

Mandatory Disclosure Rules

Implementation of mandatory disclosure rules in Portugal

This article provides a summary of the Portuguese mandatory disclosure rules under DAC6.

Status

On July 21, 2020, Law no. 26/2020 (“Portuguese MDR Legislation” or “Portuguese Law”), implementing the European Union (EU) Directive 2018/822 of 25 May 2018 on the mandatory disclosure and exchange of cross-border tax arrangements (“DAC 6” or “Directive”), was published in Portugal.

The Portuguese MDR legislation became effective on July 1, 2020 and repealed the previous Portuguese regime on the mandatory disclosure of certain abusive tax planning schemes to the Portuguese Tax Authorities (“PTA”).

In January 2021, the PTA issued guidance on the interpretation of the Portuguese MDR Legislation.

Please note that this summary is based on information available as at April 12, 2021.

Scope

Portuguese MDRs extend beyond the minimum requirements imposed by DAC6 by broadening the scope to include not only cross-border arrangements, but also certain domestic arrangements, including those related to VAT.

Definitions

Definitions included in the Portuguese law are mostly aligned with the text of the Directive. In particular, the definitions of “associated enterprise”, “hallmarks”, “intermediary”, “relevant taxpayer”, “cross-border”, “marketable arrangement” and “bespoke arrangement” are generally in line with the text of the DAC6. In addition, the legislation and the guidelines include the following clarifications and definitions:

1) Intermediary

In line with the Directive, an intermediary is defined in Portuguese MDR legislation as any person that designs, markets, makes available, implements or manages the implementation of an arrangement.

However, a person does not qualify as an intermediary when they are merely describing existing tax regimes, including tax benefits, or providing advice on the existing tax situation of the relevant taxpayer.

Moreover, according to the guidance, an employee of the intermediary working under an employment agreement cannot be considered an intermediary. On the other hand, a person that designs, markets, makes available, implements or manages the implementation of an arrangement to the intermediary under a service agreement shall qualify as an intermediary as well.

2) Relevant taxpayer

Under the Portuguese Law a person qualifies as a relevant taxpayer when they have implemented any step or part of a reportable arrangement (and not only the first step of the arrangement, as provided by the Directive). The guidance specifies that an employee of the relevant taxpayer cannot be considered as a relevant taxpayer.

3) Participant

Similar to the Directive, the Portuguese MDR legislation does not lay down a definition of the term “participant”. Nonetheless, guidance clarifies that the relevant taxpayer, as well as their associated enterprises and other persons/entities without legal personality affecting or being affected by the arrangement, are deemed

to be participants in the arrangement, while intermediaries are not to be treated as such.

4) Arrangement

According to the Portuguese MDR legislation, the term “arrangement” means any scheme, project, proposal, advice, instruction or recommendation, either explicit or implied, whether or not legally enforceable, and may comprise more than one step or part, as well as a series of arrangements, either simultaneous or sequential, which can be marketable (without a need for substantial customization) or bespoke.

In addition, as the Portuguese law applies to both domestic and cross-border arrangements, domestic arrangements are defined as those arrangements that, according to their objective characteristics, are capable of being applied or of producing effects (either totally or partially) in Portugal and do not qualify as cross-border arrangements.

Guidance clarifies that, although the definitions of “domestic arrangement” and “cross-border arrangement” do not overlap, there may be cases where a cross-border arrangement is capable of being applied or of producing effects (either totally or partially) in Portugal. In such an instance, the arrangement is deemed to be cross-border.

5) Tax advantage

The Portuguese MDR Legislation also includes a definition of the term “tax advantage”, which is deemed to arise when:

- there is a reduction, elimination or deferral of the tax due (including the use of tax losses) as a result of the arrangement;
- the arrangement allows the taxpayer to obtain a tax benefit that otherwise would not be achieved.

Hallmarks & Main Benefit Test

The list of hallmarks is closely aligned with Annex IV of the Directive. The generic hallmarks under category A (i.e. those relating to confidentiality clauses, success fees and standardized documentation/structure) are not relevant with respect to domestic arrangements.

In line with the Directive, the main benefit test applies to the category A and B hallmarks and paragraph 1(b)(i), (c) and (d) of category C hallmarks.

According to the Portuguese law, the main benefit test is satisfied if it can be established, without a reasonable doubt, 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.

Further, guidance clarifies that arrangements that lead to tax benefits that are in line with the intent of the legislator should not trigger the main benefit test.

No clarifications have been provided on whether tax advantage, within the meaning of the main benefit test, should refer to both EU and non-EU tax advantages.

Hallmarks

- **Hallmark B(1) (acquiring loss-making companies):** guidance states that the concept of “main activity” refers to the main business that is actually carried on by the company, based on the average turnover of the three previous financial years;
- **Hallmark B(2) (conversion of income):** according to the guidance, the expression “other categories of revenues” is not limited to the categories of income defined in the Portuguese tax legislation, thus includes any type of income that is taxed at a lower level or exempt from tax in accordance with the applicable tax rules;
- **Hallmark C(1)(b)(i) (recipient liable to zero or almost zero corporate income tax):** the Portuguese law specifies that an “almost-zero tax rate” means a nominal tax rate of less than 1 percent;
- **Hallmark C(1)(d) (preferential tax regime):** the Portuguese Law extends the scope of this hallmark by referring to a more favorable tax regime and not just a preferential tax regime;
- **Hallmark C(2) (depreciation of the same asset in more than one jurisdiction):** guidance suggests that this hallmark should not be triggered if the same asset is depreciated both by the PE and its headquarter, provided that the income attributed to the PE is taxed in the jurisdiction where the headquarter is situated;

Hallmarks & Main Benefit Test (cont.)

