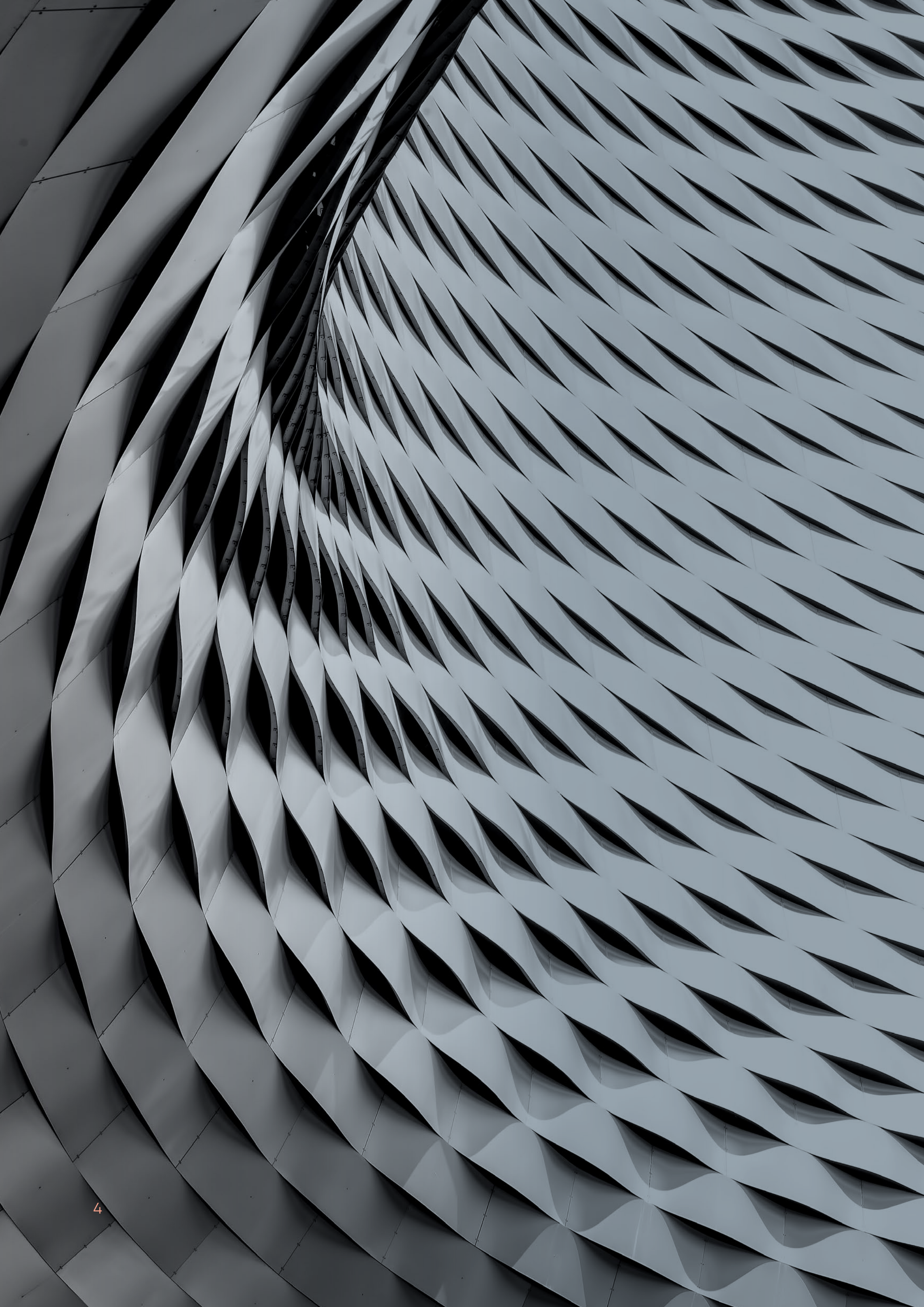
TaylorWessing

Global transparency and the UK

Contents



Introduction

From a private wealth perspective, the term 'transparency', connotes, in broad terms, the measures taken by various jurisdictions to prevent the concealment of the proceeds of crime, and to give tax authorities visibility over their subjects' foreign assets.

This guide provides a broad understanding as to how your confidentiality and data rights can be compromised by global transparency rules, as well as an understanding of the broader risks stemming from use of the data published or otherwise shared thereunder, including especially the UK tax risks. The issues from a UK tax perspective are relevant if you, or other family members, live in the UK or have assets in the UK.

Now that transparency rules have given tax authorities much greater visibility over taxable assets worldwide, they are taking a much tougher approach with regard to non-compliance and suspected non-compliance. It is important to be aware of the principal measures available to tax authorities. This guide looks only at UK tax measures, although it is envisaged that future editions of this guide will also look at other jurisdictions.

In that regard, the following relevant topics are covered:

- Registers of beneficial ownership
- Automatic exchange of information
- UK disclosure of tax avoidance schemes regime (DOTAS)
- Model mandatory disclosure rules and DAC6
- HMRC powers of information
- Relevant aspects of UK data protection law
- New UK penalties for tax non-compliance
- Unexplained wealth orders and tax investigations
- Reputation management

In each of the cases above, this guide covers why the relevant provisions matter and how we can help.

This guide does not constitute legal advice and you are not entitled to rely on the contents. If you have any concerns arising from the contents of this guide, you should seek appropriate professional advice whether from Taylor Wessing LLP or other suitably qualified advisors.

Background

The Financial Action Task Force (FATF), an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions, sets standards and promotes measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. In so doing, the FATF has developed a series of 'Recommendations' that are recognised as the international standard for combating money laundering and the financing of terrorism and proliferation of weapons of mass destruction.

First issued in 1990, the FATF Recommendations were revised in 1996, 2001, 2003, 2012, 2020 and most recently in 2021.

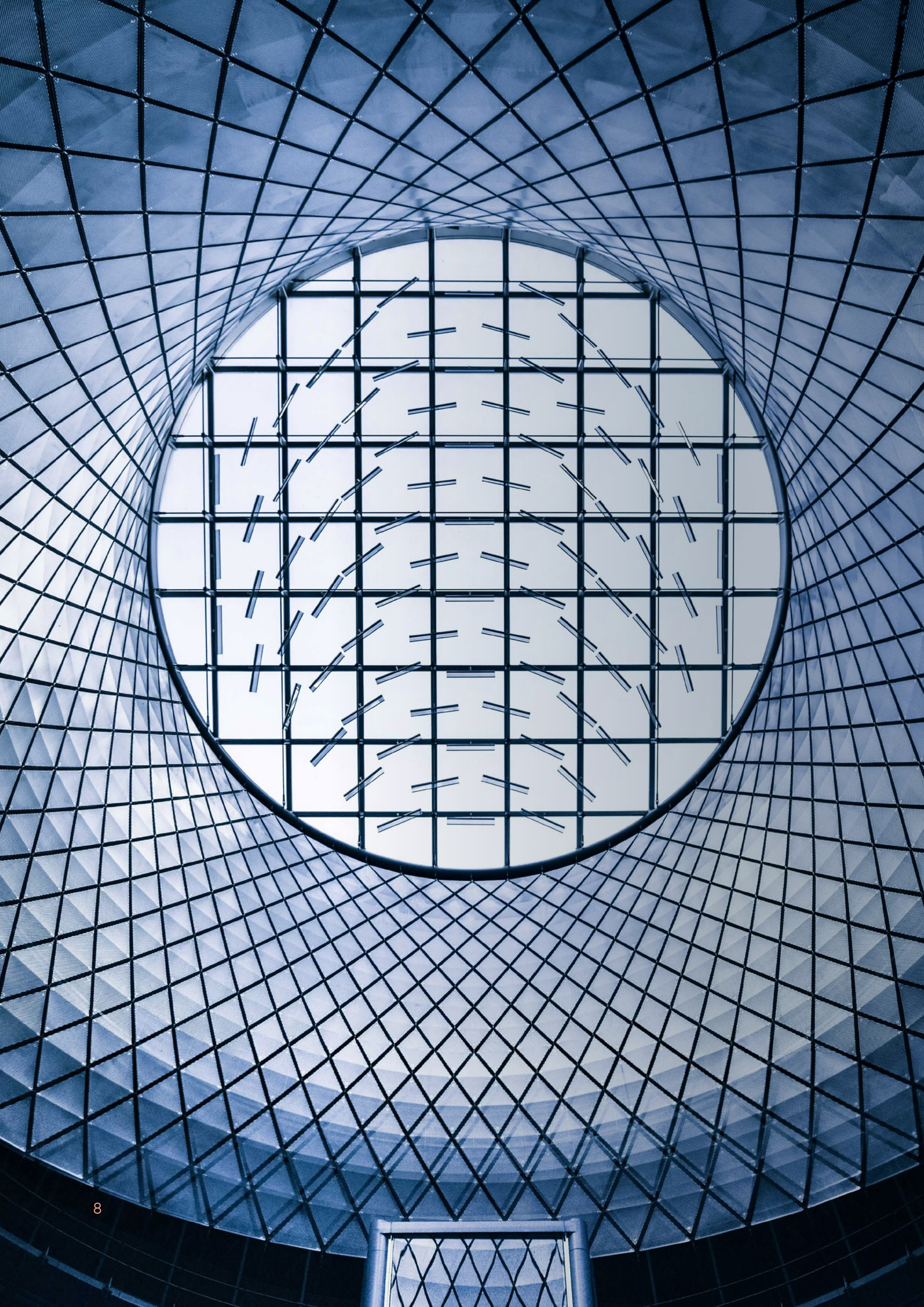
Many of the transparency measures covered in this guide are essentially a means of implementing part of the Recommendations, summarised by the following statement in the Recommendations document:

'Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities.'

Comment

There are good and proper reasons for rules which prevent the misuse of structures for illicit purposes. However, there is a danger that these rules, however well intentioned, go further than necessary and can result in your personal information becoming available to those who have no legitimate interest in accessing it, or, worse still, those who seek to use it for pernicious purposes.

In addition, there are risks of chaotic implementation (both in terms of unclear legislation and confusion amongst those applying the legislation) which may give rise to unwarranted suspicion from tax authorities (or other third parties). At the very least, the measures constitute an additional layer of compliance, with penalties for non-compliance.



Registers of beneficial ownership (RBOs)

An RBO is essentially a centralised register which seeks to record those individual(s) who ultimately 'own' or control a particular entity or asset.

An RBO may be accessible by the general public or only by certain state bodies.

The introduction of RBOs has been justified on the basis that the true 'ownership' of legal entities or assets is not always apparent from the legal documents, which can sometimes conceal the true position and make it more difficult for crime prevention agencies to trace the proceeds of crime. RBOs are intended to provide full transparency in relation to the ownership of certain legal entities or assets, to help tackle money laundering (including ascertaining the proceeds of tax evasion).

RBOs in the UK and EEA

Under the Fourth Anti-Money Laundering Directive (4AMLD), EU Member States were required to set up central RBOs for certain types of legal vehicle registered in their jurisdiction, which includes companies and trusts. The deadline for implementation of 4AMLD fell in June 2017, and it did not require EU Member States to make their RBOs publicly accessible.

Whilst it was not required to do so under 4AMLD, the UK, in April 2016, introduced a fully public RBO for companies – the People with Significant Control (PSC) register. The PSC register records, in broad terms, those individuals with significant influence or control over UK registered companies and LLPs. The information is recorded at Companies House, where it is publicly available.

As with all RBOs, the PSC register looks to identify the individual 'warm bodies' ultimately behind the relevant entity rather than its immediate shareholders (which might be an overseas company without registration requirements). To be entered on the PSC register, an individual must meet one of the conditions for control – such as holding (directly or indirectly) more than 25% of the shares or voting rights in the company. Where UK companies are (ultimately) held in trust (whether a UK or non-UK trust), the PSC register looks to identify the individuals controlling the trust as well as the trustees, eg any person who has the right to appoint and remove trustees.

Currently, the UK PSC register only applies to UK incorporated entities. However, the UK Government has consulted on extending the PSC register requirements so that they also apply to non-UK entities holding UK land, and this will be known as the 'Register of Overseas Entities'. The UK Government originally envisaged introducing such a register at some point in 2021; this did not happen but, at the time of writing, the Government has re-affirmed its commitment to introducing the register. The fundamental premise is that any non-UK entity which owns or is looking to purchase UK property (either freehold property or leasehold property with a term of over seven years) would need to register information on its beneficial owners at Companies House.

As required by 4AMLD, in June 2017 the UK Government introduced a non-public RBO for trusts. In broad terms, a trust, whether or not it is resident in the UK, is required to register its beneficial owners (including the identity of the settlor and named beneficiaries) with Her Majesty's Revenue and Customs (HMRC) if a UK tax liability arises at the level of the trust (eg if the trustee receives UK rental income). Currently, the register is not public but is maintained by HMRC and accessible only by them and relevant crime prevention agencies, such as the National Crime Agency. However, both accessibility to the register and the trigger points for registration are to be widened with full effect from September 2022.

In May 2018, the EU Council approved the Fifth Anti-Money Laundering Directive (5AMLD), which amended 4AMLD in certain important respects.

The main changes introduced by 5AMLD were in relation to trusts and include:

- the trigger for registration obligations will no longer be linked only to tax liabilities. Broadly speaking, the registration obligations will instead apply to any trust managed in a EU member state (whether or not taxable there) and any trust managed outside the EU which forms a 'business relationship' in the EU or which acquires EU real estate
- the contents of the register, although not fully accessible by the general public, will be available, on request, to any member of the public who can demonstrate a 'legitimate interest' in the contents. Further, and more alarmingly, for trusts holding underlying non-EEA companies, a member of the public is entitled to request access without demonstrating a legitimate interest (although 5AMLD does allow for certain safeguards if there is a risk of kidnapping, extortion etc)
- EU member states are given autonomy to interpret the above defined terms, and so there is scope for divergence across the EU as to the width of the registration obligations and access to the register.

The UK, which transposed 5AMLD prior to its exit from the EU, has interpreted the scope of the extension more narrowly (in particular in relation to the 'business relationship' trigger) and has put in place certain limited safeguards around access, even where a legitimate interest does not need to be shown. It is also important to be aware that the registration rules on trusts also apply to vehicles similar to trusts, such as foundations.

RBOs outside the EEA

Many other jurisdictions have introduced RBO requirements, in order to adhere to global standards, although typically those requirements apply only in relation to companies. The UK's Crown Dependencies (eg Jersey, Guernsey) and Overseas Territories (eg Cayman Islands, BVI) all have legislation requiring beneficial ownership registers for companies. At the time of writing, none of those registers are public, other than Gibraltar (as of March 2020), and not all are centralised. However, the UK Government has legislated to compel its Overseas Territories (OTs) to introduce public RBOs for companies by 2023 and all OTs have now committed to doing so. Separately, the UK's Crown Dependencies (Jersey, Guernsey and the Isle of Man) have (independently) confirmed they will align access to their central company registers with the requirements of 5AMLD, albeit in a nuanced manner.

Why do RBOs matter?

RBOs represent an erosion of confidentiality and potentially create a risk to your personal safety.

In that regard, although different RBOs will share many common features, there are likely to be important jurisdictional differences which you may wish to consider.

The issues for clients to consider will include the following:

- Public/non-public – probably the most important aspect to consider is whether your information will be accessible to the general public and, if so, how (eg readily available online or whether a prior request is required).
- Requirement to register – trigger points for registration and reporting thresholds can vary. Equally, even though your structure is managed in one jurisdiction, the manner in which it is operated could trigger reporting requirements in another jurisdiction (eg a Jersey trust with a UK tax liability at trust level can be required to register in the UK).

- How much information to disclose – the amount of information, and the manner of display, will clearly be important, (eg it would be preferable not to include one's home address on a public register if it is not required).

Failure to comply with registration obligations can lead to criminal penalties, and so it is important to know which rules apply and to be compliant.

What can we do to help?

We can help you identify the right jurisdiction(s) for your asset holding vehicle(s), with regard to your safety and confidentiality (and other important factors). We can make you aware of the rules applicable depending on the location and manner of operation of your structure, which will help you stay compliant (and avoid potentially severe penalties) as well as to protect your safety and confidentiality in a permissible manner.

