KPMG

GMS Flash Alert

2020-017 | January 24, 2020

European Union - Mandatory Disclosure Rules (MDR) in Global Mobility

Direct taxation is not harmonized across the European Union (EU), which can mean that some taxpayers may exploit the gaps and inconsistencies and find ways to avoid or evade taxes in the relevant countries. In their pursuit to combat fraud and prevent tax evasion, tax authorities in the EU have agreed to cooperate more closely,[1] which has resulted in several legislative initiatives[2].

The EU Directive for Administrative Cooperation, No 6 (DAC6)[3] outlines a range of rules for mandatory disclosure of certain types of cross-border tax arrangements to relevant tax administrations.

Although a major part of the mandatory disclosure rules ("MDR") concerns tax arrangements and transactions between undertakings, certain tax arrangements for employees are in the scope of these rules and must be reported to the relevant tax administrations.

The mandatory reporting of certain cross-border tax arrangements for employees is set to begin from 1 July 2020. Reportable tax-arrangements enacted from 25 June 2018, must be reported retroactively.

WHY THIS MATTERS

Failure to report a tax arrangement to the relevant tax administration is sanctioned with significant financial fines that vary from country to country. Moreover, non-compliance with MDR can present high reputational risk to employers.

Employers need to understand the impact of MDR, assess their activities, policies, documentation, etc., and determine what is reportable, where/to whom to report it, and what information they should retain in respect of non-reportable arrangements.

MDR in More Detail

Background in Brief

DAC6 introduces an obligation to disclose information on cross-border tax arrangements that meet certain criteria between intermediaries to tax administrations in the EU. Subsequently, tax administrations will automatically exchange information about the reported arrangements.

All disclosures must be reported within 30 days of the earlier day on which the arrangement is made available for implementation. However, the reportable tax arrangements enacted between 25 June 2018 and 1 July 2020, must be reported to the relevant tax administration by 31 August 2020.

The EU member states were required to transpose DAC6 into national legislation by end 2019. At this point, some countries are yet to complete this process.

Poland has already implemented MDR and Norway, as a non-EU member state, is considering introducing MDRs in line with parts of DAC6 in their national legislation.[4] The rules are broadly drafted and the EU has not issued accompanying guidance, which raises questions as to the interpretation. This means that the implementation of DAC6 will vary from country to country. Member states are also free to broaden the scope of the rules to additional types of taxes, domestic arrangements, etc.

Some matters, for example, defining the penalty regime, are left to member states. Sanctions for not reporting range from daily fines to fines of for over EUR 2 million in certain countries.

Scope and Definitions

- **Cross-border arrangement**: an arrangement that includes one EU country and one other EU or non-EU country.

- **Intermediary**: any person that designs, markets, organises, or makes available for implementation or manages the implementation of a reportable cross-border arrangement. It also includes any person who knows or could be reasonably expected to know that he or she has undertaken to provide, aid, assistance, or advice to designing, marketing, organising, to make available for implementation or manages the implementation of a reportable cross-border arrangement.

  Primary obligation to report rests with the intermediary. The obligation to report can shift to taxpayers where, for instance, the arrangements that are developed are done in-house or where legal advisers are based outside of the EU or claim legal professional privilege.

- **Reportable cross-border arrangements:** must contain certain features ("hallmarks") and in some instances, the main or expected benefit of the arrangement is a tax advantage, which can be:

  - *generic*, e.g., use of confidentiality clauses, standard documentation, contingent fee arrangements dependent on achieving a tax benefit;

  - *specific*, e.g., cross-border payments that benefit from full tax exemption in the recipient's jurisdiction, conversion of income into categories taxed at lower levels, relief from double taxation claimed in multiple jurisdictions.

Examples

In the following, we have outlined examples of potentially reportable tax arrangements for employees.

Assignment: An employee is temporarily assigned to a company/permanent establishment in another country. The tax rate on income in the host country is lower than in the home country.

