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Dear Mr Marshall

Re: The City of London Law Society Revenue Law Committee response to the Consultation Document "International Tax Enforcement: disclosable arrangements" (the "ConDoc").

1. INTRODUCTION

1.1 The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients, from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

1.2 The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Revenue Law Committee (the "**Committee**"). A list of the committee members can be found at:

http://www.citysolicitors.org.uk/clls/committees/revenue-law/revenue-law-committee-members/

2. **GENERAL COMMENTS**

2.1 The Committee welcomes the opportunity to respond to the consultation on the UK rules to implement EU Directive 2018/833 ("**DAC6**") which amends EU Directive 2011/16 (**"DAC"**). We support the concept behind these new rules and appreciate the importance of ensuring that tax authorities have early access to information about aggressive tax planning. However, the rules laid out by DAC6 are exceptionally broad and lack detail. It is therefore critical that the rules are implemented in the UK in a way which makes them clear, understandable and practical.

2.2 The general approach taken by HMRC has been to cross-refer directly to definitions used within DAC6. DAC6 is a piece of European legislation and European jurisprudence permits the courts to fill in the detail of legislation based on context and purpose to a far greater extent than is permitted by the courts of England and Wales (and we understand by the courts of other parts of the United Kingdom). Therefore, while it may have been appropriate for the Council of the European Union to use the broad defined terms found in DAC6, we do not believe that the same approach can easily be used in the UK legislation that implements DAC6. We therefore propose that the definitions used in DAC6 are not merely cross-referred to by the UK legislation, but rather that the definitions should be transposed and supplemented to clearly articulate the circumstances in which the various rules apply.

3. **CONSULTATION QUESTION 1: DO YOU HAVE ANY SUGGESTIONS ABOUT HOW HMRC CAN PROVIDE MORE CLARITY ABOUT WHEN AN ARRANGEMENT WILL CONCERN MULTIPLE JURISDICTIONS?**

It seems to us that the DAC6 Directive itself gives a strong steer as to what is meant by "concern" in this context and that it would be helpful for the UK legislation to spell this out. Given that one of the pieces of information required to be reported is "details of the national provisions that form the basis of the reportable cross-border arrangement" (Article 8ab(14)(e)) an arrangement logically only "concerns" a member state if that member state's national (tax) provisions form part of the basis of the reportable cross-border arrangement. Under that definition the example at paragraph 2.5 of the ConDoc would not be a cross-border arrangement as the (tax) provisions of the member state of residence are not relevant to the arrangement (which takes place entirely within the jurisdiction of the permanent establishment).

4. **CONSULTATION QUESTION 2: ARE THERE ANY PERSONS OR ARRANGEMENTS WHO MIGHT BE CAUGHT BY THIS APPROACH TO DEFINING 'INTERMEDIARY' WHO YOU THINK SHOULD NOT BE CAUGHT?**

Individual partners in professional partnerships and self-employed consultants

4.1 Regulation 13 of the draft regulations provides that an employee (as defined for the purposes of Parts 2 and 3 to 7A of the Income Tax (Earnings and Pensions) Act 2003) of a relevant intermediary will not themselves be treated as an intermediary in relation to a particular arrangement.

4.2 However, partners in professional partnerships would not fall within this definition of employee. It therefore seems that each individual partner in an intermediary formed as a partnership could be treated as a separate intermediary in their own individual capacity with all the

individual compliance burden and potential exposure to penalties this entails. Given that many intermediaries in the UK (such as law firms and accounting firms) are formed as professional LLPs, and that a large number of partners of the same intermediary LLP may work on a single transaction, this seems to be unnecessarily duplicative. The same would apply to self-employed consultants. Our assumption is that this result is not the intention as a matter of policy and that the position can be amended in the statutory drafting. There would seem to be a good argument in the case of LLPs that, where the LLP and not the individual lawyer is the one which enters into an engagement with the client, the LLP is the only person that can be said to have undertaken to provide aid assistance or advice for the purposes of the second paragraph of Article 3(21) of the DAC. It alone should therefore be considered to be the intermediary. If HMRC agrees with this approach it would be helpful if it could be confirmed in guidance.

Foreign law firms with SRA ID numbers

4.3 It would be very helpful if further practical examples could be provided as to what it means to be "registered with a professional association" (see paragraphs 3.14 - 3.17 of the ConDoc). One particular example faced by some legal partnerships which do not have a UK presence (and so are not otherwise in the scope of the rules) is that the Solicitors Regulation Authority ("SRA") has a practice of allocating ID numbers to foreign law firms which employ England and Wales qualified solicitors who practice outside England and Wales. The ID number does not denote any level of authorisation or regulation of the relevant firm but is required by the SRA to keep a record of the employers of the relevant solicitors (who the SRA does regulate). It would be helpful if it could be confirmed that this does not amount to "registration" causing the entire partnership to be subject to the requirements of the legislation (at the very most the partnership should only be within the scope of the rules as regards the activities of the relevant individuals).