More generally, we can help you understand and have greater control over how your data is proliferated, to understand how State bodies might use the data (eg with regard to potential tax investigations), and to understand how other third parties might also use your data.

Automatic exchange of information (AEOI)

AEOI connotes, in broad terms, measures which give tax authorities visibility over their subjects' financial assets which are held outside that jurisdiction. AEOI measures require tax authorities of jurisdiction X to exchange information with the tax authorities of jurisdiction Y, detailing the financial assets in jurisdiction X held by residents of jurisdiction Y, and vice versa.

Those assets (generally) were not previously visible to home tax authorities, and so these rules are very much a 'game changer'.

In broad terms, the rules work by imposing reporting obligations on the 'financial institutions' which hold your assets (eg custodians, professional trustees) to make annual reports on the value of the financial assets deemed attributable to you. Those annual reports are made to the local tax authority, which then makes onward transmissions to tax authorities in other participating jurisdictions.

Background

AEOI measures were first introduced piecemeal. They supplemented existing international agreements which had only required jurisdictions to exchange information on request or spontaneously.

For instance, the European Savings Directive, which took effect from 1 July 2005, provided for automatic exchange between EU Member States in respect of savings income. A paying agent, who paid savings income to a person in another EU Member State was required to report the recipient's details to its home tax authority. That tax authority would pass their information on to the Member State of the jurisdiction in which the individual was resident. This applied only in respect of savings income.

The United States (US) later brought in the more all-embracing Foreign Account Tax Compliance Act (FATCA), which took full effect on 1 July 2014. FATCA generally operated non-reciprocally in favour of the US, ie it required financial institutions outside the US to report to the US on financial assets held by US taxpayers outside the US. However, various jurisdictions entered into inter-governmental agreements (IGAs) with the US, implementing FATCA, and a number of those IGAs were reciprocal, ie the US undertook limited obligations to report to those jurisdictions on financial assets held by their residents in the US. FATCA only required information exchange between the US and other jurisdictions, ie it did not require non-US jurisdictions to exchange between themselves.

The UK subsequently adopted FATCA-like arrangements with its Crown Dependencies and Overseas Territories – and the UK began to receive information from those jurisdictions, on its taxpayers, in 2016.

The CRS

The all-encompassing Common Reporting Standard (the (CRS)) began to take effect in 2017 as between a large number of non-US jurisdictions. It operates in parallel with FATCA but has otherwise, generally superseded previous AEOI rules.

The CRS, which was based very closely on FATCA, is a universal standard for AEOI between jurisdictions, proposed by the Organisation for Economic Co-operation and Development (OECD) in July 2014. A multitude of jurisdictions – not including the US (for which FATCA remains the only AEOI platform) – have committed to adopt the CRS. A number of those jurisdictions began exchanging information on their taxpayers in September 2017, and a further (larger) set of jurisdictions began making exchanges in September 2018. Most developed jurisdictions worldwide have adopted the CRS (except notably the US).

Broadly, jurisdictions that have adopted the CRS will, each year, automatically provide information to other jurisdictions which have adopted the CRS, in relation to taxpayers holding financial assets outside the jurisdiction in which they are resident.

It is not expected that Brexit will impact on the UK's implementation of the CRS. The UK has agreed to adopt the CRS in its own right and the relevant rules have been transcribed into UK law. Since leaving the EU, the regulations have been amended to remove certain references to EU arrangements. However, the UK government has confirmed that the reporting obligations of UK financial institutions remain unchanged.

FATCA

Whilst the US has not adopted the CRS, it receives information on its taxpayers' non-US financial assets under FATCA. Further, under the IGAs it has in place with various jurisdictions, it shares information with other jurisdictions on financial assets in the US. The CRS and FATCA provisions are very similar and, indeed, financial institutions often use common forms and procedures to address both sets of obligations. However, there are some differences as to scope and the information reported on assets held in the US can be less than it would be under the CRS.

Both CRS and FATCA require reporting of interests held through companies, trusts and other structures, and will typically impose the relevant reporting obligations on the professional persons administering those structures, or those administering any underlying accounts holding financial assets.

Why does AEOI matter?

These rules give your home tax authority visibility over your assets which they did not previously have. Therefore, if you have not discharged all applicable tax obligations, these rules will assist your home tax authority in identifying you. Further, even if you are compliant, the additional information available to your home tax authority can cause them to become unnecessarily suspicious, particularly if there is any inconsistency between your personal reports and the AEOI reports which they receive.

Where you hold assets through complex structures, there is scope for different reports to be made by different counterparties at different levels of the structure. This provides further potential for inconsistencies to generate a tax enquiry or investigation unnecessarily.

The rules are relatively new and can be difficult to interpret and apply, especially in more complex scenarios (for instance in relation to structures involving private trust companies). Lay trustees can often have reporting obligations, by virtue of being classified as a 'financial institution' for the purposes of the rules (eg if they hold assets with a discretionary fund manager), which can come as a surprise. Further, whilst the CRS is an international standard, there are nuances between different jurisdictions as to their manner of adoption (which can, for instance, result in different jurisdictions reporting different asset values as attributable to the same person in relation to the same assets). As well as the risk of unnecessary tax enquiries, there are penalties for incorrect reporting and/or failure to apply the rules.

As with RBOs, the application of AEOI rules can compromise confidentiality and safety. Some clients may feel uncomfortable with public officials having oversight of all their financial information, eg if they have been the subject of state persecution, or if the respective Government bodies have poor information governance procedures.

All of these possibilities point towards the need to take proper advice as to the application of the rules and the potential consequences if they are not followed correctly and/or if insufficient attention is paid to their operation by you or your intermediaries.

What can we do to help?

Your intermediaries will be discharging their obligations under these provisions, often ‘behind the scenes’ without you realising what is being reported. We can add value to the process in important ways such as:

- Support your intermediaries in discharging their obligations, such that the reports made are correct, consistent and not duplicative.
- Having discussed with your intermediaries, advise as to the contents of the reports being made, so that you have a better understanding of where your information is going, greater predictability as to any tax enquiries and satisfaction that your information is not being disseminated unnecessarily and/or incorrectly.
- Work with your accountants to support on your personal tax reporting, so that you may pre-empt tax enquiries which might otherwise arise on AEOI reports coming to tax authorities ‘out of the blue’.
- Alert lay clients of obligations which they might not otherwise be aware apply to them, so that they ensure they are compliant and avoid penalties.
- If you have concerns about the integrity or security of particular tax jurisdictions receiving your information, we can advise on any options to improve the position.
- We can assist in dealing with tax enquiries or investigations which may arise, and/or with any regularisation and disclosure work which may be required if you discover any non-compliance.

UK disclosure of tax avoidance schemes regime (DOTAS)

In addition to the above rules which oblige bodies automatically to report information, directly or indirectly, to tax authorities (from which they may detect tax avoidance), it is relevant also to consider the obligations on intermediaries to make spontaneous disclosures alerting tax authorities to specific instances of tax avoidance.

The UK rules, which have existed for some years, are summarised here partly to give context to a new set of EU rules summarised in the following section.

What is DOTAS?

The UK introduced the Disclosure of Tax Avoidance Schemes regime (commonly known as DOTAS) back in 2004, with both its scope and effectiveness being broadened as time has progressed.

The regime was designed to provide HMRC with details of potential tax avoidance schemes at an earlier stage, by placing a positive obligation on scheme promoters to notify HMRC of the scheme.

The aim behind the regime was twofold; firstly, the reduction in the number of tax avoidance schemes available (especially those considered as being more aggressive) and secondly, due to the earlier notification, allowing HMRC to both investigate and take counteraction against schemes more promptly and effectively.

The regime applies to income tax, corporation tax, capital gains tax, inheritance tax, stamp duty land tax, annual tax on enveloped dwellings and national insurance contributions.

The DOTAS rules do not define precisely what constitutes an avoidance scheme but rather set out a number of characteristics which determine whether the scheme is a notifiable arrangement. In broad terms, a scheme will be notifiable if it delivers a tax advantage (with the tax advantage being the main benefit of the scheme) and it carries certain ‘hallmarks’ which are specified features common to avoidance schemes (such as the generation of artificial losses, obligations to keep the scheme confidential and premium fees).

