

Austria passes bill to implement Mandatory Disclosure Rules

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Executive summary

Austria officially published, on 22 October 2019, the *EU-Mandatory Disclosure Act* (EU-Meldepflichtgesetz, referred to hereinafter as EU-MPFG) 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 2020.¹

The final text of the Austrian EU-MPFG is broadly aligned with the Directive. In comparison to the Austrian draft bill released in May 2019, there have been no significant changes. The Austrian legislation will be effective from 1 July 2020.

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 2018.²

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.³ 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.

The adopted Austrian MDR legislation is broadly aligned with the Directive and there have been no significant changes compared to the draft bill that was released in May 2019. The scope of EU-MPFG is very broad and covers a wide range of cross-border arrangements with characteristics or features that present an indication of a potential risk of tax avoidance. However, due to the scope and breath of the rules, some non-aggressive tax arrangements will be reportable. Hence, all cross-border arrangements should be reviewed in relation to the new reporting obligations.

This Alert also highlights any clarifications provided by the Austrian Government or amendments to the Austrian legislation.

Scope of taxes covered

The scope of taxes covered under the Austrian legislation is fully consistent with the Directive and applies to individual and corporate income tax but not 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 overall definition of “reportable agreements” included in the final Austrian MDR legislation is aligned with the DAC6 definition. The EU-MPFG only covers cross-border arrangements and does not cover pure domestic arrangements. Similar to the Directive, the EU-MPFG differentiates between two types of hallmarks: hallmarks subject to the MBT (referred to under the Austrian legislation as “conditionally reportable”) and hallmarks not subject to the MBT test (referred to under the Austrian legislation as “unconditionally reportable”).

Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The EU-MPFG does not contain additional clarifications on the scope of the respective hallmarks. However, the comments document accompanying the EU-MPFG provides examples with respect to some definitions and certain hallmarks. Specifically, the following comments are included:

- ▶ **Definition of relevant taxpayer:** the comments include an example demonstrating that several persons may fulfill the relevant taxpayer definition, e.g., if the parent entity hires an intermediary to design a reportable arrangement, that will be implemented by the subsidiary, both (the parent and the subsidiary) are considered relevant taxpayers.
- ▶ **Hallmark B2 (conversion of income):** “taxed at a lower level” includes both nominal and effective taxation.
- ▶ **Hallmark C2 (deduction for the same depreciation on the asset in more than one jurisdiction):** the commentary accompanying EU-MPFG states that this hallmark covers inter alia double deductions under the EU Anti-Tax Avoidance Directive (ATAD) II as well as arrangements covering qualification conflicts on the attribution of assets.

- ▶ **Hallmark C(1)(b)(i) (cross-border payments to low-taxed jurisdictions):** the comments note that 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 as no more than 1%.
- ▶ **Hallmark D1 (undermining the automatic exchange of information):** The comments address an account transfer from an Austrian bank to its branch in the United States (US). As the US is not applying the Common Reporting Standard on the automatic exchange of information and the US-Austria Intergovernmental Agreement for FATCA (*Foreign Account Tax Compliance Act*) is not reciprocal, this arrangement could be reportable.

Additional hallmarks

No additional hallmarks beyond the hallmarks A-E of DAC6 have been included in the final Austrian MDR legislation.

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.

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 the intermediary informs the relevant taxpayer about the obligations under the EU-MPFG and provides the information he has available for the respective reportable transaction to the relevant taxpayer, the obligation will shift to the taxpayer.

The Austrian EU-MPFG exempts intermediaries from the reporting obligation, if they are bound to professional secrecy by law (e.g., tax advisors, public accountants, lawyers and notaries). In such a case, the taxpayer is obliged to report the reportable arrangement (once he has been informed appropriately by the intermediary). Further, the primary reporting obligation will also lie with the relevant taxpayer, when an intermediary is resident in a third country or the taxpayer does not (sufficiently) mandate an

intermediary with the arrangement (i.e., the intermediary does not know, that he is part of a reportable arrangement), the relevant taxpayer is obliged to file the report.

DAC6 defines two categories of intermediaries: promoters and service providers. The EU-MPFG defines intermediaries by reference to the same two categories.

- ▶ The promoter (intermediary) as well as the service provider (intermediary) is covered if in addition one of the following geographical nexus elements to Austria is met:
 - Permanent home, habitual abode or place of effective management is in Austria.
 - If the intermediary is a resident of a Non-EU country and:
 - 1) a permanent establishment located in Austria provides the reportable services or
 - 2) the intermediary is subject to regulations by professional / commercial law in Austria or
 - 3) the intermediary is a member of an Austrian professional association.
- ▶ There are no differences between the reporting obligations that apply to the different categories of intermediaries.
- ▶ The EU-MPFG does not explicitly mention that employees of an entity can themselves be regarded as intermediaries. Also, the law does not explicitly mention that an "in house" tax team could 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." The same trigger events apply in the EU-MPFG. In addition, reporting obligations of the respective taxpayer are triggered once the taxpayer has been informed by the intermediary that the obligation to report shifts to the taxpayer due to the LPP.

Under the Directive, reporting starts from 1 July 2020 and exchanges between jurisdictions by 31 October 2020. However, reports will retroactively cover arrangements where the first step is implemented between 25 June 2018 and 30 June 2020.

The Austrian reporting deadlines are fully in line with the DAC6 timeframes.

Penalties

Infringements of reporting obligations under the EU-MPFG are punishable as administrative offenses under the *Austrian Fiscal Criminal Act* of up to €50,000 in the case of deliberate intent and up to €25,000 in the case of gross negligence and per violation. Although a voluntary disclosure can in some cases waive a penalty (e.g., for non-inclusion of income in the income tax return), the EU-MPFG explicitly disallows this option for MDR-related penalties.

Next steps

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Due to the scale and significance of the regime enacted in the EU-MPFG, taxpayers and intermediaries who have operations in Austria should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations/ specific deadlines.

Endnotes

1. See EY Global Tax Alert, [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 5 June 2018.
2. Ibid for background on MDR.
3. 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 Steuerberatungsgesellschaft m.b.H., Vienna

- ▶ Andreas Stefaner andreas.stefaner@at.ey.com
- ▶ Roland Rief roland.rief@at.ey.com
- ▶ Markus Schragl markus.schragl@at.ey.com
- ▶ Markus Stefaner markus.stefaner@at.ey.com
- ▶ Klaus Pflieger klaus.pflieger@at.ey.com
- ▶ Patrick Plansky patrick.plansky@at.ey.com
- ▶ Dominik Novak dominik.novak@at.ey.com

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