

## EU Mandatory Disclosure Rules - An update on local country implementation status and trends

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### Executive summary

The Council of the European Union (EU) adopted Directive 2018/822 (the Directive or Mandatory Disclosure Rules (MDR) Directive) on the mandatory disclosure and exchange of cross-border tax arrangements on 25 May 2018.<sup>1</sup>

The Directive, which is the sixth update of the Directive 2011/16/EU on Administrative Cooperation and therefore commonly referred to as DAC6, is aimed at improving transparency and addressing aggressive cross-border tax planning. It broadly reflects the objectives of Action 12 (*Mandatory Disclosure Rules*) of the Organisation for Economic Co-operation and Development (OECD)'s Base Erosion and Profit Shifting (BEPS) Project, as well as introducing automatic exchanges of the disclosures across the EU Member States.

Under the terms of the Directive, Member States are required to adopt and publish national laws to comply with the Directive by 31 December 2019. When transposing the Directive into their domestic law, Member States can align their domestic rules with the scope of the Directive or they can adopt a broader scope. The disclosure is required to be made to the relevant national tax authority and then will be automatically shared with all other member state tax authorities by way of a central directory. However, the information collected under the broadened scope adopted by some Member States will not be subject to the automatic sharing across the Member States.

This Alert summarizes the status of the MDR implementation into the domestic law for the 28 EU Member States, along with the differences in scope between such domestic laws and the Directive. The comments set out herein are preliminary in nature and are subject to change, as they are predominantly based on draft laws which are likely to be amended before final enactment.

## Detailed discussion

### Status of implementation

As set out above, the Directive must be implemented by Member States by 31 December 2019. As at 31 July 2019, Hungary, [Lithuania](#), [Poland](#) and [Slovenia](#) have already adopted the final legislation implementing the MDR Directive.

A further 14 Member States have published draft MDR legislation, namely, Austria, [Cyprus](#), [Czech Republic](#), [Denmark](#), Estonia, Finland, [Germany](#), Italy, Luxembourg, [Netherlands](#), [Portugal](#), [Slovakia](#), [Spain](#) and the [United Kingdom](#) (UK). As noted, comments set out in this Alert are based on the proposed legislation for these Member States. However, it is understood that amendments to the proposed law may be made as part of the legislative process.

Two Member States (Latvia and [Sweden](#)) have commenced formal consultations and a further five Member States (Belgium, France, Ireland, Malta and Romania) have launched informal consultations.

The remaining three Member States (Bulgaria, Croatia, and Greece) have not taken any public action on the implementation of MDR legislation.

### Accelerated timing

Under the Directive, cross-border reportable arrangements, where the first step of implementation is taken during the transitional period between 25 June 2018 and 30 June 2020, are required to be reported by 31 August 2020. As of 1 July 2020, reporting will be required within 30 days of a triggering event, e.g., the cross-border arrangement being ready for implementation.

The reporting timelines for Hungary, Lithuania, Slovenia and for the other 14 Member States that have published their draft MDR legislation are in line with the Directive. However, Poland has implemented reporting deadlines that are significantly earlier than this date.

The Polish MDR law has been in force since 1 January 2019 and is supplemented by [official detailed guidance](#). Under the Polish MDR legislation, cross-border tax schemes implemented between 25 June 2018 and 1 January 2019 were reportable by 30 June 2019 by the intermediaries (acting as promoters) and by end of September 2019 by relevant taxpayers (if intermediaries have not reported).

Domestic tax schemes implemented from 1 November 2018 and before 1 January 2019 were reportable by 30 June 2019 by the intermediaries (acting as promoters) and by 30 September 2019 by relevant taxpayers (if intermediaries have not reported).

In addition, under the Polish legislation, tax arrangements commencing on or after 1 January 2019 are reportable within 30 days after the day when the scheme is: (i) made available for the client; (ii) ready for implementation; or (iii) the first step in the implementation is undertaken, whichever is sooner. Consequently, an arrangement made available as of 1 January 2019 had to be reported by 31 January 2019 (i.e., 18 months earlier than required by the Directive).

### Scope of reportable arrangements

Under the Directive, there is an obligation for intermediaries with an EU nexus to disclose any cross-border arrangement that falls within one or more of the hallmarks. The scope of the new reporting requirements comprises arrangements within the EU, as well as between Member States and third countries.

