

Mandatory Disclosure Rules

Danish implementation of DAC6 into domestic legislation

This article provides a summary of the Danish transposition of mandatory disclosure rules under DAC6 into domestic law.

Status

On December 31, 2019, the Danish Parliament adopted 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 and the publication of the proposal by the Minister of Taxation. It will be fully operational on July 1, 2020.

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

Scope

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

The legislation does not apply to the Faroe Islands or Greenland.

Definitions

The definitions in the new legislation are closely aligned with the Directive. In particular, the definitions of “relevant taxpayer”, “associated enterprise”, “marketable arrangement” and “cross-border arrangement” have the same meaning as in the Directive.

In addition, the legislation includes the following clarifications:

1) Intermediary

The definition of intermediary mirrors the definition presented in the Directive.

The law clarifies that a person should not be considered to be an intermediary 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) Person

The Danish MDR legislation also contains a definition of the term “person”. In this regard, a “person” will include any natural or legal person, an association of persons that do not have legal personality but can carry out legal actions or any other form of legal arrangement irrespective of nature or form. As such, the definition is broadly cast, which is relevant in the context of the definition of an intermediary or relevant taxpayer.

3) First step in the arrangement

The proposals published by the Danish Minister of Taxation provide an indication of the meaning of when “the first step in the arrangement” is deemed to be taken. This definition is important in the context of determining when a reporting obligation is triggered.

In this regard, the comments published on the proposal clarify that the first step in the arrangement will depend on the facts and circumstances of the case. An example is provided of an intra-group transfer of functions. In this case, a decision made by the parent company to complete the transfer could be considered to be the first step in the arrangement.

In contrast, a management decision to discuss a transfer of functions with external third parties would not be regarded as the first step in the arrangement.

4) Value of the arrangement

The comments on the proposal indicate that, when an intermediary or relevant taxpayer is reporting, the value of the arrangement reported should be the value of the entire transaction as opposed to the tax benefit generated.

Hallmarks & Main Benefit Test

The list of hallmarks is aligned with Annex IV of the Directive. The main benefit test should apply to the category A and B hallmarks and paragraph 1(b)(i), (c) and (d) of the category C hallmarks).

A definition of the term “tax advantage” is not contained in the Danish MDR legislation. While the Danish legislation does not provide additional information on how the hallmarks should be interpreted, the comments to the proposal do provide some guidance:

- Hallmark A(3) (standardized documentation): the proposal notes that this hallmark is subject to the main benefit test and, while broadly defined, is targeted at arrangements that are intended to avoid tax and can be applied to a wide range of persons without substantial customization.
- Hallmark B(1) (loss-making companies): an example is provided of a reduction in a tax liability being achieved through the transfer of acquired losses to another jurisdiction or through the accelerated use of the losses that were acquired.
- Hallmark B(3) (circular arrangements): an example is provided of funds being invested abroad and re-invested in the country of origin to take advantage of favorable tax rates (e.g. provided to foreign investors).
- Hallmark C(1) (deductible cross-border payments): for Hallmark C(1)(b)(i), reference is made to the European Commission’s recommendation that the term “almost zero” should mean less than 1%.
- Hallmark C(2) (double depreciation): an example is provided of a leasing transaction where, due to differences in the treatment, a deduction for depreciation is available both in the jurisdiction of the lessor and in the jurisdiction of the lessee.
- Hallmark E(2) (hard-to-value intangibles): reference is made to the definition of hard-to-value intangibles contained in the OECD’s Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2017).
- Hallmark E(3) (intra-group transfers of functions, assets and risks): the proposal indicates that compensation received as a result of the transfer should not be included in the calculation of EBIT.

Reporting - Intermediaries

An intermediary will only have a reporting obligation in Denmark if they meet one of the following conditions:

- 1) tax residence in Denmark;
- 2) permanent establishment (PE) in Denmark through which the services with respect to the arrangement are provided;
- 3) incorporation in Denmark; and
- 4) registration with a professional association in Denmark.

In the case of (2), (3) and (4) above, the intermediary would qualify as a reporting entity in Denmark only if it is neither resident in any other EU Member State, nor has a permanent establishment in another EU Member State through which the services are provided.

