A Brexit Dividend — UK Substantially Restricts DAC6 Reporting Obligations

On 29 December 2020, the United Kingdom, in an unexpected but very welcome development, introduced amending regulations that will largely remove any obligation for UK asset managers to comply with the EU's DAC6 mandatory disclosure regime.

DAC6 is an EU Directive that requires "intermediaries" — such as asset managers — and taxpayers to disclose to their local tax authorities arrangements they are involved in which display one or more specified "hallmarks". The primary obligation to report falls on the intermediary, but if the intermediary does not report for some reason (for example, the intermediary is a law firm that cannot be required to report because of legal professional privilege), the reporting obligation falls back on to the taxpayer. For example, an asset manager in an EU Member State advising a fund in relation to a transaction that displays a DAC6 hallmark is an intermediary of the taxpayer fund and therefore must disclose details of the transaction to its local tax authority. If the asset manager failed to report, the taxpayer fund would then have a secondary reporting obligation. Although intended to enable tax authorities to identify "tax avoidance" transactions, some of the hallmarks are widely drawn, and so DAC6 may require disclosure of a number of common commercial transactions. The first DAC6 reporting deadline fell on 31 January 2021, for disclosure of all reportable arrangements where the reporting trigger occurred in the period 25 June 2018 to 31 December 2020.

Previously, the United Kingdom had announced that, despite Brexit, it would implement DAC6 in full in the United Kingdom. Now, however, in a surprise development, the United Kingdom will only require disclosure of arrangements that display one of the 'Category D' hallmarks — either an arrangement that may have the effect of undermining reporting obligations under the OECD Common Reporting Standard (CRS) or an arrangement that is structured in such a way that beneficial owners cannot be identified. This is a very significant limitation on the scope of the obligation — the Category D hallmarks are only two of 19 DAC6 hallmarks in total and are very unlikely to arise in practice — and as a result DAC6 should broadly cease to be applicable to UK asset managers. HMRC has also indicated that, following the decision only to implement DAC6 to this very limited extent, it will soon bring forth legislation to replace DAC6 reporting obligations with the reporting obligations required by the OECD's Mandatory Disclosure Regime (which would again only require disclosure of arrangements with hallmarks broadly similar to the two Category D hallmarks).

The removal of DAC6 disclosure obligations from UK intermediaries such as UK asset managers is clearly good news. However, UK managers managing EU funds or with subsidiaries or operations in EU Member States need to recognise that (now that there are no UK DAC6 reporting obligations), where the fund enters into arrangements that display a DAC6 hallmark, DAC6 reporting obligations will fall on the fund itself or on a management subsidiary in an EU Member State. For larger management groups with operations in other EU jurisdictions, or for UK managers managing EU-based funds, this is likely to mean that DAC6 compliance has not gone away. The UK manager may still have to take a leadership role in DAC6 analysis and in ensuring that appropriate DAC6 reports are made in the relevant EU jurisdictions, whether that is by the (taxpayer) EU fund or its own management subsidiaries.