

Sweden issues final proposal on Mandatory Disclosure Rules to Parliament

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Executive summary

The Swedish Government issued, on 4 February 2020, a final bill to Parliament implementing the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).

An earlier draft of the proposed bill, published on 6 December 2019,¹ was subject to scrutiny by The Council on Legislation (Swe: Lagrådet), which made only minor remarks. The updated bill takes into account the view of the Council and the final bill is unlikely to be amended materially before final enactment. It is expected that the Parliament will enact the proposal in early March 2020.

If implemented as currently proposed, the Swedish Mandatory Disclosure Rules (MDR) legislation will be closely aligned with the requirements of the Directive. However, the proposal states that it deals only with the implementation of DAC6 and the Government is still considering whether the regulation should be extended to domestic arrangements.

The Swedish legislation will enter into force on 1 July 2020 and sanctions will be effective from that date.

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 value added tax (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 were to adopt and publish national laws required to comply with the Directive by 31 December 2019. Sweden did not meet this deadline, but it is expected to adopt the final bill in March 2020 with effect from 1 July 2020. The bill will also retrospectively cover reportable arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.

Scope of taxes covered

The scope of the taxes covered under the Swedish new draft 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 between those that 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” in the Swedish final draft legislation aligns with the DAC6 definition.

Contrary to the initial proposal, the Swedish bill does not cover domestic arrangements, but the Government is still considering an extension at a later stage.

Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The Government’s explanatory notes in the bill provide some clarification on these elements.

- ▶ **Hallmark A.3. (Standardized documentation and/or structure):** The Government’s explanatory notes describe these arrangements as “plug and play-arrangements” that require no further professional advice of material substance.
- ▶ **Hallmark B.1. (Acquisition of a loss-making company):** In the explanatory notes, it is stated that not only losses from earlier years are included in the assessment but also losses from the current year (the year in which the loss-making company is acquired). It is also stated that the hallmark should be met irrespective of whether the main business activity of the company is discontinued before or after the acquisition.
- ▶ **Hallmark B.2. (Conversion of income into capital, gifts or other revenue):** By way of example, the explanatory notes specifically mention arrangements with the effect of converting salary income to lower taxed dividends or capital gains. Another example provided is converting a loan receivable owed by a foreign subsidiary company to its parent company into equity, resulting in a conversion of taxable interest income to tax exempt dividends. It is indicated that bona fide gifts are not to be covered by hallmark B.2.
- ▶ **Hallmark C.1. (b) (i) (Deductible cross-border payments between associated enterprises where the recipient is resident in a jurisdiction that either does not impose any corporate tax, or imposes corporate tax at the rate of zero or almost zero):** The explanatory notes state that it interprets “tax at the rate of zero or almost zero” as being the level of the nominal tax rate and that it is only the tax rate which generally applies to the particular kind of income and not cases where, for example, certain types of entities or operations are taxed at a zero rate. As an example, the

explanatory notes mention the situation where a Swedish company carries out an arrangement that includes a tax deductible, cross-border payment to a company in Jersey, where the corporate tax rate as a rule is 0%.

- ▶ **Hallmark C1. (d) (Deductible cross-border payments between associated enterprises where the payment benefits from a preferential tax regime):** The explanatory notes provide a few examples of when a payment benefits from a preferential tax regime and specifically mentions the Dutch innovation box regime and the patent box regime in the United Kingdom.
- ▶ **Category E Hallmarks 1-3 (hallmarks concerning transfer pricing):** The explanatory notes discuss what constitutes an arrangement when it comes to transfer pricing and concludes that if several running transactions meet the same hallmark, and are carried out in the same manner, then they should be regarded as a series of transactions that need to be reported only once.
- ▶ **Hallmark E.1 (arrangements which involve the use of unilateral safe harbors):** The explanatory notes confirm that multilateral safe harbor rules are not covered by the hallmark and therefore arrangements complying with the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines should not be reportable.
- ▶ **Hallmark E.3 (intra-group transfers resulting in significant profit shifts (50%):** The explanatory notes state that DAC6 does not define “intra-group” but that since the hallmark concerns transfer pricing, the concept of “intra-group” should be interpreted in accordance with how it is interpreted in the OECD Transfer Pricing Guidelines. In addition, the Government provides a specific example on when hallmark E3 should be met: *A Swedish company has during a period developed, manufactured and sold a product in its own name and on its own behalf. Within the group, it is then decided that the activities of the group should be reorganized, meaning certain functions, risks and/or assets are to be transferred to a group company in another country. After the transfer, it is expected that the Swedish company will have earnings before interest and taxes (EBIT) during the subsequent three years, of SEK20m. If the transfer had not been carried out, the expected equivalent earnings would have been SEK50m for the three years. Since the projected earnings would be less than 50 percent of projected earnings had the transfer not taken place, the arrangement is reportable.*

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, is the obtaining of a tax advantage.

