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DAC6: Directive on Administrative Cooperation - The requirements - Reporting checklists

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THE HISTORY:

Cyprus transposed the Council Directive (EU) 2018/822 amending Directive 2011/16/EU (**"DAC 6"**) into domestic law through the adoption of law N. 41(I)/2021 (the "Law") amending the Law on Administrative Cooperation in the field of Taxation (Law N. 205(I)/2012 and the amended law referred to hereinafter as the **"MDR Law"**).

On 1 January 2021 the Law entered into effect, but, in certain cases, it will have a retrospective effect on arrangements concluded on or after 25 June 2018[1].

The Cypriot Ministry of Finance issued a Decree[2] to provide guidance and clarifications on the MDR Law provisions. The MDR Law is aligned with the provisions of DAC6 with certain exceptions as indicated below.

PURPOSE:

The aim of DAC6 is to reduce international tax evasion by identifying and reporting reportable cross-border arrangements, enhancing transparency and mandating automatic exchange of information between Member States of the EU, as well as reducing uncertainty over beneficial ownership.

The tax element in the reportable cross-border arrangement need not be of benefit to the taxpayer himself but can be of benefit to the relevant arrangement and this is sufficient in itself to categorise the arrangement as a reportable cross-border arrangement.

WHAT TO REPORT:

The Directive: Methods to determine whether one is dealing with a reportable cross-border arrangement:

1. Pursuant to the Law, a cross-border arrangement is one which concerns more than one Member State or a Member State and under certain conditions, a third country.

2. Once the arrangement has been identified as cross-border, one needs to determine whether it is **reportable**. To be reportable, the arrangement needs to meet one of the hallmarks set out in Annex IV of the Directive[3], some of which require a further satisfaction of the Main Benefit Test whereas others trigger the reporting obligation themselves without any additional test.

What is the Main Benefit Test (MBT):

Pursuant to the Directive, the MBT is satisfied if it can be established that the main or one of the main benefits reasonably expected to arise from the arrangement, taking into consideration all relevant facts and circumstances, is the obtaining of a tax advantage.

The MBT compares the value of the expected tax advantage with any other benefits likely to be obtained from the transaction and has the advantage of requiring an objective assessment of the tax benefits.

[1] Any reportable arrangements of which the first implementation step takes place between 25 June 2018 and 30 June 2020 need to be reported by 31 August 2020.

[2] Decree N.438/2021

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The tax advantage relates to taxes imposed by or on account of Cyprus or another Member State or (where Member State is Federal) its subdivisions.

It is clarified that the Law does not apply to value added tax (VAT), customs duties, excise duties and compulsory social security contributions. The Directive sets out a minimum standard and allows Member States to extend the scope of taxes covered.

Burden of reporting:

The obligation to report such reportable cross - border arrangements is placed upon the Intermediaries[4] in certain cases and on the taxpayers where there is no Intermediary involved or the Intermediaries are exempt from reporting[5] (e.g. Legal Professional Privilege).

The deadline for reporting is set at 30 days after the trigger event.

According to the definition in the Law the term Intermediary includes any person that:

a/ designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement, or

b/ taking into account all facts and circumstances, available information as well as the relevant expertise and understanding required to provide such services as described in (a) above, knows or can reasonably be assumed to know that it has undertaken to provide assistance or advice related to services described in (a) above.

Note that any person may provide evidence to the effect that he/she did not know and could not have reasonably been assumed to know he/she was participating in a reportable cross-border arrangement. One can refer to the circumstances but also to the relevant expertise and understanding of the arrangement by such person. How easily the national tax department can be convinced of such absence of knowledge is yet to be tested and great caution must be exercised by any person who can be deemed to be an Intermediary.

Where there is no Intermediary involved in the relevant reportable cross-border arrangement, or the Intermediary is exempt from the obligation to report, reporting will be done by the taxpayer.

The reporting is made to the relevant tax authority and the Directive mandates automatic exchange of such information between Member States.

[3] The Hallmarks are categorised as follows: Generic Hallmarks linked to the MBT, Specific Hallmarks linked to the MBT, Specific Hallmarks linked to Cross-Border Arrangements, Specific Hallmarks Concerning the Automatic Exchange of Information and Beneficial Ownership (no MBT test) and Specific Hallmarks concerning Transfer Pricing (no MBT).

[4] See definition of "Intermediary" in Law 2015(I)/2012 as amended.

[5] (205(I)/2012) Section 7D (5)(a) of Law 205(I)/2012 as amended

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We, at C.D. Messios LLC can advise you on your obligations to report and can assist you by providing you with a step-to-step checklist on identifying transactions which are reportable under the Directive.

The current article is for informational purposes only and does not constitute legal advice.

For specialised legal advice please contact
Sabina Timotheou
sabina@messios.com

or **Samantha Hellicar**
samantha@messios.com

Contact Details

36 Ayias Elenis Street
Suite 401, 4th floor
Galaxias Commercial Centre
1061 Nicosia, Cyprus
P.O. Box 27034
CY-1641, Nicosia, Cyprus

T +357 22460446
F +357 22761176
E messios@messios.com
www.messios.com