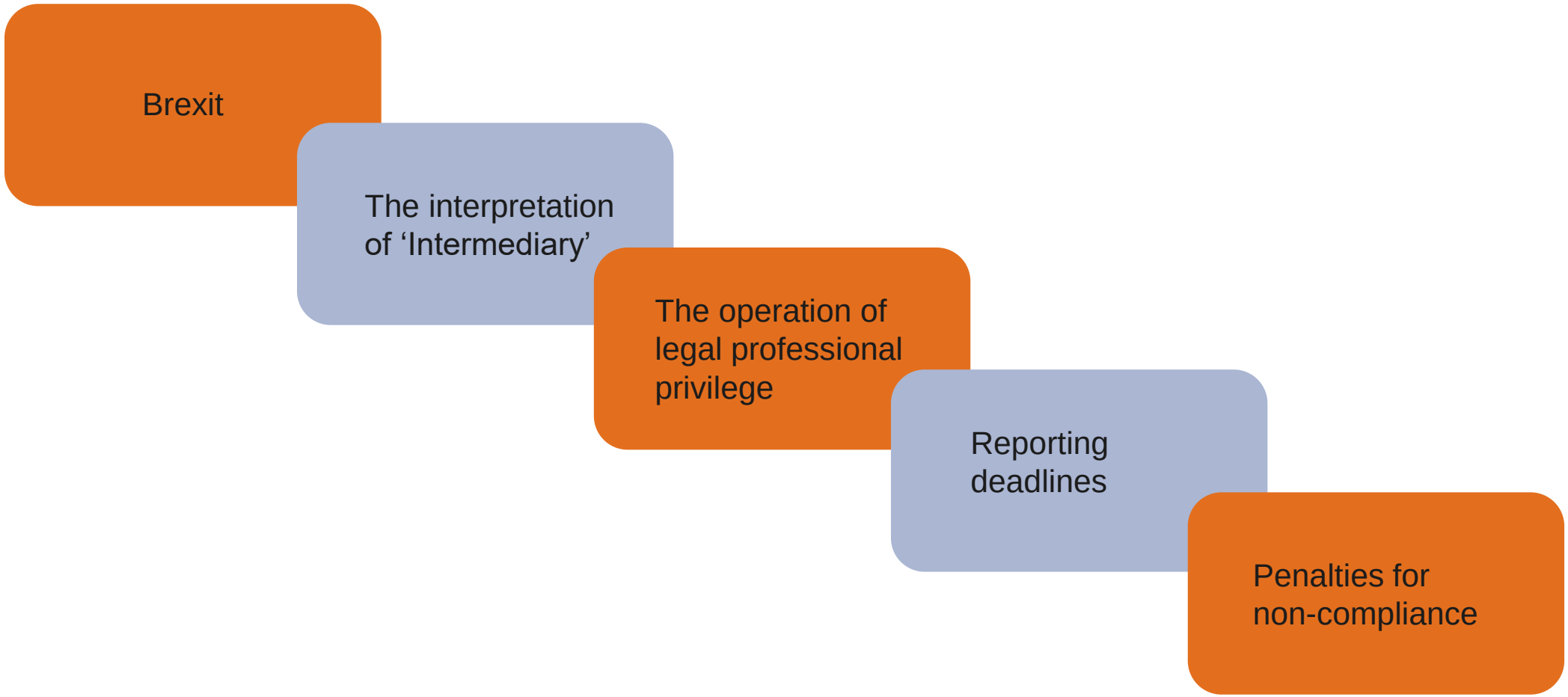
UK implementation of DAC 6: key areas to consider



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UK implementation of DAC 6: Brexit

- The International Tax Enforcement (Disclosable Arrangements) Regulations 2020 (the '**UK Regulations**') implementing DAC 6 came into effect on 1 July 2020.
- However, following the UK's departure from the EU, the UK is no longer required to implement DAC 6.
- The UK Government intends to repeal the UK Regulations in their entirety and implement the OECD's mandatory disclosure rules instead. In the interim, a more limited version of DAC 6 applies in the UK.
- The International Tax Enforcement (Disclosable Arrangements) (Amendment) (No. 2) (EU Exit) Regulations 2020 remove Hallmarks A, B, C and E from the scope of the UK's implementation of DAC 6, and as a consequence the MBT.
- This change applies retrospectively such that disclosure will not be required in respect of historic arrangements which fall into Hallmarks A, B, C and E.