Based on the current state of implementation, 17 out of the 28 Member States have or intend to adopt the scope of reportable arrangements in line with the Directive. Germany, Poland, Portugal, and Sweden have adopted or have proposed to adopt a widened scope in comparison to the requirements of the Directive and include certain domestic tax arrangements. No details are available as at the date of this Alert in relation to the remaining seven Member States.

### Additional hallmarks

The Directive imposes on intermediaries and taxpayers the obligation to report any cross-border arrangement that contains one or more features or "hallmarks." These hallmarks target a relatively wide range of cross-border structures and transactions, including certain deductible payments which are taxed at a rate of zero or nearly zero when received and intercompany transactions which meet

specific transfer pricing hallmarks, such as any transfer of hard-to-value intangibles. Under the Directive, there are no minimum threshold exceptions. However, some of the hallmarks will only trigger reporting requirements when they also fulfill the main benefit test.

Poland and Portugal have extended the scope of the reporting required under the Directive to include additional hallmarks. For example, Portugal has included in its draft legislation an additional general hallmark for "an arrangement that excludes or limits the responsibility of the relevant taxpayer, the intermediary or any other participant in the arrangement" and a specific hallmark that covers "an arrangement which includes the participation of persons or entities without legal personality not subject to tax, or are fully or partially exempt or taxed more favorably."

### Main benefit test

The hallmarks in the Directive are divided between those for which the "main benefit test" (MBT) must be satisfied as a gateway criterion before the hallmark will give rise to a reporting obligation, and those which of themselves will give rise to a reporting obligation.

Under the domestic legislation, certain Member States have provided clarification as to their interpretation and intended application of the MBT.

For example, the Spanish draft legislation clarifies that "tax advantage" means a reduction in the taxable base or tax due, including a deferral of the tax due, as well as generating net operating losses, or tax credits. In addition, the Spanish draft legislation provides that when the companies involved in the arrangement are associated enterprises within the meaning of Article 3. 23) of the Directive, the tax advantages of all the associated enterprises will be taken into consideration.

The German draft legislation provides that if the cross-border arrangement only results in a mere German tax advantage and if, taking into consideration all relevant circumstances, this effect is intended by law, it is not to be regarded as a tax advantage for the purposes of the MBT.

The Cypriot draft legislation has added specific wording to the article referring to the MBT in order to clarify that only the taxes of EU Member States (i.e., only EU taxes) are included in the scope of the Directive and Cypriot MDR legislation, as prescribed in Article 2 of Directive 2011/16/EU.

In the consultation paper from the UK's HM Revenue and Customs (HMRC) that accompanies the draft UK legislation, the MBT is described as an "objective" test not requiring consideration of motives or intentions but of tax outcomes in relation to the policy objectives of the Directive.

### Covered taxes

Under the Directive, the disclosure regime applies to all taxes except value added tax (VAT), customs duties, excise duties and compulsory social security contributions.

However, under the domestic legislation, both the Polish law and the Portugal proposed legislation have extended the scope of the reporting required under the Directive to include VAT in the definition of "Covered Taxes" with respect to domestic arrangements.

### Intermediaries and legal professional privilege

Under the Directive, intermediaries with an EU nexus have the primary obligation to report arrangements to the tax authority. However, this requirement has been extended under the Polish legislation where the reporting obligation for tax arrangements can also apply to entities acting as promoters, beneficiaries or service providers that are nonresident, established or managed in the territory of Poland.

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 to report will shift to the taxpayers.

To date, seven Member States, being Austria, Czech Republic, Germany, Hungary, Poland, Slovakia and Spain, have agreed to exempt law firms and certain other intermediaries from the reporting obligation where the reporting obligation would breach LPP. However, in Poland, LPP will not apply to "marketable arrangements" (arrangements that can be easily rolled-out to many recipients), where the intermediaries will be expected to report MDR information on a no-name-basis.

In Cyprus, Netherlands, Portugal and Slovenia, it is proposed that only law firms can be exempt from the reporting obligation due to LPP. In the UK, there is a proposed limitation placed on LPP such that it is unlikely to provide a blanket exception for law firms from reporting obligations where they may be intermediaries. Italy does not provide any exemption from the reporting obligation due to LPP.

## Penalties

The Directive allows for Member States to transpose into their domestic law penalties for non-compliance that are effective, proportionate and dissuasive.

