

Mandatory Disclosure Rules

Swedish Government proposed legislation to implement DAC6 presented to the Swedish Parliament

This article provides a summary of the proposed Swedish legislation to implement mandatory disclosure rules under DAC6 into domestic law.

Status

On February 4, 2020, the Swedish Government presented a proposal to implement Directive (EU) 2018/822 on mandatory disclosure rules (hereinafter “DAC6” or “the Directive”) into domestic law, to the Swedish Parliament. A draft proposal had previously been presented to the Council on Legislation which provided its comments on January 14, 2020. The proposal is subject to approval by Parliament, with voting currently planned for May 27, 2020.

Please note that the summary therefore is based on the Government’s proposal and that changes in the final legislation may occur.

Scope

The scope of the proposal is closely aligned with the Directive, with no extension of scope proposed for VAT, customs duties or excise duties. Swedish mandatory disclosure requirements (MDRs) will also initially only apply to cross-border arrangements. The question of whether the scope will subsequently be broadened to include certain domestic arrangements remains subject to further analysis within the Swedish Government.

Definitions

The proposal aims to implement DAC6 and the text of the proposed legislation is closely aligned with the Directive.

The proposal includes certain definitions and clarifications of terms used in the Directive, including for example:

1) Intermediary

The definition of intermediary in the Swedish bill is intended to implement the definition in the Directive.

The explanatory memorandum accompanying the proposal provides the following examples of primary intermediaries:

- audit and law firms;
- independent tax advisory agencies;
- a group company designing an arrangement to be implemented by another company within the same group.

The explanatory memorandum highlights that a secondary intermediary is a person that is not in a position to act independently in the arrangement. Any person that acts independently in the marketing or design of an arrangement would qualify as a primary, rather than secondary intermediary.

In addition, the explanatory memorandum provides the example of a bank that assists in a cross-border arrangement and that could potentially qualify as a secondary intermediary. However, the explanatory memorandum further notes that a bank that only assists by opening a bank account or granting a loan, without having access to further information about the arrangement, should not qualify as intermediary.

A secondary intermediary will not have an obligation or duty to investigate further, i.e. a bank should only assess whether it qualifies as intermediary based on the available information (e.g. including information collected to comply with anti-money-laundering provisions).

2) Made available for implementation

According to the bill, in order for an arrangement to be considered to have been made available for implementation, it is necessary to have an essentially finalized solution. Not all details of the arrangement need to have been finalized, but enough details need to have been worked out (virtually complete) so that a decision can be made to implement the arrangement. If an intermediary presents to a potential client three different options (normally marketable arrangements), each of which with enough details worked out so that a decision can be made to implement, all three arrangements should be reported.

3) User

The proposal replaces the term "relevant taxpayer" with "user". However, the definition of a user in the proposal is intended to implement the definition of a relevant taxpayer, which is the term used in the Directive.

4) Arrangement

The proposal does not provide a definition of the term "arrangement". However, the explanatory memorandum refers to the European Commission Recommendation on aggressive tax planning of December 6, 2012. The Recommendation provides that an arrangement means any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event. An arrangement may include more than one step or part.

Further, reference is made to the OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures. According to the model, an arrangement "includes an agreement, scheme, plan or understanding, whether or not legally enforceable, and includes all the steps and transactions that bring it into effect".

The Swedish explanatory memorandum also states that amendments to existing arrangements could be considered to create a new arrangement for MDR purposes.

5) Participant

The term participant is not defined in the proposal. However, according to the explanatory memorandum, any users and other persons involved in the arrangement should generally qualify as participants. An intermediary should not, in general, be considered to be a participant.

6) Tax Advantage and Main Benefit Test

The proposal does not provide a definition of the term "tax advantage". However, the explanatory memorandum refers to the definition provided in the European Commission Recommendation on aggressive tax planning (December 6, 2012). According to the Recommendation, a tax advantage could be assumed to exist where:

- an amount is not included in the tax base;
- the taxpayer benefits from a deduction;
- a loss for tax purpose is incurred;
- no withholding tax is due; or
- foreign tax credit is available.