4.4 As well as being inconsistent with the principle already outlined in the ConDoc at paragraph 3.17 concerning "governance and oversight", such an outcome could deter such non-UK firms from employing England and Wales qualified solicitors. In one example, a partnership including around 1,000 lawyers working outside the EU practicing law in non-EU jurisdictions could be pulled into the rules because of its employment of a handful of dual-qualified solicitors.

EU registered employees of foreign law firms

4.5 Foreign law firms which have an office in the United Kingdom are often structured by way of separate partnerships: for example, one partnership operating the law firm's business in the US (the "US Partnership") and one partnership operating the law firm's business in the UK (the "UK Partnership"). Assuming that the US Partnership (which may have an SRA ID number, but which would not be regulated by the SRA, as described above) does not itself constitute an intermediary, it would appear that an employee of the US partnership who is an England and Wales qualified solicitor would not be able to rely on regulation 13 of the draft regulations (as his or her employer would not be an "intermediary" in relation to the relevant arrangement).

4.6 Where the UK Partnership (which would be an "intermediary") is also involved on the same matter, regulation 13(3) should mean that the employee is not treated as an intermediary in his

or her individual capacity. However, there will often be circumstances where matters with an EU nexus are worked on by the US Partnership without the involvement of the UK Partnership (for example, where there is an EU counterparty or financier, or where advice in respect of the relevant EU jurisdiction is provided by another adviser). In these circumstances, the UK Partnership would not be an "intermediary" in relation to the relevant matter and so individual employees who happen to be registered with the SRA (or another regulator in the EU) could be regarded as an intermediary in their individual capacity. This would impose an unreasonable burden on individual lawyers. One possible way of alleviating this may be to provide that the employing partnership/firm is brought within the UK rules as an "intermediary" but only to the extent of the activities of the individuals practicing England and Wales law in their capacity of a partner or employee of the partnership/firm. However, this has the potential to pull wholly non-UK based firms (i.e. those without any UK connection) within the scope of the rules and may, as noted above, discourage such firms from hiring dual-qualified individuals.

Legal professional privilege

4.7 The ConDoc suggests (at paragraph 3.18) that law firms (as intermediaries) will be required to make partial disclosures where privilege applies.

4.8 We disagree. Legal advice privilege is not limited to advice about the law to the exclusion of information that is "factual in nature". Information that is provided by the client as part of the continuum of communications will be privileged in the same way as legal advice is privileged. It would be difficult to make any disclosure without also revealing that the lawyer had advised in connection with a transaction that carried a hallmark. That in itself is likely to be privileged information.

4.9 In most circumstances it will be very difficult for a lawyer to make a disclosure under DAC6 without disclosing the content of privileged communications between the lawyer and the client. In our view the ConDoc is incorrect on this point.

4.10 We must also add that notifying other intermediaries (or the relevant taxpayer if not the client of the law firm) about specific disclosure obligations may also involve a breach of privilege.

4.11 This was a point that was discussed at length in 2004 as part of the implementation of the DoTAS rules. HMRC and the legal community reached a very sensible compromise then which can be found at Regulation 4 of the Tax Avoidance (Promoters and Prescribed Circumstances) Regulations 2004 (SI 2004/1865). Lawyers are exempted from the obligation to disclose under the DoTAS rules where some of the information they are required to disclose is subject to legal professional privilege. In such a case the overall purpose of the DoTAS rules is still met as the obligation to disclose falls on the taxpayer or another promoter. The same would apply to DAC6.

4.12 Finally, a very real problem for our members will be that we will not be able to demonstrate that we did not know we were involved in a cross-border reportable arrangement without breaching legal professional privilege. One approach which could be taken to resolve this is to adopt a self-certification mechanic like the one used in similar circumstances in relation to the

anti-enablers of tax avoidance rules (see paragraph 44 of schedule 16 Finance (No.2) Act 2017).

5. **CONSULTATION QUESTION 5: DO YOU HAVE ANY OTHER COMMENTS ABOUT THE DEFINITION OF INTERMEDIARY AND WHO WILL BE CAUGHT UNDER THE PROPOSED RULES?**

5.1 Lawyers are commonly approached by clients for pure corporate law advice. In those circumstances, the lawyer might not need to know every detail of the arrangements, and may not be aware of aspects which might attract a hallmark. The lawyer might make suggestions about the design or manage the implementation of all or part of the arrangement (e.g. a lawyer saying the plan is legally defective, but amended in a given way would work or a lawyer preparing and managing the execution of documentation for the implementation of the steps of a step plan that has been prepared by the client or third party advisers).

5.2 There is a particular point here which is whether such a lawyer would be a "promoter" or a "service provider" for the purposes of paragraph 3.7 of the ConDoc. We think such a lawyer must clearly be a service provider because otherwise they cannot rely on the knowledge defence. This should be the case even where the lawyer makes suggestions or manages the execution of document as described above.