To date, a one-off fee of up to €25,000 has been introduced in Hungary and Slovenia and has been proposed by Cyprus, Czech Republic and Germany. In Austria, Slovakia and Sweden, the proposed penalty is a one-off fee of up to €50,000.

The Spanish draft legislation provides for a penalty of €1,000 per data or set of data, with a minimum of €3,000 and a maximum of the amount of the fees received by the intermediary or alternatively, the tax value of the arrangement will be imposed in cases of non-compliance by the taxpayer.

Penalties for non-compliance with the rules are proposed in Denmark to be dependent on the size of the intermediary and would range from DKK50,000 (approximately €6,700) for small enterprises to DKK400,000 (approximately €53,600) for very large enterprises (minimum penalties).

The Netherlands has also proposed severe penalties with a one-off maximum fee of approximately €800,000, depending on the nature of the non-compliance.

The UK draft legislation contains detailed penalty provisions including for failures by intermediaries and relevant taxpayers to make returns of reportable information and to respond to requirements to provide information. For failures under these headings there is a maximum penalty of £600 per day and for certain other failures a flat rate penalty of up to £5,000. A relevant taxpayer who fails to comply with the requirement to make an annual report is liable to a penalty of up to £5,000 and up to £10,000 where there have been previous such failures.

In Poland, intermediaries whose revenues or costs exceeded in the year preceding the financial year the equivalent of PLN8m (approx. €1.85m) are obliged to introduce and use an "internal procedure" for MDR. In the event of failure to meet this obligation, the tax authorities may impose a financial penalty in an amount not exceeding PLN2m (approx. €463k). In addition, specific cases which relate to failure to comply with the reporting obligation or delayed complying can result in additional substantive monetary penalties amounting up to approximately €4,700,000.

## Additional compliance obligations

In accordance with the Commission Implementing Regulation 2019/532, relating to Article 8ab of the Directive 2011/16/EU, a single reference number should be featured on all exchanges of the same arrangement to ensure the mandatory automatic exchange of information on reportable cross-border arrangements is effective (especially where more than one intermediary or relevant taxpayer is obliged to file information). This should allow multiple reports by different intermediaries and taxpayers to be linked to a single arrangement on the central directory.

In addition to the above requirement under the Regulation, the draft legislation for certain Member States includes an obligation for the taxpayer to disclose to the relevant tax authority the use of reportable cross-border arrangements that have already been reported. In some cases, taxpayers will also have to quote the unique relevant arrangement reference number mentioned above. Practically, this means that intermediaries and relevant taxpayers will need to liaise with one another to share this reference number and ensure consistent reporting to the tax authorities.

For example, in the UK, relevant taxpayers who are resident or taxable in the UK will have an obligation to report to HMRC for each accounting period or tax year that the taxpayer participates in the reportable arrangement. The taxpayer must report to HMRC the period or year involved and the relevant arrangement reference number provided following the initial report. HMRC envisages that the reference number will need to be provided in the white space on income and corporation tax returns, while further accompanying detail may be required alongside the tax return.

In accordance with the Spanish draft legislation, relevant taxpayers who are Spanish tax residents or have a permanent establishment in the Spanish territory, or those which derive income or perform activities in Spain related to the cross-border arrangement must make this disclosure to the Spanish tax authorities via the filing of an annual report.

## Implications

A review of the Hungarian, Lithuania, Polish and Slovenian law and the proposed MDR legislation released to date for the 14 EU Member States demonstrates that certain Member States are broadening the scope of the Directive in respect of geographical application, hallmarks and covered taxes.

These Member States also intend to adopt different tests in respect of the MBT, the LPP exemption and the imposition of penalties. The remaining 10 Member States are in the process of drafting their MDR implementing legislation and are expected to make this public by 31 December 2019. It is likely that this legislation, once released, will result in further deviations from the Directive.

Hungary, Lithuania, Poland and Slovenia have already adopted the Directive into their domestic legislation, with the Polish legislation already in force. It is critical that taxpayers

and intermediaries **act now** to determine whether they are compliant with the Polish legislation as the reporting obligation deadlines have already passed for certain arrangements. Taxpayers and intermediaries also need to **implement policies, procedures and processes now** to identify and capture details of transactions that may need to potentially be disclosed either under the scope of the Directive or the domestic legislation.

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## Endnote

1. For background, see EY Global Tax Alerts, [EU Council adopts Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 29 May 2018 and [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 5 June 2018.

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