An intermediary will not be required to report if:

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

The Danish legislation does not clarify what evidence is deemed sufficient to convincingly demonstrate that reporting was completed by another intermediary.

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

The information that is required to be disclosed by an intermediary largely mirrors the requirements of the Directive. The Danish legislation states that a standard form will be developed which will be required to be filed electronically.

In addition, the legislation clarifies that the information can be reported in Danish or English. However, in line with the requirements of EU Implementing Regulation 2019/532 of March 28, 2019, the following information must be reported in English:

- details of the hallmarks that make the cross-border arrangement reportable;

- a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy; and
- details of the national provisions that form the basis of the reportable cross-border arrangement.

Legal Professional Privilege

Intermediaries may be granted a waiver from filing information based on legal professional privilege to the extent the intermediary qualifies as a “lawyer” as defined by the relevant Danish law.

However, where the intermediary would, in the absence of a requirement to maintain client confidentiality, have a reporting obligation under the Danish MDR provisions, the intermediary is required to notify other intermediaries or relevant taxpayers that legal professional privilege is being claimed. A timeline for making this notification is not set out in the Danish legislation.

Where multiple intermediaries are involved in the arrangement, the intermediary relying on legal professional privilege is required to inform the other intermediaries of their reporting obligations. If no other intermediaries are involved, the notification should be made to the relevant taxpayer. In addition, the exempt intermediary is required to provide a copy of the reportable information in writing to the relevant taxpayer.

The intermediary is required to notify the relevant taxpayer of the timeline in which the taxpayer is required to fulfil its reporting obligation. The intermediary is also required to report the information to the Danish tax authorities where the taxpayer fails to report the arrangement within the specified timeline and notify the taxpayer of this fact.

Reporting – Relevant Taxpayer

Reporting timelines for relevant taxpayers and the information that is required to be disclosed mirror the requirements of DAC6. Relevant taxpayers should also report on the use of reported arrangements each year.

A relevant taxpayer will be obliged to report arrangements in Denmark if it meets one of the following conditions:

- 1) Is liable to tax in Denmark by virtue of tax residency, PE, registered office or place of business;
- 2) Operates in Denmark through a PE, which benefits from the arrangement;
- 3) Receives income or profits in Denmark; or
- 4) Pursues an activity in Denmark.

In the case of (2) above, a taxpayer qualifies as a relevant taxpayer in Denmark only if it is not liable to tax in another EU Member State.

In relation to (3) and (4) above, a taxpayer qualifies as a relevant taxpayer in Denmark only if it is neither liable to tax in another EU Member State, nor operating in another EU Member State through a permanent establishment which benefits from the arrangement.

A taxpayer will not be required to report if:

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

The Danish legislation does not clarify what evidence is deemed to be sufficient.

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; or
2. The taxpayer that is managing the implementation of the arrangement.

Registration with Danish Tax Authorities

Where an intermediary or relevant taxpayer has a reporting obligation in Denmark, the intermediary or taxpayer must notify the Danish tax authorities of the filing requirement within eight days.

The notification should be made electronically via a special form that can be obtained from the Danish tax authorities.

Penalties

The Danish DAC6 legislation provides for penalties for intermediaries and relevant taxpayers that fail:

- To provide correct and accurate information;
- To fulfil their reporting obligations in a timely manner;
- To notify intermediaries or relevant taxpayers of their reporting obligation where legal professional privilege applies;
- To file a report where a relevant taxpayer fails to do so (in cases where legal professional privilege applies); and
- To register with the Danish tax authorities within the eight day time limit.

The level of penalties corresponds to those applicable for a violation of the Danish Anti-Money Laundering Act. These penalties are graduated and based on turnover.

The legislation contains a guiding minimum for each category (approx. EUR 6,700 for the lowest category of default and approx. EUR 54,000 for the top category of default).

According to the comments on the proposal made by the Danish Minister of Taxation, it will be a matter for the Danish courts to determine the applicable penalty. This determination should take into account the suggested penalty ranges above and also the value of the tax arrangement and any mitigating or aggravating circumstances.

Penalties for taxpayers should be 50% of the penalties that are applied to intermediaries.

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

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