If the promoter of a scheme considers that it is notifiable, the promoter must disclose the main elements of the scheme to HMRC within five days of the arrangements first being made available. HMRC will then issue the scheme with a DOTAS number and anyone who uses the scheme subsequently needs to include this number in their UK tax return. HMRC will then monitor the scheme's use and, if appropriate, legislate to counteract the scheme.

Why does it matter?

Whilst the primary obligation is on the promoter under DOTAS, if a taxpayer uses a scheme and does not include the DOTAS number in their tax return, they face financial penalties of up to £1,000 on each occasion of failure. Once HMRC are aware of inaccuracies within a taxpayer's return, HMRC are more likely to issue an enquiry into their tax affairs.

Even more significantly, since 2014, HMRC have powers, in certain circumstances, to issue so-called Accelerated Payment Notices (APNs) to taxpayers using DOTAS schemes, requiring them to pay the amount of tax that HMRC consider has been wrongfully avoided within 90 days.

The APN regime seeks to prevent taxpayers benefitting from the cash flow advantage achieved by using tax avoidance schemes. Previously, the taxpayer did not need to pay the disputed tax until a tribunal or court reached a decision on whether the scheme worked. The effect of the APN regime is to obtain payment of the disputed tax up front whilst litigation progresses. Only if the taxpayer is ultimately successful will any portion of the accelerated payment be refunded.

In addition, if HMRC are successful in litigation against one user of a scheme and they believe that the outcome can be applied to similar tax avoidance arrangements undertaken by other taxpayers, they have the power to issue Follower Notices (FNs) to those taxpayers.

HMRC accompany the FN with a request for payment of the disputed tax via an APN, which will mean that the tax needs to be paid within 90 days.

There is no right of appeal against an APN or FN, although representations can be sent to HMRC for consideration before the notices are finalised. Significantly if a taxpayer receives a FN and APN and does not pay the tax in response, they can face a penalty of up to 50% of the disputed tax.

HMRC's powers to counteract suspected tax avoidance arrangements were increased by Finance Act 2021. HMRC may now allocate a scheme reference number to an arrangement or a proposal for an arrangement that has not been disclosed, but which HMRC has reasonable grounds for suspecting is notifiable; this enables HMRC to obtain information about suspected notifiable arrangements (and involved parties) at a much earlier stage.

What can we do to help?

We can advise as to the applicability of DOTAS obligations, so that you will have a better appreciation of the risks of any arrangement which has been marketed to you, as well as your own reporting requirements.

If you receive an APN we can review and make representations to HMRC as to whether it has been validly issued from a formalities perspective (both in relation to the respective conditions it needs to meet or in relation to the amount specified). However, there is no substantive right of appeal against an APN (and nor will HMRC negotiate about the amount of tax due or the time limit).

HMRC have a duty to consider any representations and have acknowledged that APNs were incorrectly issued in the past and withdrawn them, so we would recommend careful review within the 90 day time period.

Model mandatory disclosure rules and DAC6

The EU has introduced an additional level of disclosure designed to detect potentially aggressive tax planning with an EU cross-border element, by broadening existing directives. These rules are conceptually similar to the UK's DOTAS rules but have important differences with regard to scope and application.

This measure in part implemented the OECD's 2018 Mandatory Disclosure Rules (the MDR), which aimed to strengthen cross-border tax transparency and counter aggressive tax planning, by requiring intermediaries to inform tax authorities of any schemes implemented which seek to avoid reporting under the CRS or prevent the identification of beneficial owners. This new directive (known as DAC6, as it is an extension of previous iterations of the 'Directive on Administrative Cooperation') provides for mandatory disclosure of certain cross-border tax arrangements by intermediaries, or taxpayers, to EU tax authorities (and mandates subsequent automatic exchange of this information amongst EU Member States). DAC6 had an implementation deadline of 1 July 2020, albeit the deadline for reporting historical arrangements was extended from 31 August 2020 to 28 February 2021 (in light of disruption from COVID-19). It has an element of retrospectivity in that it will require the reporting of schemes undertaken on or after 25 June 2018.

The aim is that this mandatory disclosure will enable tax authorities to obtain early knowledge of relevant arrangements so that they can take prompt action where appropriate to counteract them. In order to be within DAC6, the arrangement must meet two requirements:

- Firstly, the arrangement must be a 'cross-border' arrangement – which means that it must concern either more than one EU Member State or, (provided certain conditions are met), an EU Member State and a third country.

- Secondly it must be a 'reportable' arrangement which means that it must fall within at least one of 18 'hallmarks', which are broad categories setting out particular characteristics which potentially indicate aggressive tax planning. A number of the hallmarks only apply if the main benefit expected from the arrangement is a tax advantage, but equally a number do not have this threshold requirement, thereby substantially increasing the potential scope of those hallmarks.

If an arrangement is within DAC6, a relevant intermediary (or the taxpayer) must make a report within 30 days of the earlier of (i) the day the arrangement is made available for implementation, (ii) the day it is ready for implementation or (iii) the day when the first step in implementation is made. The report needs to summarise the value, details and implementation of the arrangement, the applicable hallmark(s) and provide full identification details of the taxpayers. A different reporting timescale applied for schemes first undertaken between 25 June 2018 and 30 June 2020, which needed to be reported by 28 February 2021. For arrangements between 1 July 2020 and 31 December 2020, the deadline was 30 January 2021.

Why does it matter?

Whilst DAC6 may have been targeted primarily at larger corporates, this regime also potentially affects private wealth holding structures and the options regarding their creation or alterations.

Whilst there are significant potential financial penalties (a maximum penalty for taxpayers of £5,000 for each offence, but the UK courts have the power to increase penalties to £1 million), the reputational damage could also be significant if you fail to comply with this regime.

Similar to DOTAS, the primary reporting obligation is on your intermediaries, but where your intermediary is outside scope (eg because they are outside the EU or subject to legal professional privilege), the obligation will fall on you directly.

Potentially the most relevant hallmark for private clients is the automatic exchange of information and beneficial ownership hallmark (Hallmark D) and, since 31 December 2020 it is only this hallmark which now applies in the UK (after the UK surprisingly decided following its withdrawal from the EU not to continue with its implementation of DAC6 but instead to implement only the MDR, with which Hallmark D is broadly aligned). Clients with an EU footprint still need to consider the other DAC6 hallmarks, as well as Hallmark D. The 'main benefit' test described above does not apply to Hallmark D (or the MDR), therefore, even if arrangements are not purely tax driven, the parties involved still need to consider DAC6 disclosure.

Under Hallmark D, a cross-border arrangement will be caught if it may have the effect of undermining the CRS reporting obligations or if it takes advantage of the absence of such obligations. So, if you are considering any steps which might result in reduced reporting under CRS, you will need to consider whether any DAC6 (or MDR) disclosure obligations arise.

Hallmark D also captures arrangements involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:

- which do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises
- that are incorporated, resident, or managed in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures
- where the beneficial owners of such entities are made unidentifiable.

This is potentially very wide, although it is expected that it will not be met where an intermediary in a well-regulated jurisdiction can satisfactorily determine the beneficial ownership position in accordance with its AML regulations.

Hallmark D could, however, potentially capture a situation where a trustee of a trust customarily acts under the instructions of another person not named as a trustee or protector under the trust deed.

What can we do to help?

If you have implemented transactions without external advice or sought advice or services from a non-UK or non-EU intermediary (or a UK or EU intermediary that benefits from legal privilege) then the obligation will fall upon you as the taxpayer to capture and report the relevant information.

If you are concerned that your arrangements may be caught by DAC6 and/or the MDR, then we can assist by reviewing the arrangement to ascertain if it is within scope, ascertaining the information needed for submission and agreeing an approach with any other involved intermediaries to ensure that any required reporting is consistent.

Finally, if you are considering taking any steps which seek to impact on the reports required under AEOI obligations, we can advise as to the risk of those steps giving rise to a reporting obligation under DAC6 and/or the MDR.

