

## Portugal publishes draft proposal on Mandatory Disclosure Rules

---

### **NEW!** EY Tax News Update: Global Edition

EY's new 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

The Portuguese Government published, on 28 May 2019, 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 is subject to the formal legislative process and is likely to be amended before final enactment. If implemented as currently proposed, the Portuguese Mandatory Disclosure Rules (MDR) legislation will have a wider scope in comparison to the requirements of the Directive. It is proposed that the Portuguese MDR will cover "domestic arrangements" (as defined), will cover value added tax (VAT) for so-called domestic arrangements, and will introduce additional hallmarks.

The draft legislation is expected to be finalized by September 2019.

### 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.<sup>1</sup>

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.<sup>2</sup> 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 the publication in the *Official Gazette* (after being approved in Parliament and by the President).

The key differences between the draft Portuguese legislation and the Directive are as 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 and cross-border arrangements that are aimed to be applied or to produce effects, totally or partially, in the Portuguese territory (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 aligns with the DAC6 definition, with respect to cross-border arrangements.

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 or the additional Portuguese hallmarks.

### 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.

Nevertheless, the Portuguese draft legislation, in relation to the assessment of the specific hallmarks concerning the automatic exchange of information and beneficial ownership, permits the use of the documents on this topic published by the Organisation for Economic Co-operation and Development (OECD) which are relevant for interpreting the definitions of “financial account” and “financial institution” as referred in Appendix I to Directive 2011/16/UE.

### Additional hallmarks

In addition to the hallmarks that mirror the Directive, the Portuguese draft legislation includes additional hallmarks, extensions to the scope of the DAC6 hallmarks, and clarifications on the interpretation of the DAC6 hallmarks, namely:

#### Additional Portuguese hallmarks

- ▶ Generic hallmark subject to the MBT - An arrangement that excludes or limits the responsibility of the relevant taxpayer, the intermediary or any other participant in the arrangement.
- ▶ Specific hallmark subject to the MBT - 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.

#### Extensions to the scope of DAC6 hallmarks

- ▶ Specific hallmark subject to the MBT (extension of DAC6 hallmark B2 on the conversion of income) - This hallmark should also cover situations where the aim is to obtain

a deduction of payments taxed more favorably, exempt or not subject to tax at the level of the beneficiary, or to obtain a deduction related to the depreciation of an asset by more than one entity.

- ▶ Specific hallmark on cross-border arrangements not subject to the MBT (extension of DAC6 hallmark C1 b ii)) - The list of non-cooperative jurisdictions should also include all countries, territories or regions included in the Portuguese blacklist (currently, 81 countries, territories and regions).

### Clarifications on the interpretation of DAC6 hallmarks

- ▶ Specific hallmark on cross-border arrangements subject to the MBT (clarification of DAC6 hallmark C1 b i)) - An almost nil tax rate means a nominal tax rate lower than 1% or an effective taxation below 60% of the tax that would have paid in Portugal.
- ▶ Specific hallmark related to transfer pricing not subject to the MBT (clarification of DAC6 hallmark E1) - The unilateral safe harbor should only be considered if not foreseen in the international consensus stated in the OECD 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, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement, 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 Portuguese draft legislation does not provide for any reporting exemptions based on LPP. Therefore, intermediaries that would otherwise benefit from LPP in Portugal will not be exempted from an MDR reporting obligation. This will be further discussed going forward and a LPP exemption may be introduced.

The Portuguese draft legislation defines intermediary by reference to Portuguese nexus. Further, intermediaries are always required to report domestic arrangements (as defined), even if they also have a cross-border feature and have already been reported in another EU Member State.

### Taxpayers

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

Although there may be an intermediary, relevant taxpayers are required to report the arrangements when becoming aware that the intermediary did not comply (regardless of the reason) with the primary reporting obligation.

Relevant taxpayers are always required to report domestic arrangements (as defined), even if they also have a cross-border feature and have already been reported in another EU Member State.

### 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 Portuguese reporting deadlines are expected to fully align with DAC6. However, for domestic arrangements (as defined), the retroactive reporting requirement will cover arrangements made available for implementation, ready for implementation or where any of the steps is implemented between the date in which the Portuguese legislation enters into force and 1 July 2020.

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 waived 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 relevant taxpayer needs to report due to a failure to report by the intermediary, a 20-day extension is included in the 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 in 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, penalties that are expected to apply are as follows:

- ▶ 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 - from €6,000 to €80,000
- ▶ Omissions or inaccuracies in the reported information - from €2,000 to €60,000
- ▶ Failure to provide or delay in providing additional information - from €3,000 to €80,000

The payment of the penalty does not waive the compliance with the reporting obligations.

### Next steps

The Portuguese draft legislation has clarified some questions with respect to the interpretation and implementation of DAC6, however many questions remain unanswered. The Government will present the formal draft legislation to the Portuguese Parliament. 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. 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; and (iii) bring forward the start date for reporting.

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](http://ey.com).

© 2019 EYGM Limited.  
All Rights Reserved.

EYG no. 002607-19Gbl

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](http://ey.com)**