5.3 It would be helpful if HMRC could confirm that in such cases, if the person concerned does the usual due diligence that a reasonable person would do absent the provisions of DAC6 and is not being wilfully ignorant, in HMRC's view the person would not be a "promoter" and could avail themselves of the service provider "did not know" exemption.

5.4 We consider that the reference to an intermediary that designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement must mean a person that is substantially involved in those aspects of the arrangement that have caused one of the hallmarks to be present – and in the case of a hallmark that is subject to the main benefit test, that means that the intermediary must design, market, organise, make available for implementation or manage the implementation of the tax aspects of the arrangement. This is logical because if the intermediary has not been responsible for the tax aspects of the arrangements then they might not have knowledge of whether the main benefit test is satisfied.

5.5 It is unclear whether an intermediary established as a UK limited liability partnership has the requisite territorial nexus with the UK to be required to make a return to HMRC in respect of a reportable cross-border arrangement. There are a number of technical points underpinning this.

5.6 Regulation 3(1) of the draft regulations requires any "intermediary" which participates in a reportable cross-border arrangement to make a return to HMRC. "Intermediary" is defined in draft regulation 2(1) by reference to Article 3(21) of the DAC. There is therefore seemingly no requirement as part of this for the intermediary has any nexus with the UK. This is contrary to the position set out by HMRC in paragraph 3.14 of the ConDoc.

5.7 This prima facie obligation to report is subject to regulation 3(2)(a) of the draft regulations, which ameliorates the apparent extraterritoriality to some extent. This has the effect that the

intermediary will not be required to return to HMRC any information in relation to a reportable cross-border arrangement if it has filed that information with the competent authorities of another member State which, applying the list in Article 8ab(3) of the DAC, features before the UK.

5.8 The first jurisdiction in the list in Article 8ab(3) of the DAC is the Member State where the intermediary is resident for tax purposes. If in the case of a particular intermediary this is the UK, the intermediary will therefore not fall within the exception from reporting in the UK in regulation 3(2)(a) of the draft regulations. However, in the case of an LLP, this raises the questions of whether a UK limited liability partnership can have a residence for tax purposes for the purposes of the DAC and, if so, how is this to be determined?

5.9 Regulation 2(2) of the draft regulations provides that, for the purposes of these Regulations, "resident for tax purposes" means liable under the law of a jurisdiction to tax there by reason of domicile, residence, place of management or any criterion of a similar nature. This might suggest that an LLP which is carrying on a trade or business cannot be resident for tax purposes in the UK as the fact it is treated as tax transparent means that it is not liable to UK tax. However, regulation 2(2) only applies for the purposes of the draft regulations whereas the test in question here is in Article 8ab(3) of the DAC. This can be contrasted with regulation 2(3) which operates "In applying the DAC for the purposes of these Regulations". It is therefore strongly arguable that regulation 2(2) of the draft regulations does not assist in determining the tax residence of an LLP for the purpose of the DAC.

5.10 It is worth noting that the DAC is the same EU Directive which requires the implementation of the Common Reporting Standard in the EU. HMRC's guidance on the UK implementation of this aspect of the DAC at IEIM400620 provides that a partnership (which, by implication of the guidance at IEIM400860, includes an LLP in this context) is resident for tax purposes in the UK "*If the control and management of the business of the partnership takes place in the UK, or the partnership registers with and submits Partnership Tax Returns to HMRC.*" This broadly reflects the position set out in paragraph 3 (Residence of a Financial Institution) of Annex II to the DAC (prior to its amendment to incorporate DAC6). It is suggested that this same test of residence for LLPs should apply in relation to the UK's implementation of DAC6 and it would be helpful if that could be made clear.

6. **CONSULTATION QUESTION 6. 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?**

6.1 Given the breadth of the hallmarks, which potentially encompass benign arrangements (e.g. an intra-group transfer of assets to a UK company), in our view the ongoing reporting requirement goes further than is necessary to achieve the aim of DAC6. The ongoing requirement could continue indefinitely without bringing any additional benefit. By the time a later report is required, the competent authorities should already have sufficient information to enquire into (and if appropriate challenge) the relevant arrangements. The exception would be where new tax planning has been undertaken or the arrangements have substantially changed; in those circumstances, we agree that a further report would be appropriate.

6.2 The ongoing reporting requirement may also have a disproportionate effect in the context of commercial transactions. A potential buyer (especially a non-EU buyer with limited awareness of DAC6) may perceive a requirement to report as a red flag, partly as it may infer that more aggressive tax planning has taken place than is actually the case, given the breadth of the hallmarks. In addition, a buyer may not be willing to take on a seemingly unnecessary compliance obligation for an indefinite period.

