

# Mandatory Disclosure Rules

## Finland has enacted the DAC6 transposition bill - published guidance also now available

This article provides a summary of the Finnish legislation to transpose mandatory disclosure rules under DAC6 into Finnish domestic law.

### Status

The Finnish Parliament has approved the bill to transpose Directive (EU) 2018/822 on mandatory disclosure rules (hereinafter “DAC6” or “the Directive”) into Finnish domestic law that entered into force on January 1, 2020.

The provisions will come into operation on July 1, 2020.

Alongside the bill, the motivations of the government’s proposal (hereinafter the “government’s proposal”) clarified the interpretation of key terms.

The Finnish tax administration also published detailed final guidance (hereinafter the “detailed guidance”) on April 30, 2020, that clarifies the application of the law further.

Please note that the summary is based on information available as at May 14, 2020.

### Scope

The scope of the law is closely aligned with the Directive, with no extension of scope for VAT, customs duties or excise duties. Finnish mandatory disclosure rules (MDs) will only apply with respect to “cross-border arrangements” (i.e. domestic transactions will not be in scope).

### Definitions

The law is closely aligned with the Directive. In particular, the definitions of “associated enterprise”, “marketable arrangement” and “cross-border arrangement” have the same meaning as that included in the Directive.

The law also includes the following definitions:

#### 1) Service provider (intermediary)

The legislation contains definitions for a “service provider” – which corresponds the term “intermediary” in the Directive, and for a “Finnish service provider”.

The government’s proposal notes this could include lawyers, auditors, financial advisors and consultants who, as part of their business, provide services related to reportable arrangements. The reporting obligation always lies with the company providing the services. The employees, who carry out the assignment, are not personally in the position of a service provider.

#### 2) Main benefit test and tax advantage

According to the detailed guidance, the main benefit test will be interpreted as an objective test in which the expected tax benefit is assessed in relation to the circumstances and overall benefits of the arrangement on a case-by-case basis. The fulfillment of the test will not be dependent on whether the tax benefit was in fact realized.

The law clarifies that the main benefit test will take into account non-EU tax advantages. According to the detailed guidance the test is deemed to be met when the arrangement involves tax planning actions, which are in contradiction with the purpose of the tax system, applicable law or procedural provisions.

Where the arrangement was previously approved through case law and tax practice and the arrangement does not conflict with applicable law or procedures, the main benefit test would not be considered to be met. In addition, the detailed guidance states that the test is not met in case the tax advantage is explicitly stated in the law.

## 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 related to the test in the Directive (i.e. category A and B hallmarks and paragraphs (1)(b)(i), (c) and (d) of the category C hallmarks).

Additional guidance on selected hallmarks is also provided:

- Hallmark A(1) (confidentiality clauses): the main benefit test would not be met where a confidentiality clause is included solely for competitive reasons but would be met when a confidentiality clause is used to protect the way the tax advantage is attained.
- Hallmark A(2) (remuneration based on tax advantage): the hallmark is met when the service provider's fee is determined in whole or in part on the basis of a tax advantage or when the service provider is obliged to reimburse the payment received in full or in part if the intended tax advantage does not materialize.

Services relating merely to filing tax returns or tax refund claims do not generally trigger this hallmark as they constitute administrative services rather than design or implementation of reportable arrangements.

- Hallmark A(3) (standardized contracts): the main benefit test would only be satisfied where the tax benefit was the principle or one of the principle benefits of the arrangement. An example is provided of a mortgage from a financial institution, which would not satisfy the main benefit test.
- Hallmark B(1) (loss-making company acquisition): an indicator would be a transaction of an artificial nature, the purpose of which would be exclusively or almost exclusively to obtain a tax advantage.

The government's proposal also notes that, while DAC6 does not provide a time limit in which the activities of the loss-making company should be discontinued, a company should not fall within Hallmark B(1) if it continued to operate for several years post-acquisition. Hallmark B(1) could also apply even if the loss-making company would discontinue its main business before the acquisition.

- Hallmark B(2) (conversion of income): choosing a more tax efficient option where the tax legislation explicitly allows the arrangement to be implemented in two or more alternative ways is generally not considered to be reportable. For example, choosing to invest in a share savings account due to favorable tax treatment rather than making a direct equity investment is not considered reportable.

However, conversion of receivables into equity in a foreign subsidiary could be reportable if the main benefit test is met.

- Hallmark B(3) (circular arrangements): the hallmark could apply to situations where funds are circulated through another jurisdiction in order to qualify for preferential tax treatment for foreign direct investment. The hallmark would not typically apply to ordinary dividends paid from a subsidiary to a parent company.
- Hallmark C(1)(a) (no tax residency): the hallmark would be applicable if a payment is made to a tax-transparent entity and its owners are located in the same state and are not taxed on the entity's income.
- Hallmark C(1)(b)(i) (no corporate tax or tax rate of 0%): it has been clarified that Estonia is not considered a country with no CIT and hence payments to Estonian companies are in principle not reportable on the basis of this hallmark alone.
- Hallmark C(1)(d) (preferential tax regime): the term "preferential tax regime" should be interpreted as described in the OECD BEPS Action 5 Report on Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. Typically, these could include patent boxes and preferential regimes applicable to foreign investment.
- Hallmark C(2) (double deduction): the government's proposal notes that the scope of this hallmark is not limited to measures that are covered by the anti-hybrid rules introduced under the EU Anti-Tax Avoidance Directive.