- Hallmarks D(1) and D(2) (automatic exchange of information and beneficial ownership): the guidance specifies that the OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures and related commentary may be used as an illustrative guide when applying this category of hallmarks;
- Hallmark E(1) (unilateral safe harbor rules): this hallmark is deemed to be met if an arrangement involves the use of unilateral safe harbor rules that are not consistent with the OECD Transfer Pricing Guidelines (2017);
- Hallmark E(2) (hard-to-value intangibles): the definition of hard-to-value intangibles provided for by the Portuguese MDR legislation mirrors that laid down in the OECD Transfer Pricing Guidelines (2017).

Reporting - Intermediaries

As a general rule, the primary reporting obligation in Portugal lies with the intermediary that meets at least one of the following conditions:

- is resident for tax purposes in Portugal;
- has a permanent establishment (PE) in Portugal through which the services with respect to the arrangement are provided;
- is incorporated in, or governed by the laws of, Portugal; or
- is registered with a professional association related to legal, taxation or consultancy services in Portugal.

However, when intermediaries act as service providers, they will be subject to the reporting obligation only when – having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, they know or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable arrangement.

According to the Portuguese law, when multiple intermediaries are involved, they are all required to report the relevant information to the PTA, unless the intermediary has proof that the arrangement has been disclosed by another

intermediary to the PTA or to the tax authorities of another Member State.

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

Legal Professional Privilege

Portuguese MDR legislation includes provisions according to which intermediaries may be exempt from reporting in case legal professional privilege or a contractual confidentiality clause apply.

Intermediaries covered by legal or contractual privilege are required to notify other intermediaries or the relevant taxpayer of their reporting obligation within five days from the trigger event.

In such cases, the relevant taxpayer must inform the intermediary that they have complied with the reporting obligation, by providing them with proof of reporting, within 30 days from the date when they were notified by the intermediary. However, should the relevant taxpayer fail to comply with their reporting obligation (or to inform the intermediary that the report has been made), intermediaries, even if covered by legal or contractual privilege, will be required to report to the PTA within ten days from the expiry of the 30-day deadline for the taxpayer.

Reporting – Relevant taxpayer

The relevant taxpayer will generally be obliged to report an arrangement if the intermediary is covered by legal or contractual privilege or if no intermediary is involved (either because the arrangement is developed in-house or the intermediary involved does not have any reporting obligation under DAC6, e.g. non-EU intermediary), and provided that the taxpayer:

- is resident for tax purposes in Portugal, or
- has a PE in Portugal that benefits from the arrangement, or
- receives income or generates profits in Portugal, or
- carries out an activity in Portuguese territory, or
- is registered for tax purposes in Portugal.

In line with DAC6, under Portuguese law, in case the reporting obligation arises in more than one EU Member State, the relevant taxpayer is required to communicate the relevant information on the cross-border arrangement to the tax authorities of the Member State that features first in the list below:

- the Member State in which the relevant taxpayer is resident for tax purposes;
- the Member State in which the relevant taxpayer has a PE that benefits from the arrangement;
- the Member State in which the relevant taxpayer receives income or generates profits, even if the relevant taxpayer is not tax-resident therein and has no PE in any Member State;
- the Member State in which the relevant taxpayer carries out an activity, even if the relevant taxpayer is not tax-resident therein and has no PE in any Member State.

If the taxpayer is required to report in more than one Member State, they will be exempt from reporting in Portugal if they have evidence that the same information has been filed in another Member State.

When multiple taxpayers are involved, the relevant taxpayer that has to file information will be the taxpayer that has agreed the arrangement with the intermediary or, if there is no such taxpayer, the person that has managed the implementation of the arrangement.

The relevant taxpayer will not be required to report if they have evidence that another taxpayer has reported the same information to the PTA.

Finally, the relevant taxpayer must also provide the PTA with information on any previously reported arrangement (including any update of such an arrangement) each year in which the arrangement applies or produces effects.

Deferral

Following the adoption of Council Directive 2020/ 876, allowing EU Member States to defer the DAC6 reporting deadlines by up to six months, on August 11, 2020 the Portuguese Government enacted Law Decree no. 53/2020 postponing for six months the reporting deadlines as follows:

- February 28, 2021 for “historical arrangements”, i.e. reportable cross-border arrangements the first step of which was implemented during the look-back period (June 25, 2018 – June 30, 2020).
- January 15, 2021 for reportable cross-border arrangements made available for implementation, ready for implementation, or where the first step in its implementation was made during the deferral period (July 1 – 31 December 2020).
- The start date for the 30 days reporting deadline began by January 1, 2021 (originally July 1, 2020).
- April 30, 2021 for the first periodic report on marketable arrangements.

Penalties

In accordance with Portuguese MDR Legislation, the following penalties are applicable:

- A penalty ranging from EUR 6,000 to EUR 80,000 for omitted/late reporting by intermediaries/relevant taxpayers (including failure to provide evidence that the arrangement was already reported in another EU Member State or by another intermediary/relevant taxpayer);
- A penalty ranging from EUR 2,000 to EUR 60,000 when the reported information is incorrect or incomplete;
- A penalty ranging from EUR 3,000 to EUR 80,000 for omitted/late report of additional information.

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

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