7. **CONSULTATION QUESTION 7. 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?**

Overseas intermediaries

7.1 It is not clear from the draft regulations whether UK intermediaries will be able to rely on reports made by overseas intermediaries and consequently they may still need to make at least partial reports. This does not appear to be the intention, particularly given the way in which paragraph 6.1 of the ConDoc is expressed and the fact that draft regulation 10(a) envisages an intermediary being able to produce a reference number issued by another competent authority. However, a UK intermediary has to report all information listed in paragraph 14 of Article 8ab(14) of DAC6, including (at sub-paragraph (e)) "*details of the national provisions that form the basis of the reportable cross-border arrangement*". In practice an intermediary in a jurisdiction other than the UK (particularly a service provider) will not necessarily be required, or able, to provide information about the relevant UK tax provisions so those may need to be reported in the UK. Clarification of the position in the final regulations and guidance would be welcomed.

Multiple intermediaries and timing

7.2 Where there are multiple intermediaries (whether in the UK or elsewhere) it is difficult to see how in practice an intermediary could gather enough information from one or more other intermediaries in the time available in order to ensure that it does not have an obligation to report. The practical consequence of this – and the potential inability of an intermediary to rely on a third party providing it with accurate and timely information plus the imposition of significant penalties – is that multiple partial reports are likely to be submitted, potentially in addition to a full report, in relation to the same arrangements.

7.3 Given how quickly a reporting obligation can be triggered, it is also likely that HMRC will receive different – but at the time of reporting accurate - information from different intermediaries. This is especially likely in relation to the expected value and timing for implementation, as these elements of a transaction are often not settled until the transaction is close to final, all necessary approvals have been obtained and the availability of signatories has been confirmed. Therefore, an intermediary may not have the final information until implementation is imminent (or may never have it if its involvement has ended before implementation). It is not currently clear from the draft regulations or ConDoc whether an intermediary who has been told, for example, an approximate date for implementation of a transaction should report that or whether a partial report should be given omitting that information; the time and value categories in DAC6 are not qualified by reference to approximation or estimation which implies that they should be known before they are reported.

It would be very helpful to clarify the requirements in the guidance. See also our comments at the end of this submission on timing and the meaning of "made available for implementation".

7.4 HMRC's approach to penalties in relation to pre-implementation reporting should also take into account that an intermediary may report information that is understood to be accurate at the time of reporting but which later changes for reasons outside the intermediary's control and/or without its knowledge.

HMRC reference numbers

7.5 While we welcome the requirement in the draft regulations for HMRC to issue reference numbers where reports have been issued, it would be helpful if the regulations could specify the time period within which such numbers will be issued (as the DoTAS rules do). If it is not possible to add the timing to the regulations, the guidance should indicate HMRC's expected timing for providing the numbers (there is precedent for this in the pre-2017 terms and conditions for HMRC's Double Taxation Treaty Passport Scheme).

7.6 Given that multiple intermediaries may have reporting obligations on very similar timelines, in order to be useful in practice the reference numbers would need to be issued within (at most) a few days of receiving a report.

7.7 We note the comment in paragraph 6.2 of the ConDoc that HMRC currently takes the view that there will be sufficient evidence that a report has been made where an intermediary is provided with a correct reference number. However, the passage goes on to state that the intermediary will also have to satisfy itself that the report that another relevant person has made captures everything that intermediary would have had to report. Our preference would be – at least where a promoter has provided the first report and the second potential reporter is a service provider – for the HMRC reference number to be sufficient to remove the second intermediary's reporting requirement.

7.8 However, if total exemption from reporting is not possible, it would be very useful if the HMRC numbering system could indicate whether a full or only a partial report has been received, so the second intermediary will know whether or not further information is required. DAC6 is clear that national provisions should not go beyond what is required to achieve its objectives and this is one area where a significant amount of duplicate reporting could be easily and appropriately prevented.

Reporting by service providers

7.9 The precise timeline for reporting by a service provider is not clear from the ConDoc. The language in DAC6 and the draft regulations rather simplistically envisages that the relevant advice or other involvement would be provided on one day. In practice an engagement with a professional adviser may evolve over time and the knowledge of the adviser about the breadth of the transaction to be implemented may also change in the course of the engagement. It is possible that an adviser would only gain the requisite knowledge to fall within the "service provider" category after some weeks or even months (for example if no tax report was provided to the service provider but a conference call was held with the promoter some time later to discuss how to document a particular aspect of the arrangements and the tax effect

became clear to the service provider at that point). It is not clear to us from the draft regulations or the ConDoc whether a service provider's obligation to report would apply from the very first date on which advice was given, even if it did not have the requisite knowledge to be a service provider at that point (in which case the service provider could be automatically in default as the 30 day reporting period may expire before it realised a report was required) or from the date on which the adviser gathered the requisite knowledge to become a service provider for the purposes of DAC6. In our view the latter approach is more appropriate and proportionate.

7.10 Similarly, it may be that one entity falls within both the promoter and service provider categories of intermediary. It appears logical to us that the entity should be treated primarily as a promoter (as that is the focus of DAC6) and the promoter reporting timelines should apply rather than the service provider timeline or both.

