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KPMG

Mandatory Disclosure Rules

Estonia enacts DAC6 transposition bill

This article provides a summary of the Estonian legislation transposing mandatory disclosure rules under DAC6 into domestic law.

Status

On October 3, 2019, the Estonian Government approved a bill to transpose Directive (EU) 2018/822 on mandatory disclosure rules (hereinafter "DAC6" or "the Directive"), following the conclusion of a public consultation process. The bill was passed on December 18, 2019 and entered into force on January 1, 2020. It will be fully operational on July 1, 2020.

The MDR regulation was transposed into the Tax Information Exchange Act (hereinafter "Act").

Please note that the summary is based on information available as at January 10, 2020.

Scope

The scope of the Act is closely aligned with the Directive, with no extension of scope proposed for e.g. VAT, customs duties or excise duties (which are excluded from the scope of DAC6). Estonian mandatory disclosure rules will also only apply for "cross-border arrangements with a potential tax avoidance risk" (i.e. domestic transactions will not be in scope).

Definitions

The main provisions of the Act align with the text of the Directive, including the descriptions of the hallmarks. In particular, the definitions of "associated enterprise" and "marketable arrangement" mirror the text of DAC6.

In addition, the Act includes the following provisions:

1) Intermediary

The term "teabeandja" or "information source" replaces the DAC6 term "intermediary", which we understand is primarily due to the fact that the concept of intermediary is used elsewhere in Estonian domestic law.

The explanatory memorandum clarifies that the definition of "taebeandja" is not limited to tax advisors and can include lawyers, accountants and financial advisors.

In addition, the explanatory memorandum clarifies that a person should not be considered to be a "taebeandja" if it can be shown that they did not know and could not have been reasonably expected to know that they were involved in a reportable cross-border arrangement.

2) Relevant Taxpayer

The definition of a relevant taxpayer in the Act mirrors the definition presented in the Directive.

Where the taxpayer has designed the cross-border arrangement in-house, the legal entity, and not its employees, should qualify as the relevant taxpayer.

3) Cross-Border Arrangement

The definition of a "cross-border arrangement" in the Act mirrors the text of the Directive.

According to the explanatory memorandum, a cross-border arrangement can include cases where a participant in an arrangement is resident in different jurisdictions at the same time.

Similarly, a cross-border element to an arrangement will be deemed to exist where a participant carries on business in another jurisdiction without being resident in that jurisdiction.

4) Participant

According to the explanatory memorandum, the term "participant" – which is not specifically defined in DAC6 – may include any type of participation in an arrangement.

Hallmarks

No specific clarification on how the hallmarks will be interpreted is provided in the bill or explanatory memorandum.

Further details may become available by way of ministerial decree.

Reporting - Intermediaries

The intermediary is only required to report if it has a presence in Estonia (by virtue of local residence, permanent establishment - PE, 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 to be disclosed largely mirrors the requirements of the Directive. According to the explanatory memorandum, the value of the arrangement to be reported should be the market value (as opposed to the tax value) of the arrangement.

According to the explanatory memorandum, an intermediary is only required to report information of which they are aware (i.e. the intermediary does not have an obligation or duty to investigate).

In line with the provisions of the Commission Implementing Regulations for DAC6, the Estonian tax authorities will assign a unique reference number that will be used to identify the arrangement in all Member States. The party to which the reference number is issued will be required to forward the number to the other intermediaries liable to file information and to the relevant taxpayer.

Where an intermediary has a reporting obligation in multiple Member States, the information shall be filed only in the Member State that features first in the list below:

1) The Member State where the intermediary is resident for tax purposes;
2) The Member State where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided;
3) The Member State which the intermediary is incorporated in or governed by the laws of;
4) The Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.

An intermediary will not be required to report if:

- The intermediary has evidence that it reported the same information in another Member State; or
- There is evidence that the same information has already been reported by another intermediary.

To convincingly demonstrate that the arrangement has already been reported, providing the reference number assigned to the arrangement should suffice.

Reporting should be completed electronically using the E-Tax portal.

Legal Professional Privilege

Under the terms of the Tax Information Exchange Act, attorneys and sworn auditors would be entitled to a waiver for legal professional privilege. In such circumstances, an exempt "taebeandja" is required to notify – without delay – any other intermediary, or if there is no such intermediary, the relevant taxpayer of their reporting obligation.

The explanatory memorandum notes that it would be reasonable to assume that assistance would be provided to the taxpayer to allow it to fulfil its reporting obligations.

The Estonian Bar Association Act will also allow a client, by way of written consent, to exempt an attorney from the obligation to maintain professional secrecy which, in turn, would enable the attorney to report the arrangement.

Reporting – Relevant Taxpayer

The explanatory memorandum clarifies that a reporting obligation should only arise for a relevant taxpayer where:

1) The relevant taxpayer has developed the arrangement in-house;
2) The arrangement was designed by a person with no connection to an EU Member State; or
3) Legal professional privilege is claimed.

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

Reporting – Relevant Taxpayer (cont.)

Where a taxpayer has a reporting obligation in multiple Member States, the priority of reporting will be determined in the following order:

1) The Member State where the taxpayer is resident for tax purposes;
2) The Member State where the taxpayer has a place of business or designated base which benefits from the arrangement;
3) The Member State where the taxpayer receives income; or
4) The Member State in which the taxpayers pursues business.

Where multiple taxpayers are involved, the relevant taxpayer that is 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.

To convincingly demonstrate that the arrangement has already been reported, providing the reference number assigned to the arrangement should suffice.

Penalties

Penalties of up to EUR 3,300 will apply where a "teabeandja" fails to submit information correctly.

The penalty will be capped at a maximum of EUR 1,300 for a first time offense and EUR 2,000 thereafter.

Fines of up to EUR 3,200 would apply where the offense relates to a failure to comply with obligations set out in the Estonian Tax Information Exchange Act.

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

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