HMRC powers of information

In addition to looking at how tax authorities might receive information on your affairs unprompted, it is also important to be aware how they can seek further information where the information received excites any suspicion on their part. This guide looks only at the information powers available to the UK tax authority, HMRC.

If HMRC suspects that you have not paid the right amount of tax, they will, in the first instance, typically write to you and your advisors. However, if left dissatisfied, HMRC can rely on the civil powers contained at Schedule 36, Finance Act 2008.

This wide-reaching statutory framework enables HMRC to access information and documents from the taxpayer directly, by issuing a 'taxpayer notice', or from a third-party holding information about a known taxpayer (such as lawyers, accountants or administrators), by issuing a 'third party' notice. Third parties, in particular, may require the issue of such formal notices by HMRC before they agree to cooperate with any request from HMRC for information, as data protection and confidentiality rules may inhibit them from doing so otherwise.

In broad terms, the information requested must always be 'reasonably required' by HMRC to check the taxpayer's tax position. Essentially this means that a balance must be achieved between the burden of gathering and sharing information for the recipient of the notice and how important/relevant the information is to HMRC's enquiry. Third party notices cannot be issued unless HMRC has obtained either the agreement of the taxpayer (whose tax position is being checked), or the approval of the tax tribunal. The tribunal will only grant approval if certain 'due process' conditions are met, eg the tribunal must be satisfied that the HMRC officer giving the notice is authorised and justified in doing so, and that the recipient of the notice and the taxpayer are told why the information is required and given a reasonable opportunity to make representations.

Taxpayer notices are subject to a right of appeal of the taxpayer to an independent tribunal, unless (i) the information requested forms part of the taxpayer's 'statutory records' (ie information or documents which a person is required to keep by virtue of tax legislation) or (ii) HMRC has obtained the approval of the First-tier Tribunal before issuing the notice (such approval being conditional on 'due process' requirements as above).

HMRC was granted new powers in Finance Act 2021 to issue 'Financial Institution Notices'. In effect, these are third party notices which can only be issued to 'financial institutions' and which require the specific financial institution to provide information to HMRC about a specific taxpayer. Crucially, HMRC do not require either taxpayer consent or tribunal approval to issue such notices, but rather must only demonstrate that the information requested is reasonably required for the purposes of checking a taxpayer's position. There is no right to appeal a Financial Institution Notice.

Why do they matter?

The tax landscape and HMRC's practice have changed significantly since the enactment of HMRC's powers of information, with the current framework mirroring many provisions that date back to the 1970s. Over the last few years, case law on the exercise of HMRC's Schedule 36 powers shows that these are frequently used and sometimes constitute attempts by HMRC to push the boundaries of what is 'reasonably required' to check a person's tax position, or as to whom information notices can be addressed.

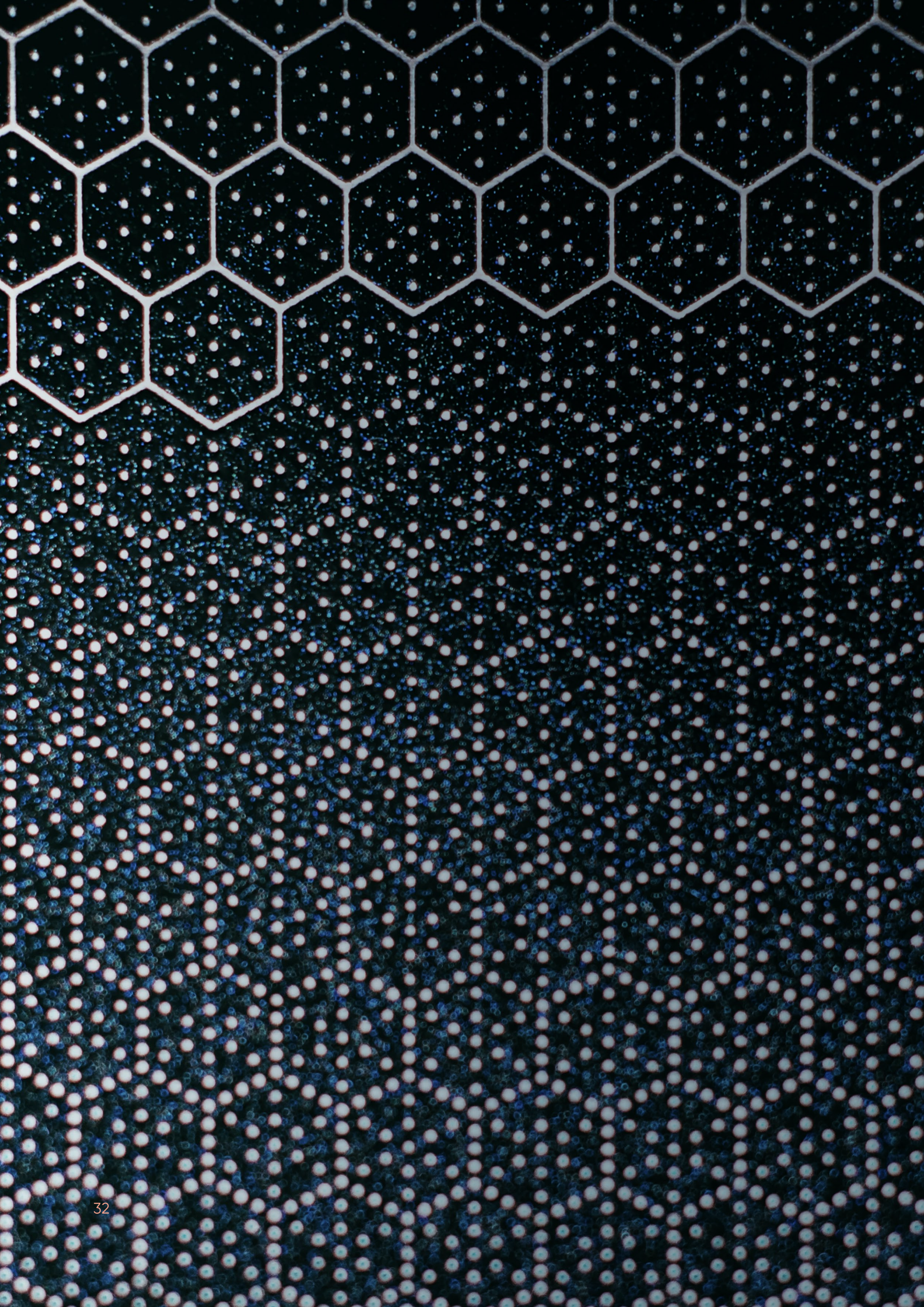
For example, while Schedule 36 itself is silent as to its geographical scope, a 2019 Court of Appeal case, Jimenez, confirmed that HMRC could issue (first party) taxpayer notices to non-UK residents (when this was previously unclear).

Later in 2019, in Mr & Mrs PQ v HMRC, the First-Tier Tax Tribunal went one step further in confirming that HMRC could also issue third party notices to non-UK residents, as long as there was a 'sufficient connection' between the required information and its intended recipient. We anticipate that HMRC will also seek to argue that Financial Institution Notices may be issued extra-territorially. These statutory powers operate alongside a network of tax information exchange agreements in place between various jurisdictions, which provide a further mechanism through which HMRC can seek information from counterparties outside the UK.

As a consequence of the various reports and disclosures made under AEOI regulations and other provisions, you could well receive tax enquiries, possibly escalating to information notices if HMRC are dissatisfied with your response(s). Even if you declined to comply, you should be aware that third party notices, Financial Institution Notices (and other binding requests) may be issued to your intermediaries both in and outside the UK, which they will need to deal with (and on which they themselves will need advice).

What can we do to help?

If you receive a request for information from HMRC, either in your capacity as taxpayer or as a third party, we can advise on whether it constitutes a valid notice (ie whether all the procedural conditions have been met), whether the information requested ought to be produced (ie whether it is reasonably required to check a person's tax position) or whether you can appeal the notice, and more generally on the appropriate manner of corresponding with HMRC.



Relevant aspects of UK data protection law

European data protection laws set enforceable rules as to how organisations collect, store, use and disclose information relating to living individuals (Personal Data). In particular the General Data Protection Regulation (GDPR) in force across the EEA (which took effect before the UK's exit from the EU), extends strong rights and protections to individuals and places important obligations on those processing their information.