7.11 Clarification of the above points in the legislation or, failing that, the guidance would be welcomed and examples in the guidance would be particularly useful in this context.

Information required under Regulation 11

7.12 We note that draft regulation 11 requires an intermediary or relevant taxpayer to provide information or documents reasonably required by HMRC within 14 days. This requirement is too broad as drafted; it should be limited first by reference to information within the relevant person's knowledge, possession or control (consistently with the reporting obligations in draft regulation 3). Secondly, the 14 day period is too short given the range of the information or documents that could potentially be requested. A 30 day period would be more appropriate as well as in line with the initial reporting periods.

8. **CONSULTATION QUESTION 8. DO YOU THINK THAT THE APPROACH TO DEFINING THE MAIN BENEFIT TEST AND TAX ADVANTAGE IS PROPORTIONATE?**

Definition of Tax Advantage

8.1 We agree with HMRC that for an arrangement to give rise to a tax advantage, that advantage must not reasonably be regarded as consistent with the policy objectives of the relevant underlying legislation. In our view, however, the current drafting of the draft regulations does not make it clear that this condition applies to tax advantages that do not fall within the non-exhaustive list of advantages listed at draft regulation 12(1)(a). We would therefore welcome clarification of the drafting to make it clear that this condition applies to all advantages that would otherwise fall within the definition of tax advantage, whether or not these are set out in the non-exhaustive list.

8.2 More generally, we would welcome clarification in the guidance that tax planning which has been stated in guidance to be acceptable for the purposes of DoTAS or the Code of Practice on Taxation for Banks or which has received (or might reasonably be expected to receive) a clearance under that Code will not be regarded as inconsistent with the policy objectives of the relevant underlying legislation (since it is presumably on this basis that it is regarded as acceptable under the DoTAS or the Code).

Definition of Tax

8.3 We note that the DAC only applies to taxes imposed by Members States and specifically excludes VAT, customs duties, excise duties and compulsory social security contributions and that this is expressly acknowledged by HMRC in the ConDoc at paragraph 7.8. It is not therefore clear to us why the definition of tax included in the draft regulations for the purposes of what constitutes a tax advantage applies to taxes imposed by Member States as well as non-EU jurisdictions. The widening of the definition of tax in this way has a number of important consequences.

8.4 First, it puts considerable pressure on the amount of knowledge that an intermediary is expected to have in order to determine whether the main benefit test applies and therefore whether an arrangement is reportable. Non-EU jurisdictions often have very different tax systems to those imposed in EU Member States and intermediaries cannot reasonably be expected to anticipate the wide variety of different taxes that might be relevant to an arrangement. If they are required to anticipate such taxes, it would add very considerable compliance burden to a regime which already imposes onerous obligations on intermediaries.

8.5 Second, in our view this wider definition of tax is contrary to the policy objectives of the DAC. The DAC is designed to enable tax authorities within Member States to exchange information about cross-border tax arrangements. As there is no equivalent exchange of information mechanism in the DAC for non-EU jurisdictions, we cannot think of a good reason why it would be relevant for HMRC to receive information about tax advantages obtained in non-EU Member States.

8.6 For the reasons set out above, we consider that HMRC should limit the definition to tax to taxes imposed in EU Member States only (plus, of course, the UK post-Brexit).

9. **CONSULTATION QUESTION 9. DO YOU HAVE ANY COMMENTS ON THE APPROACH SET OUT FOR HALLMARKS UNDER CATEGORY A?**

Hallmark A(1)

9.1 In our view, the guidance contained in the ConDoc on what might constitute a confidentiality obligation for the purposes of Hallmark A(1) is too broad and risks capturing almost any properly documented commercial arrangement.

9.2 We note that the guidance states that "any confidentiality condition does not have to explicitly specify that it applies to HMRC or other intermediaries or types of intermediary – a general confidential condition which prevented disclosure to anyone would equally be caught". In our experience, the majority of commercial agreements will contain a boiler-plate confidentiality provision. Whilst these will usually permit disclosure to a tax authority, they often do not permit disclosure to third parties (such as persons who could be intermediaries). It is not therefore clear to us why many benign commercial arrangements with general confidentiality clauses would not be caught by the confidentiality test under hallmark A(1).

9.3 Further, even if such arrangements would be taken out of the hallmark by virtue of the main benefit test, it would be administratively unworkable for every commercial transaction involving

a boilerplate confidentiality provision to require assessment against the main benefit test. It would be particularly difficult for a non-tax specialist to be confident as to whether the main benefit test is met.

9.4 For the reasons set out above, we would suggest a purpose test to the confidentiality hallmark, similar to that used in respect of Hallmark 1(b) of the DoTAS regime, which would broadly require that a reasonable person would conclude that the purpose of including the confidentiality provision in the arrangement is to keep confidential from HMRC, another tax authority or other potential intermediaries, the elements of the arrangement which give rise to and secure the expected tax advantage.

