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Ireland publishes draft proposal on Mandatory Disclosure Rules

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Executive summary

The Irish Government published, on 17 October 2019, draft legislation implementing the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).

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

Under DAC6, taxpayers and intermediaries are required to report cross-border reportable arrangements from 1 July 2020. However, reports must also retrospectively cover arrangements where the first step was implemented between 25 June 2018 and 30 June 2020.

The draft legislation proposes to amend the "Anti-Avoidance" rules of Ireland's *Taxes Consolidation Act* (TCA) by transposing DAC6 as an addition to Ireland's domestic mandatory disclosure regime that was enacted in 2011.

The draft legislation is expected to be finalized in late December 2019 and operational with effect from 1 July 2020.

Building a better working world

The draft includes some explanatory notes that clarify the concepts and terms used in the Directive, but further guidance addressing the interpretation of the hallmarks of the Directive and their application is expected to be published subsequently by Irish Revenue.

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.[1]

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.[2] 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. Ireland will introduce domestic legislation, which will take effect from the passing of *Finance Act 2019* (expected in late December) and will become operational with effect from 1 July 2020.

This Alert summarizes key differences between the draft Irish legislation and the Directive.

Scope of taxes covered

The scope of the taxes covered in the Irish draft legislation is aligned with the Directive i.e., applies to all taxes except VAT, customs duties, excise duties and compulsory social security contributions. However, the draft legislation excludes fees for documents issued by public authorities and consideration due under a contract. The rationale for this latter exclusion is not clear. Further clarification from the guidance is expected to be published by Irish Revenue.

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 overall definition of "reportable cross-border arrangements" included in the draft legislation aligns with the DAC6 definition.

The definitions provided include "arrangement," "cross-border arrangement" and "reportable cross-border arrangement."

An "arrangement" is defined as any of the following:

(a) Any transaction, action, course of action, course of conduct, scheme, plan or proposal

(b) Any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable or intended to be enforceable by legal proceedings

(c) Any series of or combination of the circumstances referred to in paragraphs (a) and (b), whether entered into or arranged by one or two or more persons–

  (i) Whether acting in concert

  (ii) Whether entered into or arranged wholly or partly outside the State, or

  (iii) Whether entered into or arranged as part of a larger arrangement or in conjunction with any other arrangement or arrangements

but "arrangement" does not include any of Ireland's Double Tax Treaties.

The definitions of the terms "cross-border arrangement," "marketable arrangement," and "hallmark" are as defined in the Directive.

Ireland has had a domestic mandatory disclosure regime since 2011 which applies to a narrow range of "domestic hallmarks." This new cross-border mandatory disclosure regime, when enacted, will sit alongside and operate separately from the existing domestic mandatory disclosure requirements.

Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The Irish draft legislation refers directly back to Annex IV of the Directive. It is expected that further explanatory notes will be provided with some clarification on these elements.

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 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."

A tax advantage is defined in the draft legislation as any of the following:

(i) Relief or increased relief from, or a reduction, avoidance or deferral of, any assessment, charge or liability to tax, including any potential or prospective assessment, charge or liability.

(ii) A refund or repayment of, or a payment of, an amount of tax, or an increase in an amount of tax refundable, repayable or otherwise payable to a person, including any potential or prospective amount so refundable, repayable or payable, or an advancement of any refund or repayment of, or payment of, an amount of tax to a person.

(iii) The avoidance of any obligation to deduct or account for tax, arising out of or by reason of an arrangement, including an arrangement where another arrangement would not have been undertaken or arranged to achieve the results, or any part of the results, achieved or intended to be achieved by the arrangement.

This broad definition sets out an objective test for the tax advantage, in contrast to the definition of the same term under the existing domestic MDR in Ireland where a tax advantage is considered obtained only if a person purportedly would not have entered into a transaction, in its current form, if the possibility of this tax advantage had not been there.

Any person who obtains, or seeks to obtain, a tax advantage from a reportable cross-border arrangement will become a chargeable person for tax under Ireland's self-assessment rules. Such a person, if not already required, must file an annual tax return.

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.

Under the draft Irish legislation, the definition of "intermediary" is in line with the Directive and there is no reference to employees of an entity or of an "in-house" tax team being regarded as an intermediary.