Data protection laws are therefore particularly relevant when contemplating the disclosure of Personal Data in response to a request received from any competent law enforcement or other body, such as a tax authority.

Why does it matter?

A common question we receive is whether AEOI or other disclosure requirements could be inconsistent with, and/or overridden, by laws on data protection. The following paragraphs summarise the relevant aspects of applicable data protection laws in relation to that question.

Any activity or 'processing' involving Personal Data must have a lawful basis in the GDPR. This can, among other things, potentially restrict an intermediary's use or disclosure of Personal Data if that use or disclosure is incompatible with its original purpose for collecting that data or if it has not first made this use clear to the subject of the data. These obligations are backed up by tough penalties under the GDPR for non-compliance with fines up to a maximum of 20,000,000 Euros or 4% of total worldwide annual turnover.

When is it safe for an intermediary to disclose?

The GDPR does not create an immovable barrier to justified Personal Data disclosures. National laws implementing the GDPR will include exemptions permitting specific uses or disclosures of Personal Data in ways that would otherwise breach the law.

The UK Data Protection Act 2018 which implements the GDPR fully into UK law includes, for example, exemptions permitting specific disclosures of Personal Data for crime and taxation purposes, or where required by law, or in connection with legal proceedings.

These are not blanket exemptions. The UK crime and taxation purposes exemption would only apply to the extent that complying with certain other obligations in the law, such as informing data subjects or facilitating their rights, would prejudice a crime and taxation purpose (in relation to processing the specific data at issue). Likewise, in the case of information required to be disclosed by law or in connection with legal proceedings, the exemption would only apply where other specific data protection obligations would prevent disclosure.

Requests to disclose

When considering requests for information it is very important to consider the facts of each case. In particular, who is making the request and if requests for data are made in connection with criminal investigations or the assessment or collection of taxes, and whether there is a likelihood of prejudice in not disclosing the requested information for that purpose.

Data protection law does not itself impose a duty to disclose in such cases. It is therefore important to clearly establish the statutory entitlement or other legal grounds for any request that is made for Personal Data. The necessity of the information to the specific request that has been made must equally be clear. This is important because the GDPR requires organisations to be accountable for their compliance. More specifically, they need to be able to evidence and demonstrate how they reached a decision to disclose in reliance on an appropriate exemption permitting disclosure.

What can we do to help?

We can help your intermediaries assess whether there is a valid legal requirement to disclose Personal Data or, in the absence of a statutory or other compulsion, whether lawful grounds permitting a specific disclosure of Personal Data without a breach of data protection law exist in any particular case. We can also assist your intermediaries with drawing up internal procedures to log and assess requests and, where appropriate, resist requests or make any permitted disclosures.

New UK penalties for tax non-compliance

The UK has introduced new civil and criminal penalties in recent years for different aspects of tax non-compliance (which may be detected through transparency measures). In the transparency context, the most significant are summarised briefly below.

Criminal liability

From 6 April 2017, any individual who fails to disclose, or accurately report, a liability to UK income tax or capital gains tax on non-UK assets can be liable to criminal sanction. In contrast to the earlier position, an offence will be committed even if the taxpayer has not acted dishonestly. However, the offence can only be committed if the tax liability for the relevant year exceeds £25,000; only if that liability relates to a non-UK matter; and only if the tax in question is income tax or capital gains tax (so, for instance, inheritance tax is not within scope). However, the £25,000 threshold is calculated only in relation to overseas assets which are not reportable to HMRC under the CRS, which is a very wide and important limitation. Therefore, if you honestly but mistakenly under-declare your UK tax in relation to non-UK assets, you should escape criminal sanction if those assets are located in a jurisdiction which has adopted the CRS.

As set out in relation to RBOs, failure to comply with beneficial ownership registration obligations can lead to criminal liability (as well as civil penalties), although one would expect criminal liability only to attach in more serious cases.

Of course, deliberate omission to discharge one's tax obligations has always carried criminal sanction.

The above measures constitute recent additions to the existing framework.

Civil liability

In addition to the existing standard penalties (which could apply at up to 200%) for failure to notify liability, late filing and late payment, additional penalties can now also be applicable.

In broad terms, now that we are well past the so-called 'Requirement to Correct' deadline of 30 September 2018, unsettled UK tax liabilities which arose in relation to non-UK assets before 6 April 2017 can attract penalties of 200% of the underpaid tax. Additionally, the 10% asset-based penalty (see below) can apply if the individual was aware in the run-up to 30 September 2018 that there was underpaid tax and did not correct the position by the deadline. There is a defence of 'reasonable excuse' which can apply, for instance, if appropriate tax advice was sought but that advice must satisfy strict requirements in order to qualify. In response to the COVID-19 pandemic, HMRC have made clear that they will consider coronavirus as a 'reasonable excuse' for missing some tax obligations (such as payments or filing dates). However, the taxpayer will need to explain how they were affected by coronavirus in their appeal.

From 1 April 2017, in broad terms, where an individual is liable to one of the standard penalties in relation to income tax, capital gains tax or inheritance tax and the penalty was imposed for deliberate conduct, the individual can be liable for an additional penalty of 10% of the value of the relevant asset, or 10 times the underpaid tax. This penalty can only apply if, in broad terms, the total underpaid tax for the relevant year exceeds £25,000.

You should also bear in mind that the limitation periods in relation to the relevant tax liabilities can be surprisingly lengthy.

The aforementioned recent civil and criminal penalties are not changed as a result of the UK's leaving the EU.

Why does it matter?

Tax non-compliance is now punished more severely than previously. In years gone by, HMRC did not have visibility over assets held outside the UK, and so tended to offer amnesties to encourage taxpayers to regularise.

Recent transparency measures have brought about a major shift in the position because, now that HMRC has visibility where it previously did not, its approach has shifted from the 'carrot' much more to the 'stick'.

What can we do to help?

If you are concerned as to any potential non-compliance, we can firstly review the position to ascertain whether or not it is actually non-compliant. If there is any non-compliance, we can assist in regularising the position, which may include disclosure to HMRC in a proactive manner, which is likely to produce a better outcome than if HMRC discovers the position first (eg through the reports they now receive under AEOI).

Unexplained wealth orders and tax investigations

As well as actions from the UK tax authorities as a result of the reporting/disclosure of information, you should also be aware of the risks of criminal investigation for suspected tax evasion and other means for the State to expropriate assets using new powers under criminal law.

Introduction – who knows what?

Law enforcement agencies have expanded their information gathering and sharing channels across multiple jurisdictions. Illicitly obtained wealth is a "hot topic" for the UK Government in particular. In 2016 the "Panama papers" leak involved the disclosure of 11.5 million files from the world's fourth biggest offshore law firm; further leaks including most recently the "Pandora papers", which involved some 12 million files, have focused on the use of offshore trusts and companies. Successive UK Governments have made it clear that they will target anonymous offshore company structures arguing that they are used by "corrupts, criminals and money launderers".

The Criminal Finances Act 2017 (CFA) continued the trend in clamping down on tax evasion, tax irregularities and overseas funds suspected to constitute the proceeds of crime. The CFA created new offences which shift the burden of proof onto individuals to justify that their funds are bona fide (rather than requiring the UK authorities to prove that they are not) and requires companies to prove they took all reasonable steps to prevent facilitation of tax evasion; the Courts have interpreted this as a high hurdle indeed.

Similar tactics have increasingly been applied by all enforcement agencies, who now more readily encourage individuals to make full disclosure about their financial affairs, whilst dangling the threat of a criminal prosecution if their requests are not complied with. HMRC continue the trend of targeting wealthy individuals using their powers to instigate criminal investigations. While the UK-EU trade and cooperation agreement (The Brexit Deal) contains some ongoing cooperation provisions in relation to criminal enforcement, it remains to be seen how Brexit will affect the UK Government's efforts in investigating offshore accounts and the financial affairs of those with assets in Europe. We should expect similar information exchange and cooperation provisions to be agreed with new territories outside the EU as the UK reaches trade agreements with them.

Why is this relevant to me?

The CFA contained several entirely new offences and procedures. However, the most used and most talked about is the unexplained wealth order (UWO). Such orders can be made by a number of authorities and can be based, in part, on information given voluntarily by individuals to tax advisors, HMRC and accountants.