9.5 We consider that the use of such a purpose test would better ensure that confidentiality clauses which are in place purely for commercial reasons and are not aimed at preventing disclosure of the relevant "tax technology" to tax authorities or intermediaries are not caught by this hallmark (and are not reportable cross-border arrangement).

Standardised structures

9.6 The concept of standardised structures also requires further clarification. Many transactions, although in some respects bespoke to a particular client, are structured in a conventional way, according to established market practice. Examples would include the use of multiple new holding companies in a private equity funded acquisition and the use of the typical private equity fund structure set out in the memorandum of understanding of 25 July 2003 between the British Venture Capital Association and the Inland Revenue on the income tax treatment of venture capital and private equity limited partnerships and carried interest. We do not believe that the hallmark is targeting conventional structures such as these, and would welcome confirmation of this in the Guidance.

10. **CONSULTATION QUESTION 10. DO YOU HAVE ANY COMMENTS ON THE APPROACH SET OUT FOR HALLMARKS UNDER CATEGORY B?**

In respect of Hallmark B(2), we note the helpful guidance at paragraph 9.7 in respect of share options. We would welcome further guidance on what amounts to a "conversion" for the purposes of this hallmark and the applicability of the main benefit test – in particular, it would be helpful in the context of employee share incentives to make clear in the guidance that if the primary purpose of an incentive arrangement is to serve as a genuine incentive to employees and directors to grow the business and a decision is made to structure that incentive in one or other relatively standard forms – e.g. equity rather than a bonus or a share option – and the tax consequences of that decision are accepted by the parties (for example, the requirement to pay income tax or national insurance contributions if shares are acquired at less than unrestricted market value), this does not of itself represent a "conversion", notwithstanding that there was another way of structuring the arrangements that would have had a higher tax cost.

11. **CONSULTATION QUESTION 11. ARE THERE ANY POINTS IN THE DEFINITION OF ASSOCIATED ENTERPRISE WHICH YOU THINK REQUIRE CLARIFICATION OR EXPLANATION IN GUIDANCE?**

11.1 We do not think that the definition of "associated enterprise" is sufficiently clear.

11.2 It is not clear what is meant by "management" and "significant influence". There is a similar test which UK tax practitioners are used to which is found at section 1124 of the Corporation Tax Act 2010. It would be sensible to apply the same test here.

11.3 It is also not clear what is meant by an entitlement to "profits" of another person. Are these profits computed on tax principles, accounting profits or some other economic profit? This should be clarified, at least in the guidance.

12. **CONSULTATION QUESTION 12. 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.**

12.1 The guidance in paragraphs 10.6 to 10.9 is helpful, but in our view, raises questions which apply more broadly and should therefore be applicable to all hallmarks, not just Hallmark C(1) – we consider that this guidance should be taken into account more widely in, for example, making the distinction between intermediaries and service providers and in determining the information that an intermediary or service provider is required to provide in relation to a reportable arrangement.

12.2 The comments about widely held partnerships at paragraph 10.8 are helpful. It would be very helpful if the same point could be made about securities issued into the capital markets. There will clearly be very many situations where the residence of each (or any) owner of those securities will not be known to an intermediary.

12.3 The concept of residence used in paragraph (a) of Hallmark C(1) is a little confusing. There are some jurisdictions which do not impose corporation tax and therefore do not have a concept of residence (e.g. the Cayman Islands). We assume that such a situation is intended to fall under paragraph (b)(i) (resident in a jurisdiction that does not impose corporation tax) rather than paragraph (a) (not resident anywhere), but could this be confirmed.

12.4 There are also some jurisdictions that tax on the basis of incorporation but not residence (e.g. the United States of America). Clearly the intention is that US companies should not be caught by paragraph (a), but again this should be confirmed.

13. **CONSULTATION QUESTION 13. 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?**

A key principle of structuring collective investment schemes is that investors should not be in a worse tax position through investing via such an arrangement than if they made the investment directly. This principle is recognised by many jurisdictions (including the UK), for example through the availability of tax transparent or tax advantaged structures for use as fund vehicles. It would be helpful if the guidance made clear that, of itself, designing a structure in accordance with this principle will not breach the main benefit test.

14. **CONSULTATION QUESTION 16. DO YOU HAVE ANY GENERAL COMMENTS ABOUT THE APPROACH TO HALLMARKS UNDER CATEGORY C?**

14.1 Paragraph 10.15 of the ConDoc states that there is no definitive list of what constitutes a "preferential tax regime" for the purposes of Hallmark C(1)(d). It would be helpful if this could be clarified, preferably in the legislation, to ensure that tax regimes which are compliant with BEPS Action 5 are not "preferential tax regimes".

14.2 We would welcome extra guidance on Hallmark C(4), particularly given that the main benefit test does not apply to this particular hallmark. Are intermediaries expected and required to obtain and interpret financial projections to ascertain whether there would be a material difference in treatment? This raises potential problems where future financial projections are used (even assuming that such projections are always available, which may not be the case) and as to the accuracy of those projections, which is an issue out of intermediaries' control. There are particular issues for businesses without predictable financial results.

