



EU Direct Tax Newsalert

Portugal – Revised draft law transposing DAC6

Following the end of the public consultation period, the draft law implementing DAC6 was amended extensively. We highlight below the main differences of the new draft compared with the first draft law, as well as the position of Portugal in view of DAC6:

Highlights on the new draft law

- Reportable Arrangements: Same as cross border arrangement, purely domestic arrangements are also reportable (thus deviating from DAC6) insofar they meet hallmarks B to E; different from the first draft law, the new draft establishes that hallmark A (generic hallmarks linked to the main benefit test) is not relevant in case of purely domestic arrangements.
- Main Benefit Test: Different from the first draft law and deviating from DAC6 by narrowing the situations covered, the Main Benefit Test is only satisfied if it can be established that, beyond a reasonable doubt, 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.
- Tax Advantage: Different from the first draft law and deviating from DAC6, both silent in this regard, the new draft law defines as “tax advantage” any reduction, elimination or tax deferral, including the use of tax losses or the granting of tax benefits that would not be granted fully or partially, without the use of the mechanism.
- Intermediary: Deviating from DAC 6 and from the first draft, the new draft establishes that a person is not deemed to be an intermediary in case it provides only a description of the tax regime applicable; as in the first draft, but again deviating from DAC6, the new draft establishes that an entity is not regarded as an intermediary if it provides advice strictly connected with an existing tax situation of the relevant taxpayer.

Professional Privilege: While the first draft disregarded all types of professional privilege or legal secrecy, the new draft took a U-turn now establishing that in case any professional privilege or confidentiality clauses apply the reporting obligations are shifted to the relevant taxpayer; the new draft further

establishes that in case the relevant taxpayer does not comply with this obligation the reporting obligation is then shifted to the intermediary.

- Limitation of liability: Now in line with DAC6, the new draft removed a hallmark established by the first draft regarding limitation of liability; the first draft considered as reportable an arrangement involving the exclusion or limitation of liability of the relevant taxpayer, the intermediary or any other participant in the arrangement.
- Hallmark in cross border transactions:
 - Deviating from DAC 6, under the first draft an hallmark was also met in case of deductible payments made to an entity resident in a jurisdiction included in the Portuguese blacklist; this specific reference was removed in the new draft thus the conditions to meet the hallmark are now in line with DAC6 (reference is made to the OECD and EU lists of non-cooperative jurisdictions);
 - Zero or almost zero tax rate: as allowed under DAC6, according to the new draft law a zero or almost zero tax rate is a nominal tax rate lower than 1%; in the first draft, this definition also included a reference to an effective taxation of 60% or lower than the tax that would be due in Portugal.

Next steps and takeaways

Although Portugal is already non-compliant as DAC6 was not yet implemented in domestic law, the new draft law is still at the Parliament for discussion in details. Amendments to the reporting deadlines are now expected upon publication of the Council Directive setting out deferrals of the reporting and exchanging of information deadlines for mandatory disclosure rules under DAC6.

Despite lack of enactment, multinationals and large national companies have already started to assess potentially reportable cross border arrangements whose first implementation step has occurred or occurs on or after 25 June 2018, as well as those that may have taken place after that date.

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