KPMG Comment: *Employee assignments are usually standardized in documentation and structure. The adjustment to the employment contract can be interpreted as a conversion of a high-taxed income to a low-taxed income. Lastly, if the assignment (e.g., the choice of jurisdiction) is motivated by the tax advantage or if such tax advantage in fact occurs, the arrangement can be reportable. The same assessment and result can be reached if the host cost country has a special tax regime for employees from abroad.*

In conclusion, standardized documentation and structure, lower tax rate, and tax advantage will likely fulfill the requirements for mandatory reporting of such assignment.

Company cars: A group company provides cars to employees. Some employees are tax residents in another country. The use of the company cars is taxed preferentially compared to wage income.

KPMG Comment: *The use of company cars is usually standardized in documentation and structure. Reliance on standardized documentation and structures combined with preferential taxation of the benefit can fulfill the requirements for mandatory reporting of such arrangement.*

CEO remuneration: A part of the remuneration package for a CEO often consists of shares in a foreign company of the same group. The distribution of dividends in the tax jurisdiction where the company in which the CEO is awarded shares is not subject to the withholding of taxes and the income is exempt in the hands of the individual in his or her country of residence.

KPMG Comment: *The remuneration of a CEO is usually standardized in documentation and structure. Remuneration in the form of shares can be understood as a conversion of taxable employment income into non-taxable dividend income. Lastly, if the tax arrangement is motivated by the obtaining of a tax advantage or if such tax advantage in fact occurs, the arrangement can be reportable.*

In conclusion, the combination of standardized documentation and structure and low- or non-taxed dividend income (i.e., the existence of a tax advantage) can fulfill requirements for mandatory reporting of such arrangement.

Note, importantly, where a decision is made to not report an arrangement, the reasoning should be thoroughly documented for future reference, including in the event of a future tax audit.

KPMG NOTE

The majority of EU member states have either finalised the transposition process or have taken significant steps in terms of completion expected early in 2020. With the fast-approaching application date of 1 July, we can recommend that companies consider following:

1. Anticipate and Organise Compliance

- Reach out to internal stakeholders (e.g., corporate tax department) to understand the rules and coordinate the internal response.

KPMG NOTE (continued)

- Design and implement specific policy frameworks including controls and training across the business.
- Consider who will review and have sign-off capabilities and whether the individual has the right skills, or requires further training.
- Consider using technology solutions[5] for MDR compliance, including cataloging potentially reportable arrangements.

2. Assess Your Situation

- Perform an analysis to identify potential arrangements that might be reportable.
- Determine whether changes to contractual arrangements – e.g., external service providers – are needed.

3. Monitor Local Implementation and Adapt

- Monitor local implementation in EU and non-EU jurisdictions and re-assess arrangements before the reporting deadline and continuously going forward, as further guidance and professional practice become available.
- Assess whether your proposed or actual internal governance and compliance framework meets local requirements.

FOOTNOTES:

1 See the "Administrative cooperation in (direct) taxation in the EU" webpage on the European Commission website. Also, see from the European Court of Auditors, "Exchange of tax information in the EU" (October 2019).

2 See "EU Mandatory Disclosure Requirements – update," in *Euro Tax Flash*, a publication of KPMG's EU Tax Centre.

3 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

Prior iterations include the original, Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (so-called "DAC1"). Council Directive 2011/16/EU was amended several times subsequently (2014, 2015, 2016, and 2018) – see the afore-noted link.

4 See (for Poland) "EU Mandatory Disclosure Requirements – update," in *Euro Tax Flash*, 3rd Special Edition, a publication of KPMG's EU Tax Centre. And (for Norway), a later report by the same name "EU Mandatory Disclosure Requirements – update," in *Euro Tax Flash*, 5th Special Edition.

5 See more on KPMG's dedicated website "EU Mandatory Disclosure Rules."

* * * *

Contact us

For additional information or assistance, please contact your local GMS or People Services professional or the following professional with the KPMG International member firm in the Netherlands:

Daida Hadzic
Director
Tel. + 31 6 5324 4599
Haidzic.Daida@kpmg.com

The information contained in this newsletter was submitted by the KPMG International member firm in the Netherlands.

www.kpmg.com

kpmg.com/socialmedia

Flash Alert is a GMS publication of KPMG LLP's Washington National Tax practice. To view this publication or recent prior issues online, please click here. To learn more about our GMS practice, please visit us on the Internet: click here or go to http://www.kpmg.com.