15. **CONSULTATION QUESTION 19. DO YOU HAVE ANY COMMENTS ABOUT THE APPROACH TO HALLMARKS UNDER CATEGORY E?**

15.1 Transfer pricing is a very specialised area on which the majority of intermediaries (and taxpayers) simply do not have the relevant expertise to be able to determine whether any of these hallmarks are engaged.

15.2 For this reason, we would welcome the introduction of an 'ignorance test', similar to that employed in the DoTAS regime (SI 2004/1865, reg. 4(1) and (4)), which would relieve intermediaries and taxpayers of a requirement to disclose where they cannot reasonably be expected to have the information to know whether or not the arrangements are reportable. Ideally such a test should apply more widely but we feel it should at least apply to transfer pricing.

16. **CONSULTATION QUESTION 20. DO YOU HAVE ANY SUGGESTIONS FOR HOW THE PENALTY REGIME COULD BE IMPROVED?**

Application of penalties to service providers

16.1 We are not convinced that following the DoTAS approach of applying daily penalties is appropriate or proportionate in all situations to which DAC6 may apply. DoTAS focuses on promoters of tax avoidance but DAC6 has a broader reach given its extension to service providers, essentially as a fall-back in case promoters fail to report. In our view it would be appropriate and more proportionate to have a dual penalty regime with lesser penalties for service providers, to reflect that their obligations are in principle secondary to those of promoters.

16.2 In practice if a service provider fails to report it is likely to be either because it has determined in good faith that a report is not required or it has failed to reach an appropriate standard of care, rather than because it has taken too long to report, so daily penalties are not necessarily proportionate or dissuasive in that context.

16.3 We would also request that consideration be given to introducing a defence against penalties where, similarly to the corporate criminal offence of failing to prevent the facilitation of tax evasion, the service provider can demonstrate that it has reasonable procedures in place and, having followed them, it considered that a report was not required. Evidence of appropriate procedures could for example include putting in place policies, carrying out appropriate risk assessments, undertaking appropriate due diligence and communicating the applicable policies to staff (e.g. by providing training). This approach would provide an objective means of assessing whether an adviser had the requisite knowledge (or could reasonably be expected to have such knowledge) to be a service provider and if so whether an adviser's conclusion that it was not required to report was appropriately reached for the purpose of imposing penalties.

16.4 Please also see our comments in response to Consultation Question 7 above. It is possible that intermediaries (particularly service providers) may provide information that they believe to be correct but which is superseded, for example in relation to the timing or value of a transaction. We would ask that HMRC bears this in mind in considering appropriate penalties; the intermediary will most likely be relying on information it has received from a third party (either a taxpayer or another intermediary) and the details of the arrangements may not be final when the obligation to report arises. See also our comments on timing at the end of this submission.

Backdated reporting requirements

16.5 We note the proposed relaxation of the penalty rules in paragraph 14.4 of the ConDoc in relation to the reporting requirements for arrangements the first step of which is implemented prior to the publication of the ConDoc and draft regulations. While the potential for relaxation is appreciated, in our view the proposed relaxation does not go far enough.

16.6 First, paragraph 14.4 expressly acknowledges that the retrospective nature of the reporting will give rise to challenges, "*particularly where the first step was taken prior to the publication of the regulations and guidance*". We understand that draft guidance may not be published until the end of December this year; nor will the final regulations be published until HMRC has concluded its review of responses to the ConDoc. Given the number of areas where clarification of the rules is required, we consider that the publication date of the ConDoc and the draft regulations is too early a cut-off point. The earliest date would in our view be the date when the final regulations and guidance are published – it is only at that point that intermediaries and relevant taxpayers will have sufficient certainty as to the rules and their interpretation to determine whether (and to what extent) information is required to be reported.

16.7 In addition, paragraph 14.4 suggests that the relaxation will be limited to a failure to report "*due to a lack of clarity around the obligations or interpretation of the rules, which could not reasonably have been inferred from the DAC itself*". As we have noted in our general comments above, the rules laid out by DAC6 are exceptionally broad and lack detail. We do not consider it appropriate to expect intermediaries and taxpayers to second guess how the UK Government would define, apply or interpret the rules as stated in DAC6. Their ability to do so is further hampered by the current uncertainty as to the likely relationship between the UK and the EU by the time the rules come into force, and there is no indication yet of how the rules may be applied if the UK is a third country at that time. At present it is difficult to see how

imposing penalties for the retrospective period can be appropriate in defaults (other than knowing or wilful ones) given the current uncertainties, let alone proportionate as DAC6 requires. We note in support of this observation that in Germany the proposal is only to apply penalties for the retrospective reporting period where the failure to report is intentional or careless and the first step is implemented after 30 June 2020. We should be grateful if further consideration would be given to the retrospective reporting arrangements and relaxing the penalty rules in appropriate circumstances.