In addition, the explanatory memorandum notes that the term "tax advantage" should also cover future tax advantages (i.e. deferred taxes) and should relate to both EU and non-EU tax advantages.

The explanatory memorandum states that the main benefit test should normally not be considered to be met if an arrangement has a direct relationship with the company's main commercial operations and is not contingent or based on obtaining a tax benefit. However, there a high degree of uncertainty remains around how the main benefit test should be applied. The test should therefore be considered carefully in each case.

Hallmarks

The list of hallmarks is closely aligned with Annex IV of the Directive. The main benefit test will apply to the same hallmarks as those in the Directive (i.e. category A and B hallmarks and paragraphs (1)(b)(i), (c) and (d) of the category C hallmarks).

The explanatory memorandum provides some additional guidance on the interpretation of the hallmarks, and the Swedish Tax Agency has indicated that it will publish further guidance.

Reporting - Intermediaries

An intermediary is only required to report an arrangement in Sweden if such intermediary has a presence in Sweden, determined with reference to local residency, permanent establishment (PE), incorporation or professional registration.

However, an intermediary with a connection to Sweden, does not have to report in Sweden if it is considered to have a stronger connection to another EU member state.

Reporting – Intermediaries (cont.)

In some cases, an intermediary is not required to report, for example if there is evidence that the arrangement has already been reported to a Tax Authority within the EU by another intermediary.

The reporting timelines mirror the requirements of the Directive, i.e. within 30 days of the relevant reporting trigger.

Returns will be submitted electronically. The format for reporting will be clarified by an order to be issued by the Swedish Tax Authority after Parliament's approval of the legislation. The proposal does not clarify in which language the information should be reported, but indications from the Swedish Tax Authority suggests that Swedish and English will be accepted, at a minimum.

The information that is required to be disclosed largely mirrors the requirements of the Directive. According to the explanatory memorandum, the value of the cross border arrangement shall mean the value of the cross-border arrangement as a whole and not the value of the tax benefit.

An intermediary is only required to report information of which it is aware (i.e. the intermediary should not have an obligation or duty to investigate).

The Swedish Tax Authority will assign a unique reference number that will be used to identify the arrangement in all Member States.

Legal Professional Privilege

Attorneys and law firms will only be required to file information to the extent that this is allowed under attorney-client privilege rules. According to the explanatory memorandum, tax advisors and auditors cannot rely on legal professional privilege.

Exempted attorneys must immediately notify in writing all other intermediaries or, if there is no other intermediary, the relevant taxpayer, that they benefit from a waiver and that the reporting obligation therefore has shifted to the other party. No further detail on the meaning of "immediately" is provided.

The explanatory memorandum further notes that it is possible for the user to discharge the intermediary from its client confidentiality obligations, in which case, the reporting obligation would revert to the intermediary.

Reporting – User (relevant taxpayer)

A user is only obliged to report if there is no intermediary or if all intermediaries are bound by legal professional privilege rules, and the user has a presence in Sweden (local residency, PE, incorporation or professional registration).

Where a user has a reporting obligation in multiple Member States, the reporting obligation follows a certain order to decide where to report.

A user, with connection to Sweden does not have to report in Sweden if it is considered to have a stronger connection to another EU member state.

In situations where multiple users are involved, the bill sets out ordering rules for determining which relevant taxpayer is required to report.

The reporting timelines for users mirror the requirements of the Directive.

Penalties

According to the Government's proposal penalties for failure to report information are up to the following amounts, applicable per arrangement:

- SEK 315,000 (approximately EUR 29,000) for intermediaries; and
- SEK 157,500 (approximately EUR 14,500) for users.

These penalties will only apply with respect to cross-border arrangements implemented after June 30, 2020.

For more information, please refer to KPMG's [EU Mandatory Disclosure Requirements page](#) or contact the following:

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