The Government’s explanatory notes indicate that a “tax advantage” includes a tax advantage outside of Sweden (and there is no suggestion that such tax advantage must arise in respect of EU taxes). The Government further concludes that there is no requirement that the tax advantage occurs during the current fiscal year, it can occur also in the future, for example, in the form of deferred taxation. It states, however, that it must be a tax advantage based on current rules.

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 Swedish final draft legislation partly exempts members of the Swedish bar association from the reporting obligation due to LPP. However, Swedish non-bar member lawyers, legal advisers, tax advisors, auditors and accountants are required to report.

Members of the Swedish bar association do not need to report information that would conflict with the Swedish LPP. The new draft proposal does not provide guidance as to exactly what information may not be reported and leaves that to the bar members to decide. However, if the relevant taxpayer agrees to waive the LPP, a bar member may report the reportable arrangement.

An employee of an intermediary entity should not have a personal obligation to report an arrangement provided the employee undertakes the intermediary activities in his/her employment.

The final draft legislation states that an “in house” tax team could be regarded as an intermediary if it provides advice to another company within the group.

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 the Swedish final draft 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 Swedish reporting deadlines are expected to be fully aligned with DAC6.

Penalties

The final draft legislation contains a provision concerning penalties. Penalties may be imposed if there is a failure to report or if the report is incomplete or incorrect. However, a failure to report will not be regarded as a criminal offense.

The proposed penalty fees for failure to report are the following:

- ▶ Penalty for failing to report by the initial 30-day reporting deadline:
 - SEK7,500 (approx. €700) (relevant taxpayer)
 - SEK15,000 (approx. €1,400) (intermediary)
- ▶ Secondary and third penalties apply for failure to report after an additional 60 days:
 - SEK10,000 (approx. €940) (relevant taxpayer)
 - SEK20,000 (approx. €1,900) (intermediary)

If the violation has occurred within a business with a minimum turnover of SEK15m (approx. €1.4m) for the previous financial year, the secondary and third penalties are instead:

- ▶ Turnover for the previous financial year of at least SEK15m (approx. €1.4m) but less than SEK75m (approx. €7.0m):
 - SEK15,000 (approx. €1,400) (relevant taxpayer)
 - SEK30,000 (approx. €2,800) (intermediary)

- ▶ Turnover for the previous financial year of at least SEK75m (€7.0) but less than SEK500m (approx. €47m):
 - SEK30,000 (approx. €2,800) (relevant taxpayer)
 - SEK60,000 (approx. €5,600) (intermediary)
- ▶ Turnover in the previous financial year of SEK500m (approx. €47m) and above:
 - SEK75,000 (approx. €7,000) (relevant taxpayer)
 - SEK150,000 (approx. €14,000) (intermediary)

The third penalty can be mitigated if reporting occurs voluntarily before the Tax Agency has started an investigation.

Reporting penalties may be reduced or forgiven under the general rules regarding reduction or forgiveness of tax related penalties.

It is further suggested that penalties do not apply for failure to report an arrangement where the first step is implemented after 24 June 2018 and before 1 July 2020 (the transition period).

Next steps

The Parliament bill has clarified some questions with respect to the interpretation and implementation of DAC6, but many questions remain unanswered. The Swedish Parliament will likely debate and adopt the final draft legislation in March 2020. The remaining legislative process usually provides limited clarification or amendments. However, it is widely anticipated that the Swedish Tax Agency will issue guidance later this year.

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 proposed regulations, taxpayers and intermediaries who have operations in Sweden should carefully review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations.

Endnotes

1. See EY Global Tax alert, [Sweden publishes new draft legislation on Mandatory Disclosure regime](#), dated 12 December 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; (iii) bring forward the start date for reporting.

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