17. **CONSULTATION QUESTION 21. DO YOU HAVE ANY PARTICULAR COMMENTS ABOUT THE COMMENCEMENT RULES, AND HMRC'S APPROACH TO DEALING WITH THE BACKDATED REPORTING ARRANGEMENTS?**

Please see our comments on the retrospective reporting requirements in response to Consultation Question 20 above.

18. **ADDITIONAL COMMENTS: TIMING OF REPORTS**

18.1 We are concerned at the apparent requirement to provide details of taxpayers who may never actually implement cross-border arrangements or who have not yet made a decision to implement such arrangements. This is a significant departure from the UK's existing disclosure regimes and in our view it is not consistent with the stated objective of DAC6, nor is it proportionate. There may be any number of commercial reasons why a taxpayer may reject a promoter's approach, including that the taxpayer may be unwilling to risk reputational harm if it considers the arrangements to be aggressive tax planning. The approach in the draft regulations may be adequate to deal with aggressive "schemes" being promoted by advisors to clients (if any of that still happens) but in our view is deficient from the perspective of international lawyers providing advice to sophisticated multi-nationals. It is equally troublesome from the perspective of centralised tax and legal functions within those multi-nationals advising other parts of the organisation.

18.2 More generally, we are concerned that the UK approach to applying the "made available for implementation" test appears to go further than DAC6 requires. We understand that DAC6 was in part inspired by the DoTAS rules but note that the earlier "firm approach" trigger has not been included in DAC6. Despite that, the ConDoc implies that the Government's interpretation of the "made available for implementation" test is more in line with the DoTAS "firm approach" test – or brings in a reporting requirement at an even earlier point. Paragraph 4.4 of the ConDoc suggests that an intermediary "advertising the arrangement online or offering it to potential clients in person" would be making arrangements available for implementation, regardless of whether a taxpayer even reads the advert, let alone seriously entertains a proposal. This is especially problematic in the context of providing details of taxpayers at the "made available for implementation" stage.

18.3 Is it really HMRC's intention that a taxpayer's details should be reported after, for example, simply responding to a (likely generic) online advert or attending an initial high level call or meeting with a promoter, even where the taxpayer's representatives clearly have insufficient information or authority to decide to implement the arrangements? If so, for the reasons given below, we do not consider this to be appropriate – particularly as the hallmarks are sufficiently broad to catch benign arrangements.

18.4 In our view, it would be more fitting for the "made available for implementation" test to be consistent with the equivalent DoTAS test. That should be sufficient to give HMRC and other competent authorities notice that a promoter is successfully marketing relevant arrangements and provide them with meaningful information about taxpayers that have demonstrated their willingness to implement those arrangements.

18.5 In addition, it should be necessary to report a taxpayer's details only once it is clear that the taxpayer has either implemented the first step in the relevant arrangements or will implement them (i.e. once the taxpayer has obtained all necessary internal approvals and has made it clear to the relevant intermediary that it will implement).

18.6 These points are also consistent with the competent authority reporting requirements in Article 8ab(14)(d) and (f) of DAC6, namely to report "*the date on which the first step in implementing the reportable cross-border arrangement* ***has been made or will be made***" (our emphasis) and "*the value of the reportable cross-border arrangement*". These reporting categories are not qualified by reference to expectations or approximations and in our view it would be excessive for the UK competent authority to require reporting beyond what it needs in order to satisfy its obligations under DAC6.

18.7 On that basis, we consider that the draft regulations should be amended so that details of taxpayers are not required to be disclosed until it is clear that they will implement or have implemented the first step in the relevant arrangements.

18.8 Similar issues arise for our clients when they have not engaged external advisors. Large multinationals engage in group reorganisations and restructurings which are business driven. The business leaders engage with internal tax and legal functions over time to refine and develop proposals. When, for example, a non-tax motivated cross-border business transfer takes place, reporting under DAC6 will be required (either because the entity containing the tax and/or legal function is separate from the entities involved in the restructuring, making it an intermediary, or because it is a "relevant taxpayer"). Such a restructuring may be "ready to go" for many months or even years before the decision to proceed is actually made. HMRC should consider what reporting they want in these circumstances. We would expect it to be a report in relation to the restructuring which was actually carried out, rather than the first iteration which was "ready to go". Our suggestion that the reporting deadline is triggered only when the decision to implement the final iteration of the plan is taken should give HMRC the report it requires.

18.9 Please also see our comments and request for clarification above (provided in response to Consultation Question 7) in relation to the intended timing for reporting by service providers.

19. **POINTS OF CONTACT**

Should you have any queries or require any clarifications in respect of our response or any aspect of this letter, please feel free to contact me by telephone on or by email at philip.harle@hoganlovells.com.

Yours sincerely

Philip Harle

Chair City of London Law Society Revenue Law Committee

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