## Hallmarks (cont.)

- Hallmark C(3) (double taxation relief): an example of a reportable arrangement is provided in the form of a company being eligible for multiple withholding tax credits due to differences in tax treatment in third countries.
- Hallmark E(1) (unilateral safe harbor rules): unilateral safe harbors within the meaning of this hallmark exclude those intended solely to simplify administrative obligations which do not directly affect the determination of the market price. In accordance with the guidance, safe harbor rules do not refer to Advance pricing arrangements (APA) or thin capitalization rules.

An arrangement is not reportable if the transfer prices have been set at arm's length using OECD TP guidelines, even if the pricing used is also at the level indicated by the safe harbor rule.

- Hallmark E.2 (hard to value intangibles): the concept of hard-to-value intangibles is aligned with the definition of the term in the OECD TP guidelines. The term "transfer" could be any cross-border transfer, such as trade, licensing or gratuitous transfer, such as the granting of free access.

According to the detailed guidance, reliable comparables could be determined by using the CUP method or by external benchmarks found in database searches if they meet the conditions for comparability.

- Hallmark E.3 (cross-border transfer of functions, assets or risks): it has been clarified that tax-neutral M&A transactions such as cross-border mergers or sale of subsidiary shares are in principle not reportable.

## Reporting – Service providers

The service provider (intermediary) is only obliged to report if it has a presence in Finland and is considered to be a "Finnish service provider" by virtue of local residency, a permanent establishment, incorporation or registration with a relevant professional organization.

Reporting timelines mirror the requirements of the Directive, i.e. for bespoke arrangements, 30 days as of the relevant reporting trigger.

The information that should be disclosed largely mirrors the requirements of the Directive.

Where a Finnish service provider reports an arrangement, the service provider should notify other intermediaries and the relevant taxpayers that the report has been filed, without undue delay. No further guidance has been provided to date on the meaning of the phrase "without undue delay". The Finnish intermediary must also provide these parties with the reference number assigned to the arrangement by the Finnish tax authorities.

The legislation states that Finnish service providers must also update the original report filed with the Finnish tax authorities on a quarterly basis if additional information becomes available during that period.

A Finnish service provider will be released from its reporting obligation if it can clearly be demonstrated that it has already reported the arrangement in another EU Member State. In this regard, the Finnish service provider will be required to make a declaration that the report was filed and will need to include the reference number received from the authorities in the other Member State. However, a reporting obligation could still arise in Finland where the scope of the disclosure made in the other Member State was not as detailed as the information required in Finland.

Relief from reporting may also be available where another intermediary has already submitted a report to the Finnish tax authorities. In order to support this claim for relief, the intermediary would need to obtain a certificate from the other intermediary that contains the reference number assigned by the authorities and details of the information filed.

## Legal Professional Privilege

While certain categories of service providers may, in principle, benefit from a waiver for legal professional privilege, they may still be required to report the arrangement on a limited or "no names" basis.

Where professional privilege is claimed, the service provider is required to notify other service providers or relevant taxpayers of their reporting obligation and provide them with the reference number assigned by the authorities "without undue delay".

## Legal Professional Privilege (cont.)

The taxpayer may give their consent to the service provider to disclose all the information regarding the arrangement notwithstanding the legal professional privilege. In this case, the relevant taxpayer would not need to disclose any information.

## Reporting – Relevant Taxpayer

Reporting timelines for relevant taxpayers mirror the requirements of the Directive.

A taxpayer should only have a requirement to report arrangements to the Finnish tax authorities if the taxpayer is a “Finnish taxable person” (i.e. has a presence or “nexus” in Finland).

Where multiple taxpayers are involved, the relevant taxpayer that is required to file information will be the one that features first in the list below:

- 1) The taxpayer that agreed the arrangement with the intermediary;
- 2) The taxpayer that is managing the implementation of the arrangement.

A taxpayer will not be required to report if:

- There is evidence that the arrangement has been reported by an intermediary; or

- There is evidence that the arrangement has been reported by another taxable person; or
- The taxpayer has evidence that it reported the arrangement in another Member State.

## Penalties

Finnish MDR legislation provides for a range of penalties, which can apply depending on the type of breach, as follows:

- Minor omissions in reports or in the process applied – EUR 2,000;
- Substantial omissions or completion of reporting only after prompted by the tax authorities – EUR 5,000;
- Deliberate or gross negligence – EUR 15,000.

A penalty is always imposed only on the person whose breach is in question. For example, failure of the service provider to disclose information does not trigger penalties for the relevant taxpayer.

The penalties are in line with those applicable for a failure to meet other compliance, reporting or FATCA and CRS-related obligations.

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

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