The Irish draft legislation exempts intermediaries from reporting information with respect to which a claim to LPP could be maintained in legal proceedings. However, tax advisors, auditors and accountants, who cannot claim LPP, are required to report.

Intermediaries availing of the LPP exemption are however obliged to notify other intermediaries or, if there is no other intermediary, to notify other relevant taxpayers, without delay, of their reporting obligations. There is no clarification on how the expression "without delay" is to be interpreted.

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." The same trigger events apply in the draft Irish legislation, with a 30-day deadline within which to report.

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. Such arrangements will have to be reported by 31 August 2020.

The proposed Irish reporting deadlines are aligned with those in the Directive.

Ireland also has opted to take measures that require each relevant taxpayer to file information about their use of an arrangement with the Irish Revenue in each of the years for which they use it, in accordance with Article 8ab, Paragraph 11 of the Directive. Irish Revenue will assign a unique reference number to the reportable arrangement and the taxpayer is required to include that reference number in its annual tax return for each year in which it uses that arrangement. If the return is made by an intermediary, the intermediary is required to provide the reference number, in writing and within five working days, to all other intermediaries and relevant taxpayers involved in the arrangement. If the return is made by a taxpayer and there is more than one relevant taxpayer involved, the first relevant taxpayer is required to provide the reference number, in writing and within five working days, to each such other relevant taxpayer.

Intermediaries must also specify, when first reporting an arrangement, if it is a "marketable arrangement" as defined in the draft legislation, which is in line with the Directive. Information regarding the identity of each intermediary and relevant taxpayer involved; dates of implementation; and Member States involved or likely to be impacted, must be reported to the Irish Revenue every three months.

Information to be reported

Under DAC6, the following information must be provided to the relevant Revenue Authority for any reportable cross-border arrangement:

(a) The identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of individuals), tax residence, Tax Identification Number (TIN) and, where appropriate, the associated enterprises to the relevant taxpayer

(b) Details of the hallmarks set out in Annex IV that make the arrangement reportable

(c) A summary of the content of the arrangement

(d) The date on which the first step in implementing the arrangement has been made or will be made

(e) Details of the national provisions that form the basis of the reportable cross-border arrangement

(f) The value of the arrangement

(g) The identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned

(h) The identification of any other person in a Member State likely to be affected by arrangement

The Irish proposal is closely aligned with the Directive on the reportable information, with minor differences including:

- When the TIN of an intermediary or taxpayer is not known to the person making the return, the address of such intermediary or taxpayer is required.

Penalties

The following penalties for non-compliance are set forth in the draft Irish legislation:

Non-compliance:	Proposed penalties:
1. Where an **intermediary or relevant taxpayer** fails to report an arrangement within the 30-day reporting period:	Up to €500 per day per arrangement
2 (a). Where an intermediary or relevant taxpayer fails to meet their obligations under the transitional provisions for arrangements implemented before 1 July 2020; ***Or*** **2 (b).** Where an intermediary fails to meet its obligations relating to a marketable arrangement or as a result of a claim for LPP:	Up to €4,000 per arrangement
If 2(a) and 2(b) continue after a penalty is imposed:	€100 per day per arrangement
3. Where a taxpayer fails to the include the reference number assigned to a reportable cross-border transaction in its annual tax return:	Up to €5,000

Next steps

The Irish draft legislation has clarified some questions with respect to the interpretation and implementation of DAC6, however many questions remain unanswered. The Government will present the formal draft legislation, which will then be debated by the Irish Parliament. It is anticipated that the subsequent legislative process will provide more clarification.

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries especially considering the obligation of the 30-day reporting window once the legislation becomes operational in July 2020. Due to the scale and significance of the regulations included in the draft legislation, taxpayers and intermediaries who have operations in Ireland should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations.

Lastly, it is important to note that Guidance Notes containing more extensive interpretation of the Directive and its hallmarks are expected to be published by Irish Revenue and there will be time to provide feedback for this process. Following their release, Guidance Notes should be used to update any assumptions made in the interim and prepare for live reporting beginning July 2020.

Endnotes

1. 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.
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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