

Portugal publishes revised draft legislation on 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 31 January 2020, the Portuguese Government published revised 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 Portuguese draft legislation was first published on 28 May 2019¹ and was subject to a public consultation. The revised draft legislation will now be subject to the formal legislative process and may still be amended before final enactment. If implemented as currently proposed, the Portuguese Mandatory Disclosure Rules (MDR) legislation will have a broader scope in comparison to the requirements of the Directive. As outlined in EY Global Tax Alert, [Portugal publishes draft proposal on Mandatory Disclosure Rules](#), dated 29 May 2019, it is proposed that the Portuguese MDR will cover "domestic arrangements" (as defined) and will cover value-added tax (VAT) for so-called domestic arrangements. The implementation of DAC6 will revoke the existing Portuguese legislation on abusive tax planning reporting.

The final law is expected to be approved during February 2020 and 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 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. Portugal will introduce domestic legislation, which will take effect from the day following its publication in the *Official Gazette* (after being approved in Parliament and by the President). Notwithstanding, as stated in DAC6, the implementation of the Directive shall also have a transitional period for cross-border arrangements.

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

Scope of taxes covered

For arrangements other than domestic arrangements (as defined below), the scope of the taxes covered under the Portuguese draft legislation is aligned with the Directive and applies to all taxes except VAT, customs duties, excise duties and compulsory social security contributions.

However, for domestic arrangements, i.e., those that are aimed to be applied or to produce effects, totally or partially, in the Portuguese territory and that are not cross-border arrangements (hereafter referred to as “domestic arrangements”), the Portuguese draft legislation extends the scope of taxes covered to include VAT.

Reportable arrangements

Under the Directive, an arrangement is reportable if both conditions are met:

- ▶ The arrangement meets the definition of a cross-border arrangement.
- ▶ 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 arrangements included in the Portuguese draft legislation broadly aligns with the DAC6 definition however it 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, arrangements that give rise to performance fees etc. are not included for domestic arrangements under the Portuguese draft legislation.

Under the Portuguese legislation, an arrangement is reportable if:

- ▶ The arrangement is a domestic arrangement (as defined) or it is a cross-border arrangement (as defined by DAC6); and
- ▶ The arrangement meets at least one of the DAC6 hallmarks, some of which are subject to certain clarifications in the revised Portuguese draft legislation.

Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The Portuguese draft legislation also does not define most elements of the hallmarks.

Clarification of some hallmarks

The revised Portuguese draft legislation includes the following clarifications on the interpretation of the hallmarks:

- ▶ **Hallmark C1 (b) (i) (Specific hallmark on cross-border arrangements subject to the MBT):** an almost nil tax rate means a nominal tax rate of less than 1%. The reference in the initial draft legislation to an effective taxation below 60% of the tax that would have been paid in Portugal has been eliminated in the revised draft legislation.

- ▶ **Hallmark C1 (b) (ii) (Specific hallmark on cross-border arrangements not subject to the MBT):** The reference to the Portuguese tax havens list in the initial draft legislation has been eliminated in the revised draft legislation.
- ▶ **Hallmark E1 (Specific hallmark related to transfer pricing not subject to the MBT):** the use of a unilateral safe harbor should only be within the scope of this hallmark if the safe harbor is not included in the international consensus stated in the OECD⁴ transfer pricing guidelines.

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, considering all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage (in the sphere of the relevant taxpayer or a third party).

Intermediaries

Under the Directive, intermediaries with EU nexus have the primary obligation to report arrangements to the respective 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 shifts to the taxpayers.

The revised Portuguese draft legislation provides reporting exemptions based on LPP. Therefore, intermediaries benefiting from the LPP in Portugal - under a legal or contractual professional privilege - will be exempted from an MDR reporting obligation where they notify the taxpayer within five days from the trigger event regarding the latter's obligation to report. However, in the event that the taxpayer does not inform and present proof of having reported within 30 days from the notification of the intermediary to the taxpayer, the intermediary - even benefiting from LPP - will assume the obligation to report.

The Portuguese draft legislation defines intermediary by reference to Portuguese nexus.

Taxpayers

The Portuguese draft legislation imposes a reporting obligation on relevant taxpayers with Portuguese nexus (residency, permanent establishment, income source, activity and mere tax registration), including entities without legal personality.

As mentioned above, to the extent that intermediaries are exempt from the reporting obligation owing to LPP, relevant taxpayers are required to report the arrangements.

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 revised Portuguese reporting deadlines are aligned with DAC6.

Taxpayers are also required to annually inform the tax authorities of the application of a reported arrangement, including updating the information previously reported.

In the case of multiple intermediaries and/or relevant taxpayers, the Portuguese draft legislation provides that an intermediary and/or a relevant taxpayer will be exempted from the reporting obligation if they prove to the tax authority that the reporting was already made in another EU Member State or in Portugal by another intermediary or relevant taxpayer within 10 days from the reporting deadline.

If the intermediary benefiting from LPP needs to report due to a failure to report by the taxpayer, a 10-day extension is included in the revised draft legislation to comply with this obligation.

Under the Portuguese draft legislation, the tax authority can request additional information from the intermediary/relevant taxpayer, which should be provided within 10 to 20 days.

Other purposes of information

The Portuguese draft legislation states that, based on the reported information, the tax authority may:

- ▶ Define the tax treatment of the situations revealed by the arrangements.
- ▶ Propose tax law changes to better define the tax treatment of the situations revealed by the arrangements.
- ▶ Adapt the tax audits program considering the relevance of the arrangements.

- ▶ Make public on the tax authority website, for the purposes of preventing tax evasion, the arrangements (without identifying the respective participants) in abstract and synthetic terms, which may comprise arrangements that the tax authority take acknowledgement by itself, except if the complexity and innovation of the arrangement reveals improper for the purposes of tax evasion prevention or public interest defense.

Penalties

Based on the Portuguese draft legislation, the following penalties are expected to apply:

- ▶ 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

The Portuguese draft legislation has not clarified many questions with respect to the interpretation and implementation of DAC6, and therefore many questions remain unanswered. Once the Portuguese Parliament passes the legislation, the President will need to provide the final approval.

Determining if there is a reportable domestic or cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Due to the scale and significance of the regulations included in the draft legislation, taxpayers and intermediaries who have operations in Portugal 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, [Portugal publishes draft proposal on Mandatory Disclosure Rules](#), dated 29 May 2019.
2. 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.
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; and (iii) bring forward the start date for reporting.
4. Organisation for Economic Co-operation and Development.

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

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. 000629-20Gbl

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