

## Finland publishes draft proposal on Mandatory Disclosure Rules

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### Executive summary

On 31 October 2019, the Finnish Government issued a government bill accompanied by explanatory notes to the Parliament implementing the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive). Under DAC6, taxpayers and intermediaries are required to report cross-border reportable arrangements from 1 July 2020. However, reports will retrospectively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.

The Finnish draft legislation is subject to the formal legislative process and may be amended before final enactment. If implemented as currently proposed, the Finnish Mandatory Disclosure Rules (MDR) legislation will be broadly aligned to the requirements of the Directive.

The draft legislation is expected to be finalized by the end of 2019.

### Detailed discussion

#### Background

The Council of the European Union Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation (the Directive or DAC6), entered into force on 25 June 2018.

The Directive requires intermediaries (including EU-based tax consultants, banks and lawyers) and in some situations, taxpayers, to report certain cross-border arrangements (reportable arrangements) to the relevant EU member state tax authority. This disclosure regime applies to all taxes except value added tax (VAT), customs duties, excise duties and compulsory social security contributions. Cross-border arrangements will be reportable if they contain certain features (known as hallmarks). The hallmarks cover a broad range of structures and transactions. For more background, see EY Global Tax Alert, [Council of the EU reaches an agreement on new mandatory transparency rules for intermediaries and taxpayers](#), dated 14 March 2018.

EU Member States are to adopt and publish national laws required to comply with the Directive by 31 December 2019. Finland will introduce domestic legislation, which will take effect from 1 January 2020.

The Finnish Ministry of Finance on 19 June 2019 published a draft government bill for consultation. Based on the consultation, some additions were made to the explanatory notes of the now published bill, but the wording of the proposed legislation has remained largely unchanged.

The key differences between the draft Finnish legislation and the Directive are summarized below.

## Scope of taxes covered

The scope of the taxes covered under the Finnish draft legislation is fully aligned with the Directive and applies to all taxes except VAT, customs duties, excise duties and compulsory social security contributions.

## Reportable arrangements

Under the Directive, an arrangement is reportable if:

- ▶ The arrangement meets the definition of a cross-border arrangement; and
- ▶ The arrangement meets at least one of the hallmarks A-E specified in Annex IV of the Directive.

Under DAC6, cross-border arrangements are defined as arrangements concerning more than one Member State or a Member State and a third country. The hallmarks can be distinguished as hallmarks which are subject to the main benefit test (MBT), and those which by themselves trigger a reporting obligation without being subject to the MBT.

The definitions of reportable arrangements included in the Finnish draft legislation are aligned with those of the Directive and do not include any additional hallmarks in

addition to the hallmarks of the Directive. Finland has chosen not to extend the reportable arrangements to cover domestic arrangements.

## Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The explanatory notes of the Finnish draft legislation provide some clarification on these elements, such as:

- ▶ **Hallmark B1 (acquisition of a loss-making company and discontinuance of main activity):** The criteria of the hallmark are not met if the main activity of the acquired company continues several years after the acquisition. On the other hand, the hallmark could be met even if the main activity of the company is discontinued before the acquisition.
- ▶ **Hallmark B2 (converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax):** An arrangement would not normally be regarded as reportable if the tax legislation and the purpose of it allow it to be carried out in two or several alternative ways, even if one leads to a more advantageous tax result.
- ▶ **Hallmark C1(b)(i) (cross-border payments between associated enterprises made to recipients in low-tax jurisdictions):** Based on the explanatory notes this covers cases where payments are made to a country with no or a nominal tax rate of zero/almost zero; almost zero is understood in practice to be less than 1%.
- ▶ **Hallmark C2 (deductions for the same depreciation on the asset):** The hallmark is not deemed to cover situations where deductions for depreciation are claimed both in the location country of a permanent establishment (PE) and in the country of residence of its head office, provided that the profits of the PE are subject to tax in both jurisdictions (subject to credit relief for double taxation).

