

# Ireland publishes draft proposal on EU Mandatory Disclosure Regime



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## Executive summary

On 17 October 2019, the Irish Government submitted the draft proposal implementing the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive) to the Oireachtas, Ireland's legislature. Under DAC6, taxpayers and intermediaries are required to report cross-border reportable arrangements from 1 July 2020. However, reports must also retrospectively cover arrangements where the first step is implemented between 25 June 2018 and 30 June 2020.

The draft proposes to amend the 'Anti-Avoidance' rules of Ireland's Taxes Consolidation Act (TCA) by transposing DAC6 as an addendum to the Domestic Mandatory Disclosure Rules (MDR) that were enacted in 2011.

As part of the larger Finance Bill, the proposal will now go through the legislative process, and may be amended before final enactment on or before 31 December 2019. If implemented as currently proposed, the Irish cross-border MDR legislation will be broadly aligned to the requirements of the Directive. The draft includes some explanatory notes that clarify the concepts and terms used in the Directive, but the interpretation of the Hallmarks of the Directive and their application is expected to be published subsequently by the Office of the Revenue Commissioners.

# Detailed discussion

## Background

The Council of the EU 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.

The Directive requires intermediaries and, in some situations, taxpayers, to report certain cross-border arrangements (reportable arrangements) to the relevant EU Member State (MS) tax authority. This disclosure regime applies to all taxes except value added tax (VAT), customs duties, excise duties and compulsory social security contributions. Cross-border arrangements will be reportable if they contain certain features (known as hallmarks). The hallmarks cover a broad range of structures and transactions.

EU MSs are to adopt and publish required national laws to comply with the Directive by 31 December 2019. Ireland has introduced domestic legislation, which will take effect from 1 July 2020.

The key highlights of the Irish proposal are summarized below.

## Scope of Taxes Covered

The scope of the taxes covered under the Irish proposal is broadly aligned with the Directive as it applies to all taxes except VAT, customs duties, excise duties and social security contributions.

There is an additional carve-out, however, for fees for documents issued by public authorities. Also, considerations due under a contract are excluded. As such it remains to be clarified how the exclusion of contract considerations would be treated for Hallmark A.2.

Under that hallmark, an arrangement is reportable where an intermediary is entitled to be remunerated for the arrangement and the fee is fixed by reference to the amount of the tax advantage derived, or if the intermediary is obliged to refund, partially or in full, the fees when the intended tax advantage was not partially or fully achieved.

## Reportable Arrangement

Under the Directive, an arrangement is reportable if:

- ▶ The arrangement meets the definition of a cross-border arrangement, concerning more than one MS or a MS and a third country; and
- ▶ The arrangement meets at least one of the hallmarks A-E specified in Annex IV of the Directive.

The term 'arrangement' is not defined in the Directive, but its preamble uses various synonyms for the term such as scheme and transaction. The Irish proposal sets a very wide scope of what arrangements may be. The term is defined in the draft as:

- (a) any transaction, action, course of action, course of conduct, scheme, plan or proposal,
- (b) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable or intended to be enforceable by legal proceedings, and
- (c) any series of or combination of the circumstances referred to in the previous two points

whether entered into or arranged by one or two or more persons—

- (i) whether acting in concert or not,
- (ii) whether or not entered into or arranged wholly or partly outside the State, or
- (iii) whether or not entered into or arranged as part of a larger arrangement or in conjunction with any other arrangement or arrangements,

Excluded from this definition in the draft proposal, however, are agreements for relief from double taxation.

## Main Benefit Test

In accordance with DAC6, the Main Benefit Test (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 Irish proposal defines 'tax advantage' as:

- (a) relief or increased relief from, or a reduction, avoidance or deferral of, any assessment, charge or liability to tax, including any potential or prospective assessment, charge or liability,
- (b) a refund or repayment of, or a payment of, an amount of tax, or an increase in an amount of tax refundable, repayable or otherwise payable to a person, including any potential or prospective amount so refundable, repayable or payable, or an advancement of any refund or repayment of, or payment of, an amount of tax to a person, or
- (c) the avoidance of any obligation to deduct or account for tax, arising out of or by reason of an arrangement, including an arrangement where another arrangement would not have been undertaken or arranged to achieve the results, or any part of the results, achieved or intended to be achieved by the arrangement.

This broad definition sets out an objective test for the tax advantage, in contrast to the definition of the same term under the existing domestic MDR in Ireland, where a tax advantage is considered obtained only if a person purportedly would not have entered into a transaction, in its current form, if the possibility of this tax advantage had not been there.

## Legal Professional Privilege

Under the Directive, intermediaries with EU nexus have

the primary obligation to report arrangements to the tax authority. The Directive gives MSs 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 that can report, the obligation will shift to the taxpayers.

The Irish draft proposal exempts intermediaries who could maintain a claim of LPP. Such intermediaries are obligated to notify other intermediaries or relevant taxpayers, without delay, of the reporting obligations imposed on them. There is no clarification on how the expression 'without delay' could be quantified objectively in light of the reporting deadlines.

## Reporting Deadlines

Under DAC6, there are two types of intermediaries:

- ▶ Those that design, market, organise or make available for implementation or manage the implementation of a reportable cross-border arrangement (promoters), or
- ▶ Those that provide, directly or by means of other persons, aid, assistance or advice with respect to a reportable cross-border arrangement (service providers).

