

Portugal publishes final legislation to implement Mandatory Disclosure Rules

EY Tax News Update: Global Edition

EY's Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration [here](#).

Also available is our [EY Global Tax Alert Library](#) on ey.com.

Executive summary

On 21 July 2020, Portugal's Law no. 26/2020 was published implementing the European Union (EU) Directive 2018/822 of 25 May 2018 on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).

The Portuguese legislation entered into force on 22 July 2020 and is effective from 1 July 2020. The final Portuguese legislation is silent on whether a deferral of the reporting deadlines will be implemented, following the adoption on 24 June 2020 by the Council of the EU of Directive 2020/876/EU amending DAC6.¹

The implementation of DAC6 revokes the existing Portuguese legislation on abusive tax planning reporting.

The final Portuguese Mandatory Disclosure Rules (MDR) legislation is broadly aligned to the requirements of the Directive with regards to cross-border arrangements. However, the Portuguese MDR also covers "domestic arrangements" (as defined) and includes Value-Added Tax (VAT) as a covered tax for such domestic arrangements.

The final legislation differs slightly from the first version of the draft law made available for public consultation in May 2019,² as the additional hallmarks proposed in that version have now been removed. Accordingly, the Portuguese final law does not contain any additional hallmarks in comparison with the DAC6.

Detailed discussion

Background

The DAC6 amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation entered into force on 25 June 2018.³

The Directive requires intermediaries (including EU-based tax consultants, banks and lawyers) and, in some situations, taxpayers, to report certain cross-border arrangements to the tax authority of the relevant EU Member State. This disclosure regime applies to all taxes except for VAT, customs duties, excise duties and compulsory social security contributions.⁴ Cross-border arrangements will be reportable if they contain certain features (known as hallmarks). The hallmarks cover a broad range of structures and transactions.

The Portuguese draft MDR legislation was first made available on 28 May 2019 and was subject to public consultation. On 31 January 2020, the Portuguese Government submitted a revised draft of the MDR legislation to the Parliament. For more background, see EY Global Tax Alert, [Portugal publishes revised draft legislation on Mandatory Disclosure Rules](#), dated 10 February 2020. There have been no changes in the final law compared to the draft law submitted to the Parliament in January of this year.

The key differences between the final Portuguese law and the Directive are summarized below.

Covered taxes

With respect to the purely domestic arrangements, the Portuguese final legislation extends the scope of taxes to include VAT in addition to the those covered under the Directive. For cross-border arrangements, the covered taxes are the same as provided in DAC6.

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 EU Member State or a Member State and a third country. The hallmarks can be distinguished between those 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 overall definition of a reportable cross-border arrangement under the Portuguese final legislation broadly follows the DAC6 definition.

The Portuguese final law also covers domestic arrangements which meet at least one of the hallmarks B-E specified in Annex IV of the Directive. Notably, the generic hallmarks under category A relating to confidentiality clauses, success fees and standardized documentation/structure are disregarded for Portuguese domestic arrangements purposes.

As such, under the Portuguese legislation, an arrangement is reportable if:

- ▶ The arrangement is a purely domestic arrangement (as defined) or a cross-border arrangement (as defined by DAC6); and
- ▶ The arrangement meets at least one of the DAC6 hallmarks (A-E concerning cross-border arrangements; only B-E for purely domestic arrangements), some of which are subject to the MBT.

Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The Portuguese final legislation provides only for the following clarifications:

- ▶ Hallmark C1(b)(i): an “almost-zero tax rate” means a nominal tax rate of less than 1%.
- ▶ Hallmark E1: the use of a unilateral safe harbor should only fall on this hallmark if the safe harbor is not included in the international consensus stated in the Organisation for Economic Co-operation and Development (OECD) transfer pricing guidelines.

Main Benefit Test

In accordance with DAC6, under the Portuguese legislation, the MBT will be satisfied if it can be established that the main benefit or one of the main benefits which, 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 Portuguese law does not clarify whether it should refer to an EU or worldwide tax advantage.

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.

The Portuguese final legislation defines intermediary by reference to Portuguese nexus and provides for reporting exemptions based on both LPP and contractual professional privilege (CPP). Therefore, intermediaries who are exempt from reporting owing to either of those privileges in Portugal will be exempted from an MDR reporting obligation, where they notify the relevant taxpayer within five days from the trigger event regarding the latter's obligation to report. However, in the case that the relevant taxpayer does not inform and present proof of having reported within 30 days from being notified by the intermediary, the latter – even those with LPP or CPP – will assume the obligation to report.

Based on the wording of the law, intermediaries can only rely on other reports (containing the same information), if such reporting has been made by the same intermediary in another EU Member State or by another intermediary in Portugal. Similar rules apply for relevant taxpayers.

Reporting deadlines

Under DAC6, for intermediaries (and relevant taxpayers), the trigger events for reporting after 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 cross-border arrangements where the first step has been implemented between 25 June 2018 and 1 July 2020.

The Portuguese reporting deadlines fully follows DAC6 in this regard. Purely domestic arrangements will only be reportable, where the trigger event occurs after 1 July 2020. Relevant taxpayers are also required to file updated information about their use of the arrangement with the Portuguese tax authorities, in each of the years they use the arrangement.

Penalties

Based on the Portuguese final legislation, the following penalties are expected to apply per arrangement:

- ▶ Failure to report or delay in reporting by intermediaries/relevant taxpayers, including proof that the arrangement was already reported in another EU Member State or by another intermediary/relevant taxpayer - range from €6,000 to €80,000
- ▶ Omissions or inaccuracies in the reported information - range from €2,000 to €60,000
- ▶ Failure to provide or delay in providing additional information - range from €3,000 to €80,000

The payment of the penalty does not waive the obligation to comply with the reporting obligations.

Next steps

Determining whether there is a reportable arrangement raises complex technical and procedural issues for both taxpayers and intermediaries. Due to the scale and significance of the regime enacted in the final legislation, taxpayers and intermediaries who have operations in or involving Portugal should review their policies and strategies for logging and reporting tax arrangements, so that they are fully prepared for timely meeting their obligations.

Endnotes

1. This amendment permits EU Member States an option to defer for six months the time limits for the filing and exchange of information on cross-border arrangements under DAC6. For further detail, see EY Global Tax Alert, [Council of the EU adopts amendments for deferral of MDR filing deadlines](#), dated 24 June 2020. A deferral is expected to be adopted by Portugal in the upcoming weeks.
2. See EY Global Tax Alert, [Portugal publishes draft proposal on Mandatory Disclosure Rules](#), dated 29 May 2019.
3. For background on MDR, see EY Global Tax Alert, [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 5 June 2018.
4. 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.

For additional information with respect to this Alert, please contact the following:

Ernst & Young, S.A., Lisbon

- ▶ António Neves antonio.neves@pt.ey.com
- ▶ João Sousa joao.sousa@pt.ey.com
- ▶ Luís Marques luis.marques@pt.ey.com

Ernst & Young LLP (United States), Portuguese Tax Desk, New York

- ▶ Tiago Rosa tiago.rosa@ey.com

About EY

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

© 2020 EYGM Limited.
All Rights Reserved.

EYG no. 005139-20GbI

1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey.com