## Main benefit test

In accordance with DAC6, the MBT will be satisfied if it can be established that the main benefit or one of the main benefits, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement, is the obtaining of a tax advantage.

The explanatory notes of the Finnish bill mention that the "tax advantage" also covers tax advantages realized in non-EU countries. The criteria of the MBT is not considered to

be met if the arrangement concerns tax planning methods which are accepted under legal and tax practice or which are not in contradiction with the tax system or the meaning or purpose of applicable law or regulations.

## Intermediaries

Under the Directive, intermediaries with EU nexus have the primary obligation to report arrangements to the tax authority. The Directive gives Member States the option to exempt intermediaries from the obligation to report where the reporting obligation would breach legal professional privilege (LPP). If there are no intermediaries which can report, the obligation will shift to the taxpayers.

Aligned with the Directive, the Finnish draft legislation defines intermediaries by reference to EU nexus. Only intermediaries with nexus to Finland will have a reporting obligation to the Finnish Tax Authorities.

The Finnish draft legislation exempts certain intermediaries (attorneys, public legal aid counsels and lawyers who have been granted permission to represent in a court) from a reporting obligation due to national legal professional privileges (LPP). However, the exemption only applies to information subject to secrecy and testimony regulations, and the intermediaries subject to LPP are liable to report all other information required by the law on the reportable arrangements. Intermediaries that claim LPP are also required to inform other intermediaries or relevant taxpayers of their obligations to report.

Individual professionals employed by a legal entity (i.e., a company or partnership) should not themselves fall within the definition of "intermediary". Instead, it is the legal entity that provides professional services and is legally responsible for those services to relevant taxpayers that should be regarded as the intermediary in respect of a reportable arrangement. Further, the draft legislation clarifies that entities housing tax teams (so-called in-house tax teams) could also be regarded as an intermediary.

## Reporting deadlines

Under DAC6, for intermediaries (and relevant taxpayers), the trigger events for reporting under the Directive (from 1 July 2020) are when the reportable arrangement is "made available for implementation"; or when the reportable arrangement is "ready for implementation" or when "the first step of implementation has been made."

Under the Directive, reporting starts from 1 July 2020 and exchanges between jurisdictions from 31 October 2020. However, reports will retroactively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.

The same reporting trigger events apply in the Finnish draft legislation. Also, the time limits for filing the reports follow those of the Directive. These include setting a reporting period of 30-days for the intermediary and relevant taxpayer. In respect of marketable arrangements, in accordance with Article 8ab, Paragraph 2 of the Directive, the intermediary also has an obligation to make a periodic report every three months including all relevant information that has become available since the last report was filed.

## Penalties

If an intermediary or relevant taxpayer fails to meet the reporting obligations a penalty can be imposed depending on the significance of the breach. The penalties are expected to apply as follows:

- ▶ Penalty up to €2,000 in case of a minor inadequacy or mistake in the report or in the mandatory procedures, and when the intermediary or relevant taxpayer with whom the reporting obligation lies has failed to fulfill the Finnish Tax Authority's request for correcting the report or procedures.
- ▶ Penalty up to €5,000 for a material inadequacy or mistake in the report or in the mandatory procedures, or for submitting or completing a report or mandatory procedures only after a request from the Finnish Tax Authority.
- ▶ Penalty up to €15,000 for submitting a materially false report deliberately or with gross negligence, or for failing to submit a report, or a deliberate or gross negligence failure to comply with other enacted obligations.

## Next steps

The Finnish government bill has clarified some questions with respect to the interpretation and implementation of DAC6; however many questions remain unanswered. The Finnish Tax Authority is expected to publish guidelines on the MDR obligations and procedures later in 2020.

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Taxpayers and intermediaries who have operations in Finland should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting these obligations.

## Endnotes

1. For background on the MDR, see EY Global Tax Alert, [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 5 June 2018.
2. DAC6 sets out a minimum standard. Member States can take further measures; for example, (i) introduce reporting obligations for purely domestic arrangements; (ii) extend the scope of taxes covered; (iii) bring forward the start date for reporting.

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