The trigger events for reporting (from 1 July 2020), for taxpayers or intermediaries that are promoters, are when a new reportable arrangement is "made available for implementation", or when it is made "ready for implementation", or when "the first step of implementation has been made." Reporting will have to be made within 30 days.

For intermediaries that are service providers, reporting is due within 30 days of having provided aid, assistance or advice with respect to the arrangement.

Reports will also retrospectively cover arrangements where the first step is implemented between 25 June 2018 and 30 June 2020. Such arrangements will have to be reported by 31 August 2020.

The Irish reporting deadlines are expected to fully align with DAC6.

## Reference Numbers and Notifications

Under the Irish draft proposal, when a new return is made to the Revenue Commissioners, the Revenue Commissioners will assign a reference number to the reportable cross-border arrangement and then notify the intermediary or the taxpayer who filed the return.

If the return was made by an intermediary, the intermediary is required to provide the reference number, in writing and within 5 working days, to all other intermediaries and relevant taxpayers involved in the arrangement.

If the return was made by a taxpayer and there is more than one relevant taxpayer involved, the first relevant taxpayer is required to provide the reference number, in writing and within 5 working days, to each such other relevant taxpayer.

## Declaration of the use of an arrangement in the tax returns

The Irish tax code exempts certain individuals, depending on the nature of their employment and the value of their investment income, from filing an annual tax return with the tax authority.

The draft proposal removes such exemption for any individual who is reported as a relevant taxpayer in a reportable cross-border arrangement, as they are deemed to having obtained or sought to obtain a tax advantage from the arrangement.

Consequently, such individuals are required to file an annual tax return and self-assessment, and pay any preliminary tax required.

## Reporting in more than one Member State

Where an intermediary is liable to file a report in more than one MS, the Directive devised a process to determine where the report should be filed, based on the assumption that only one report should be required for any particular arrangement. In such cases, an intermediary would be exempt from filing if it has proof that the same information has been filed in another MS.

The Irish proposal is broadly aligned with this process, but it also alludes to arrangements that would have been filed and assigned reference numbers in other MSs that also need to be filed with the Irish tax authority. There is lack of clarity, however, on the conditions that would require such multiple filings.

## Information to be reported

Under DAC6, the information to be communicated for any reportable cross-border arrangement is required to contain the following:

- (a) the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of individuals), tax residence, Tax Identification Number (TIN) and, where appropriate, the associated enterprises to the relevant taxpayer;
- (b) details of the hallmarks set out in Annex IV that make the arrangement reportable;
- (c) a summary of the content of the arrangement;
- (d) the date on which the first step in implementing the arrangement has been made or will be made;
- (e) details of the national provisions that form the basis of the reportable cross-border arrangement;
- (f) the value of the arrangement;
- (g) the identification of the MS of the relevant taxpayer(s) and any other MSs which are likely to be concerned;
- (h) the identification of any other person in a MS likely to be affected by arrangement.

The Irish proposal is closely aligned with the Directive on the reportable information, with minor differences:

- ▶ When the TIN of an intermediary or taxpayer is not

known to the person making the return, the address of such intermediary or taxpayer is required.

- ▶ For arrangements that are deemed 'marketable', where a periodic return is due to the tax authority every 3 months, the arrangement needs to be flagged as marketable in the return.

## Penalties

The draft proposal contains penalty provisions for three types of specified failures.

- ▶ A penalty not exceeding €4,000 and, if the failure continues after the initial penalty is imposed, €100 per day for each day on which the failure continues, for:
  - An intermediary failing to flag a marketable arrangement as such in the return and failing to submit updated reports every 3 months.
  - Where an intermediary is availing of LPP, failing to notify other intermediaries or relevant taxpayers or delaying such notification.
  - A reporting taxpayer failing to notify other relevant taxpayers within 5 working days of receiving an arrangement reference number from the tax authority.
  - Failing to file returns for reportable arrangements of the transition period by 31 August 2020.
- ▶ A penalty not exceeding €500 per day and, if the failure continues after the initial penalty is imposed, €500 per day for each day on which the failure continues, for:
  - A taxpayer or an intermediary that is a promoter failing to file a return within 30 days of the arrangement having been ready or available for implementation or where the first step of implementation has been taken.
  - An intermediary that is a service provider failing to

file a return within 30 days of having provided aid, assistance, or advice concerning the reportable arrangement.

- A reporting intermediary failing to notify other intermediaries and relevant taxpayers within 5 working days of receive an arrangement reference number from the tax authority.

- ▶ A penalty not exceeding €5,000 when a taxpayer who is an individual fails to include the arrangement and its reference number in his or her annual tax return and self-assessment form.

## Next steps

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for intermediaries and taxpayers, especially considering the obligation to notify other concerned parties within 5 working days of receiving a reference number for a reported arrangement.

Without delay, taxpayers and intermediaries who have operations in Ireland should review and update their policies and strategies for identifying, logging and reporting arrangements while ensuring robust governance processes are in place supported by adequate technology so that they are fully prepared for meeting their obligations. Furthermore, roles should be established and agreed and communication protocols with third parties should be developed and implemented.

Lastly, it is important to note that Guidance Notes containing more extensive interpretation of the Directive and its Hallmarks are expected to be drafted by the Office of Revenue Commissioners and there is time to feedback into this process. Following their release, Guidance Notes should be used to update any assumptions made in the interim and prepare for live reporting beginning July 2020.

For additional information with respect to this Alert, please contact the following:

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