Such orders require the respondent to explain how they obtained an interest in certain property. UWOs can be made against politically exposed persons (PEPs), any individual who was/is involved in 'serious crime' (widely construed), or simply anyone connected with a respondent who has been so involved. A UWO does not require a prior criminal investigation or conviction. If the Court is not satisfied with the explanation as to how properties were obtained, then they can be deemed 'recoverable property' which in essence makes it much easier for the authorities to seize them and render them permanently forfeit. Since their introduction, only a small number of UWOs have been litigated in Court. In the first such case two properties (worth £22m) were deemed recoverable property. It is instructive that in the only case where respondents were able to successfully discharge a UWO, the Court found that the National Crime Agency (NCA) had not fairly evaluated cogent evidence provided by respondents as to who actually held the property and how it was acquired.

The Court was also clear that holding property through complex corporate structures is not in itself grounds for suspicion about the provenance of the asset. This case reinforces the argument that early, proactive engagement with the NCA, and provision of full information about the provenance of an asset, is the best way to head off a UWO.

Similarly, HMRC can investigate wealth and tax arrangements of an individual under their code of practice powers, requiring individuals to disclose full details about their financial affairs. This includes properties, trusts, details of any tax arrangements, certificates for all bank accounts and credit cards and a full description of your business activities. You are required to provide full disclosure if HMRC suspects tax irregularities brought about deliberately and/or dishonestly, failing which you may be prosecuted.

Why does it matter?

Beneficial owners required to disclose properties on the forthcoming Register of Overseas Entities (see the RBO section above) will be closely monitored by relevant enforcement agencies and may be considered by those authorities who want to test the water with UWOs.

Practically, those whose children reside in a UK property funded by parents overseas could be asked to account for their wealth. You should assume that the source of property funds may be scrutinised by HMRC and seek tax advice accordingly.

Further, if HMRC invites you to voluntarily disclose tax affairs under their codes of practice, it is likely this information will be shared with other third parties, including law enforcement agencies. There is concern that HMRC could use UWOs as a tax recovery tool (as the UWO relates to property ‘held’ rather than occupied).

What can we do to help?

If you think your tax affairs may be under scrutiny, we can, as well as advising on the substance of the tax position, advise on how best to engage with any enforcement authority.

If you have received notification about a possible UWO, or are required to make disclosures, you should urgently seek advice. Where appropriate, we can assist you with proactively engaging with the NCA in order to resolve the matter.

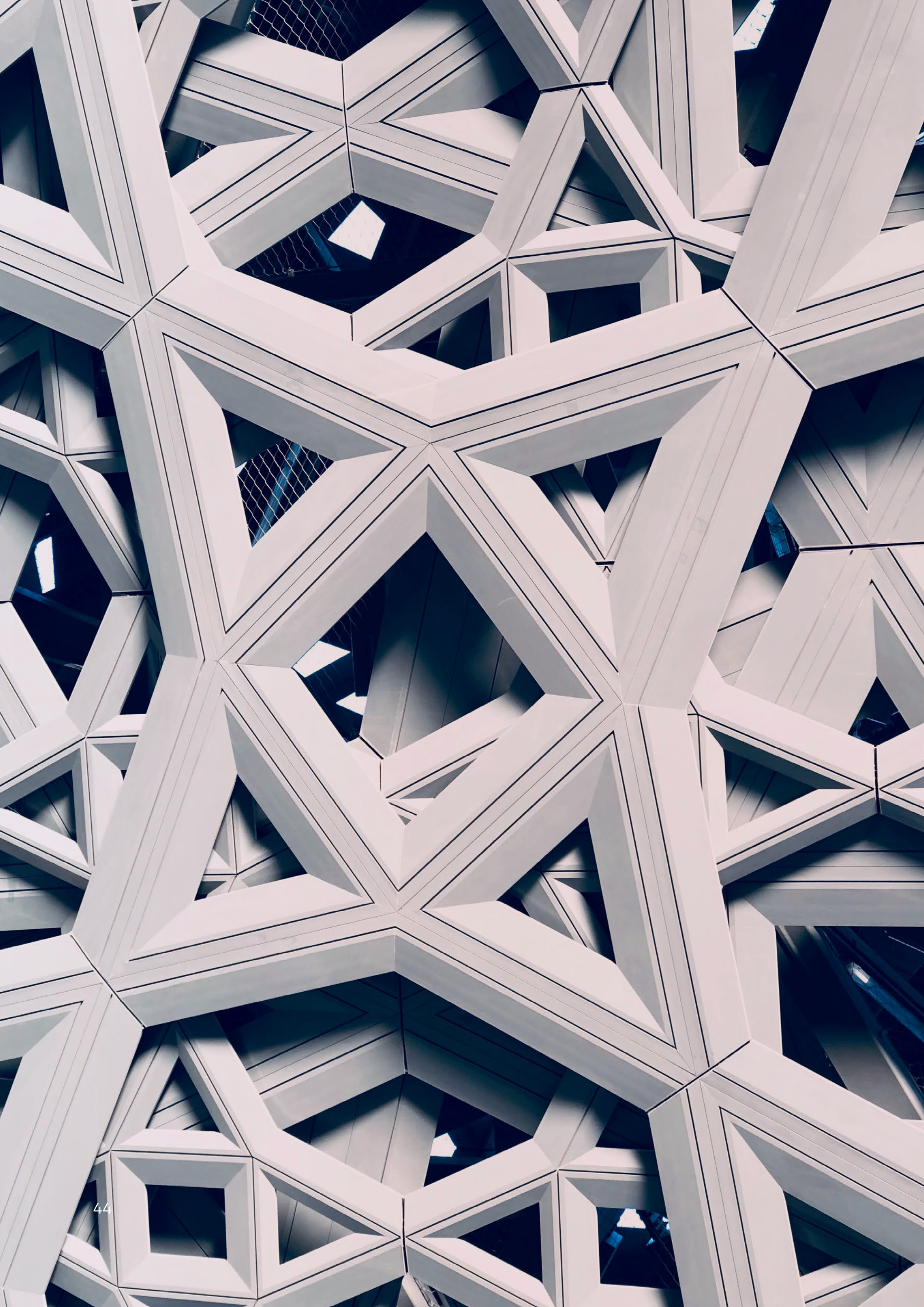
If a UWO has been granted without your knowledge there are steps we can take to respond and try to resolve this issue. Responses must be made in a timely manner and with full consideration of the terms of the Court Order, and it must be appropriate to challenge it.

If you receive a notification that you are under criminal investigation in relation to tax affairs, we can request full details from HMRC and give specialist advice relating to specific personal circumstances. We can advise as to whether you should be engaging in the investigation, and how, and explain all potential options.

If you think your tax affairs are under scrutiny for any other reason, or want to plan ahead, we can consider how best to engage with authorities proactively to achieve the best outcome and avoid any unnecessary publicity.

If you have already agreed a settlement or an investigation and are unclear what steps to take next, we can walk you through the processes.

Our regulatory team has expert lawyers across the firm who can advise on each aspect of law and explain the procedure at each stage.



Reputation and privacy protection

Individuals have the right to protect their reputation, privacy, confidentiality and data. English law provides a tool kit for doing so via several different laws such as the law of defamation, malicious falsehood, misuse of private information, breach of confidence and data protection. An individual who can establish a legal claim is entitled to various remedies including an injunction to prevent publication, damages, an apology and a statement in open court.

Why does it matter?

With more of our lives taking place digitally than ever before and information being an invaluable commodity, high net worth individuals face an increasing number, and a changing nature, of information driven threats to their privacy and reputation.

In these challenging times, the media are now openly hostile towards high net worth individuals and their lifestyles. Investigative journalism, particularly when powered by consortiums of internationally resourced journalists, is also as strong as ever and has broken a number of stories from the Pandora or Panama Papers to the FinCEN files to the OpenLux investigation. Quite separate to any media attention, there are now other, multiple layers through which information flows, creating other risk avenues to one's privacy and reputation. In any person's private family life, there are also numerous key life events which create pieces of private information or, if not managed properly, open up areas of one's private life for all to see.