UK implementation of DAC 6: Brexit

- The UK is no longer an EU Member State, which changes the jurisdictional scope for an arrangement to be viewed as ‘cross-border’.
- Accordingly, for UK purposes, a reportable cross-border arrangement is an arrangement concerning:
  - the UK or a Member State and a third country;
  - the UK and a Member State; or
  - two Member States.

Interpretation of key terms: definition of intermediary

- Although the Directive provides a definition of 'intermediary', the interpretation of what constitutes an intermediary differs across Member States.
- The UK Regulations define 'intermediary' by reference to the Directive. HMRC's guidance identifies two distinct categories of intermediary: 'promoters' and 'service providers'.
  - **Promoter intermediary**: any person who *designs, markets, organises or makes available for implementation or manages the implementation* of a reportable cross-border arrangement.
  - **Service provider intermediary**: any person who *knows or could reasonably be expected to know that they are providing aid, assistance or advice* (directly or through other persons) with respect to the designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.
- The key distinction, following HMRC Guidance, is that a service provider intermediary will not be an intermediary if they did not know and could not reasonably have been expected to know that they were involved in a reportable cross-border arrangement.

Legal Professional Privilege

- The Directive permits territories to waive the obligation to report where to do so would breach legal professional privilege ('**LPP**').
- The UK Regulations state that UK intermediaries will not be required to disclose any information that is subject to LPP. In the UK, LPP protects:
  - confidential communications, and material evidencing such communications, between clients and/or their lawyers for the dominant purpose of giving or receiving of legal advice, or where communications form part of a continuum that aims to keep client and lawyer informed so that advice may be given as required (**Legal Advice Privilege**); and
  - confidential communications between lawyers or their clients and any third party made for the sole or dominant purpose of conducting existing or reasonably contemplated litigation which is adversarial rather than investigative. The communications must also have been created for the purpose of obtaining legal advice or information relating to the conduct of that litigation (**Litigation Privilege**).
- The breadth of this exemption has caused much debate in the UK between lawyers and HMRC.
- However, it is generally accepted that in most cases, LPP will prevent UK lawyer intermediaries from reporting (unless the client waives privilege).

Administrative reporting requirements: deadlines

- The first DAC 6 disclosures were expected to be made from 1 July 2020, with a specific reporting deadline of 31 August 2020 for arrangements that occurred between 25 June 2018 and 30 June 2020.
- The UK deferred the first reporting deadlines by six months in order to provide taxpayers and intermediaries dealing with the impacts of COVID-19 additional time to comply with their reporting obligations.
- The updated reporting deadlines in the UK are:
  - 28 February 2021, for reportable cross-border arrangements where the first step was implemented between 25 June 2018 and 30 June 2020;
  - 30 days from 1 January 2021, for reportable cross-border arrangements where the first step was implemented between 1 July 2020 and 31 December 2020;
  - 30 days from the day on which the first step was implemented, for reportable cross-border arrangements entered into on or after 1 January 2021.

Penalties for non-compliance

- The Directive states that penalties must be dissuasive and proportionate, which provides EU Member States with the latitude to impose penalties which they deem appropriate.
- The UK Regulations set out the penalties for failure to comply with the UK reporting obligations.
  - In most cases, the penalty for failing to make a disclosure will be a one-off penalty of up to £5,000.
  - In the more serious cases, the First Tier Tribunal can impose daily penalties of £600 for each day that the failure continues.
  - In exceptional cases, the penalty can be up to £1million.
- No penalty will be due if there is a ‘reasonable excuse’ for failure to comply. In determining whether a person has a reasonable excuse, consideration will be given to whether the person has in place ‘reasonable procedures’ to ensure that they are able to meet their DAC 6 reporting obligations.

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