

Malta enacts legislation to implement Mandatory Disclosure Rules

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Executive summary

Malta's Minister for Finance published, on 17 December 2019, the Maltese regulations 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 Maltese legislation will be effective from 1 July 2020.

The final Maltese Mandatory Disclosure Rules (MDR) legislation is broadly aligned to the requirements of the Directive.

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.

The final Maltese legislation is broadly aligned with the Directive. No guidelines have been issued by the Maltese Tax Authorities in respect of the legislation yet.

Scope of taxes covered

The scope of taxes covered under the final Maltese 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 a "cross-border arrangement" and "reportable cross-border arrangement" in the final Maltese legislation are identical to the definitions put forward by the Directive, to the effect that only those cross-border arrangements which meet at least of one of the hallmarks A-E specified in Annex IV of the Directive would fall within the scope of the final Maltese legislation. In substance, this means that domestic arrangements are not covered under the new regulations.

Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The final Maltese legislation mirrors the provisions of the Directive and therefore does not provide further clarification on these elements. Nevertheless, more clarity should be available once the relevant guidelines are published by the Commissioner for Revenue.

Main benefit test

In accordance with DAC6, under the final Maltese 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.

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 final Maltese legislation exempts professional intermediaries from the obligation to report where the reporting of such information would constitute a criminal offense by virtue of disclosing professional secrets confided in him/her by reason of his/her calling, profession or office. Professional intermediaries include advocates, notaries, legal procurators, accountants, auditors, employees and officers of financial and credit institutions, trustees, officers of nominee companies or licensed nominees, licensed investment service providers and licensed stockbrokers.

The final Maltese legislation however requires an intermediary who is exempt from reporting to:

- a) Inform within seven working days any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations in Malta; and
- b) Provide the Commissioner for Revenue with an annual update containing a list of the said reportable cross-border arrangements in a form which is yet to be determined by the Commissioner.

DAC6 defines two categories of intermediaries: promoters and service providers. The final Maltese legislation defines intermediaries by reference to the same two categories. Only intermediaries that have nexus in Malta have a reporting obligation in Malta. However, the final legislation does not provide clarity on whether an “in house” tax team could be regarded as an intermediary.

Relevant taxpayers

Besides the obligation to report where there is no other intermediary involved or all intermediaries involved are exempt from reporting, the Directive provides that each Member State may take the necessary measures to require that each relevant taxpayer file information about their use of the arrangement to the tax administration in each of the years for which they use it.

The final Maltese legislation incorporates this requirement, to the effect that relevant taxpayers shall file information about the use of the arrangement in each of the years for which they use it. The form in which the required information is to be filed is yet to be determined.

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 Maltese reporting deadlines fully align with DAC6.

Penalties

The final Maltese legislation imposes the following penalties for failure to comply with any of the obligations set out in the final law:

- ▶ €2,500 where an intermediary or relevant taxpayer fails to retain the documentation and information it collected in the course of meeting its reporting obligations for a minimum period of five years starting from the end of the year to which the information relates.
- ▶ An initial penalty of €200 and a daily penalty of €100 for the duration of the default (capped at €20,000), where an intermediary or relevant taxpayer fails to file a report within the prescribed timeframe.
- ▶ An initial penalty of €200 and a daily penalty of €100 for the duration of the default (capped at €20,000), where an intermediary or relevant taxpayer which has an obligation to report fails to file the reportable information in a complete and accurate manner.
- ▶ An initial penalty of €1,000 and a daily penalty of €100 for the duration of the default (capped at €30,000), where an intermediary or relevant taxpayer which has an obligation to report fails to comply with a request for information made by the Commissioner.

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 final legislation, taxpayers and intermediaries who have operations in Malta should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations within the specific deadlines.

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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