What issues should be considered to improve protection?

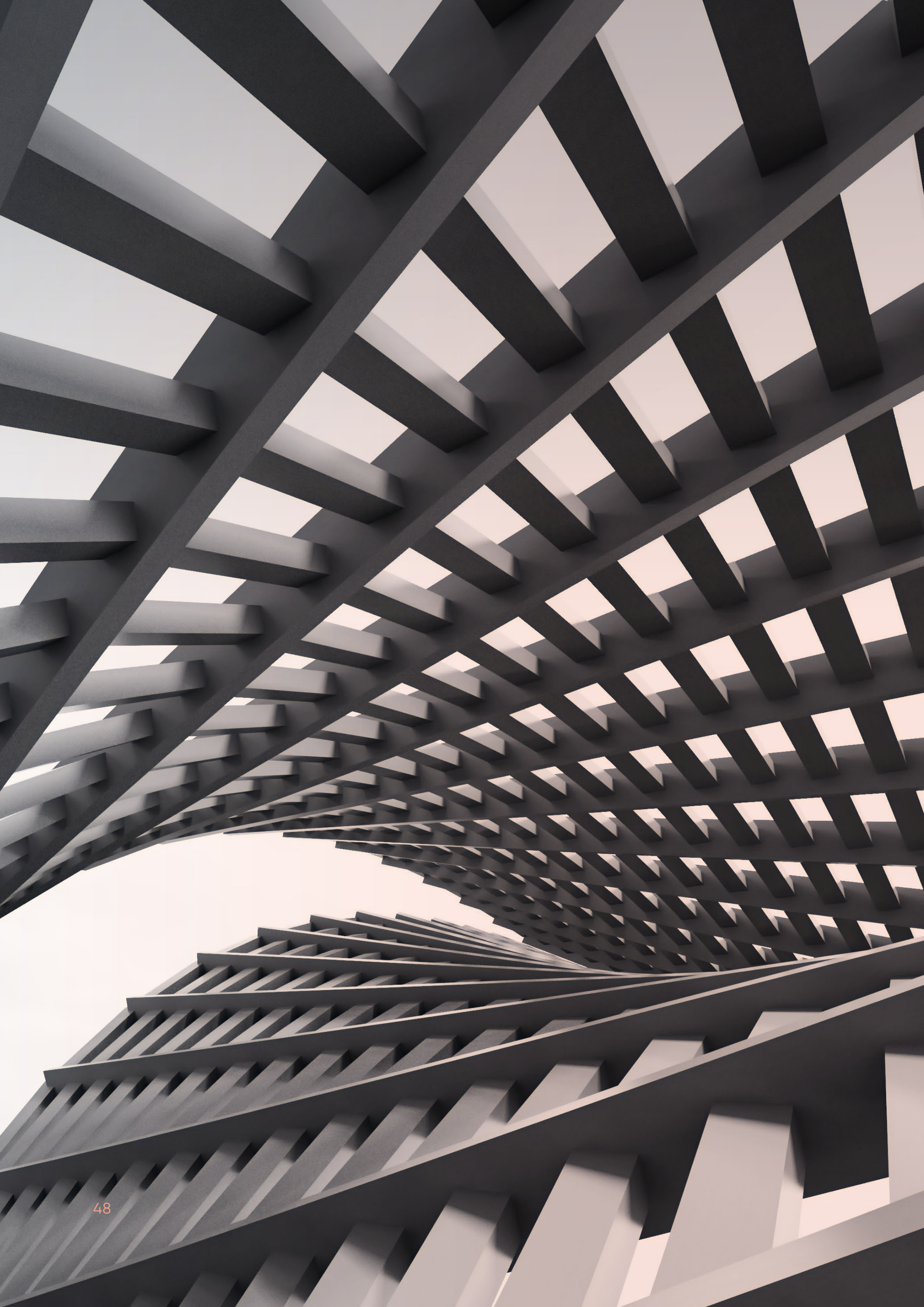
Ultimately, your reputation is everything and protecting it and your privacy is essential. Given your personal reputation can also have a direct impact on those around you as well as the brand of your business(es), questions about your personal information management must be considered:

- How much of your information, or information about your family, is accessible to the public on the clear, deep and dark web, or on social media?
- Where is this information accessible from (open or closed sources, via a search engine or on social media) and in which jurisdictions and languages?
- What do your Google search result say and has inaccurate information been left unchallenged? Could it affect your business, or could advertisers or sponsors run a mile?
- What information are due diligence platforms providing to financial institutions or others considering doing business with you?
- Are there photographs of your family home and other historic marketing materials online, potentially affecting personal security?
- Ahead of taking actions which could shine a spotlight on you, how will your privacy be affected? For example:
    - Have you taken steps to maximize privacy when getting married, divorced or having children?
    - How revealing will a court case or a Coroner's inquest be?
    - Are investments or associations controversial?
- Have staff been properly vetted and signed a legally effective NDA, or do they need reviewing?
- Is too much being shared on social media by you or your family?
- How secure are your family's 'internal' communications?

What can we do to help?

There are a large number of ways we can help you manage and protect your information.

- If you are approached by the media threatening to publish a damaging or private story, we can engage with them on your behalf in order to try and stop it or mitigate the damage. If you have ongoing concerns, we help you put the right team in place to manage the situation.
- We can help you take legal steps to protect your and your family's privacy and reputation ahead of going through key life events.
- We can undertake an online audit to discover your digital information footprint across the clear, deep and dark web, social media and search engines and then challenge or remove damaging information or search results. Audits are particularly important ahead of entering a new jurisdiction.
- We can help you protect your privacy when selling or buying a property by controlling how those involved use your information and the marketing materials created during the process.
- We can find out what information due diligence platforms or investigators have about you and how they use it. We can then seek to correct inaccuracies or challenge wrongdoing.
- We can use the civil law or work with the Police to protect you from harassment or blackmail.



Our Private Wealth group

Taylor Wessing's Private Wealth team works seamlessly together to provide a suite of legal solutions that address our clients personal and business challenges, as they look to grow, protect and transfer their wealth. Our market leading team is made up of over 100 lawyers across 17 jurisdictions.

As one of the largest private wealth teams in the European market, we have a diverse client base, including ultra high net worth individuals and families, global property investors, entrepreneurs, family offices, and venture capitalists.

More than 80% of our client base has connections to more than one jurisdiction and as a result a substantial proportion of our advice is cross-border in nature.

What we offer is rare in that we benefit from both global coverage and unrivalled market leading legal expertise.

Our clients look to us to work alongside them most often in the following areas:

Fiscal & Succession Planning

Corporate M&A

Private Wealth Disputes

Residential & Commercial Real Estate

Immigration & Residency

Employment & Pensions

Banking & Finance

Privacy & Reputation Management

Venture Capital & Private Equity

About us

Taylor Wessing is a global law firm that serves the world's most innovative people and businesses.

Deeply embedded within our sectors, we work closely together with our clients to crack complex problems, enabling ideas and aspirations to thrive.

Together we challenge expectation and create extraordinary results.

2000+ people

1100+ lawyers

300+ partners

29 offices

17 jurisdictions

Challenge expectation, together

With our team based across Europe, the Middle East, US and Asia, we work with clients wherever they want to do business. We blend the best of local commercial, industry and cultural knowledge with international experience to provide proactive, integrated solutions across the full range of service areas.

Taylor Wessing statistics published are correct as of 1 September 2021.

2000+ people **1100+** lawyers **300+** partners **29** offices **17** jurisdictions

Austria	Klagenfurt | Vienna
Belgium	Brussels
China	Beijing | Hong Kong | Shanghai
Czech Republic	Brno | Prague
France	Paris
Germany	Berlin | Düsseldorf | Frankfurt | Hamburg | Munich
Hungary	Budapest
Netherlands	Amsterdam | Eindhoven
Poland	Warsaw
Republic of Ireland	Dublin
Slovakia	Bratislava
South Korea	Seoul*
UAE	Dubai
Ukraine	Kyiv
United Kingdom	Cambridge | Liverpool | London | London TechFocus
USA	New York | Silicon Valley

* In association with DR & AJU LLC

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Let us know how we can help: privatewealth@taylorwessing.com

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