14 February 2020
Global Tax Alert

Gibraltar enacts final legislation to implement Mandatory Disclosure Rules

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Executive summary

On 30 January 2020, HM Government of Gibraltar published the Income Tax (Amendment) Regulations 2020, which will amend the *Income Tax Act 2010* in order to implement the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).

The Gibraltar legislation will be effective from 1 July 2020.

The final Gibraltar 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]

Building a better working world

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 Gibraltar final legislation is broadly aligned with the Directive. The legislation does not include any additional requirements, additional clarifications, nor other significant departures from the Directive.

No guidance has been issued by HM Government of Gibraltar in respect of the legislation.

Scope of taxes covered

The scope of taxes covered under the Gibraltar final legislation is 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 definition of reportable arrangements in Gibraltar's final legislation aligns with the DAC6 definition and does not extend to domestic arrangements.

Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The Gibraltar final legislation does not provide any additional clarification on these elements.

Main benefit test

In accordance with DAC6, under the Gibraltar final 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 final legislation does not currently provide any clarification on whether the tax advantage must arise in respect of EU taxes or also taxes outside the EU.

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 Gibraltar final legislation gives the right to a waiver from filing information where the reporting obligation would breach the LPP under the law of Gibraltar. Where this applies, the intermediaries must notify, without delay, any other intermediary, or if there is no such intermediary, the relevant taxpayer of their reporting obligations.

The Gibraltar final legislation exempts an intermediary from filing the information in Gibraltar if it has proof that the same information has been filed in a Member State outside Gibraltar, or if it has proof that the same information has already been filed by another intermediary.

DAC6 defines two categories of intermediaries: promoters and service providers. The Gibraltar final legislation defines intermediaries by reference to the same two categories. The legislation does not provide any definition or clarification of the term intermediary beyond the definition contained in the Directive. The legislation does not specifically extend the reporting obligation to intermediaries other than those which have nexus to Gibraltar. Further, the Gibraltar legislation does not provide any indication as to whether individuals as employees of the relevant taxpayer or in-house tax teams can be regarded as intermediaries.

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 Gibraltar's final legislation.

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 Gibraltar reporting deadlines fully align with DAC6.

Penalties

The following penalties apply under Gibraltar's legislation:

- An initial penalty of £300 applies for a failure to report in accordance with the legislation.
- A further penalty of up to £60 for each day that a failure to report under the legislation continues following the person in question having been notified of an assessment being raised for the initial penalty as stated above.
- A penalty of up to £3,000 for providing inaccurate information where the person providing the information knows of the inaccuracy at the time, or where they discover the inaccuracy and fail to take reasonable steps to inform the Commissioner of Income Tax of that discovery.

Next steps

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Taxpayers and intermediaries who have operations in Gibraltar should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations.

Endnote

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.

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

EY Limited Gibraltar
- Neil Rumford neil.rumford@gi.ey.com

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EYG no. 000710-20Gbl

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