



Cyprus Tax News

Tax Intermediaries' Directive enters into force on 25 June 2018

On 13 March 2018, the EU Member States reached political agreement on the tax intermediaries' directive ("the Directive"). The Directive was formally adopted by the EU Council on 25 May 2018 as an amendment to Council Directive 2011/16/EU on administrative cooperation in the field of taxation. The Directive, commonly known as "**DAC6**", provides for the mandatory automatic exchange of information in the field of taxation with respect to reportable cross-border arrangements.

Cyprus is expected to transpose the Directive into its national legislation by 31 December 2019.

WHY WAS IT INTRODUCED?

The Directive reflects the objectives of Action 12 of the BEPS Action Plan and is designed to enhance transparency to prevent aggressive cross-border tax planning.

WHO DOES IT TARGET?

The Directive targets any person ("**intermediary**") who designs, markets, organizes, makes available for implementation or manages the implementation of potentially aggressive tax-planning arrangements. Such persons may include, but are not limited to, tax advisors, accountants, banks, lawyers that are resident in the EU.

WHAT IS IT ABOUT?

The Directive requires intermediaries to report to the tax authorities of EU member states, "potentially aggressive" cross border tax-planning arrangements that contain specific broadly defined criteria ("**hallmarks**"), with penalties imposed for non-compliance.

HOW WILL IT WORK?

Reportable cross-border tax-planning arrangements will be reported by the intermediaries to the tax authorities in the country in which they are resident. The latter will then automatically share the information with the Tax Authorities of all other member states on a quarterly basis. Penalties will be imposed on intermediaries who do not comply with the transparency measures.

If the taxpayer develops the arrangement in-house, or is advised by a non-EU adviser, or if legal professional privilege applies, the requirement to report will fall on the taxpayer.

TIMEFRAME

25 June 2018: Directive enters into force

31 December 2019: Deadline for EU Member States to transpose the Directive into their domestic law

1 July 2020: Date of application of the provisions (effective date)

31 August 2020: First deadline for the reporting of arrangements held between 25 June 2018 and 1 July 2020

31 October 2020: First exchange of reports between Member States

THE DETAILS

Key features of the Directive

Reportable cross-border arrangements

A "cross-border arrangement" is an arrangement that involves more than one EU member state or a member state and a third country where at least one of the following conditions is fulfilled:

- Not all participants are resident for tax purposes in the same jurisdiction;
- One or more of the participants is simultaneously resident for tax purposes in more than one jurisdiction;
- One or more of the participants carries on a business in another jurisdiction through a permanent establishment (PE) in that jurisdiction and the arrangement forms part or all of the business of that PE;
- One or more of the participants carries on an activity in another jurisdiction without being resident for tax purposes or creating a PE in that jurisdiction; and
- The arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

A "reportable cross-border arrangement" is one that contains at least one of the designated "hallmarks," i.e. criteria that indicate a potential risk for tax avoidance (see below).

The directive covers arrangements involving all types of direct tax, including corporate, personal, capital gains and inheritance tax.

Intermediaries

The directive defines an "intermediary" as any person who designs, markets, organizes, makes available for implementation or manages the implementation of a reportable cross-border arrangement. Significantly, the definition extends to a person who knows or could be reasonably expected to know that he/she has undertaken to provide, directly or indirectly, the designing, marketing, organizing, making available for implementation or managing of the implementation of a reportable arrangement.

To be subject to the reporting rules, an intermediary also must: (i) be resident in a member state; (ii) provide the services through a PE in a member state; (iii) be incorporated in or governed by the laws of a member state; or (iv) be registered with a professional association related to legal, taxation or consultancy services in a member state.

If there are several intermediaries involved in a reportable arrangement, each intermediary will have to report it to the relevant tax authorities, unless they can prove that the same information already has been reported.

If the intermediaries are covered by local rules relating to legal professional privilege or if no tax intermediary is involved in a covered arrangement (i.e. either the reportable arrangements were developed in-house or all intermediaries are based outside the EU), the reporting obligation will fall on the relevant taxpayer, subject to the same deadlines as apply to tax intermediaries.

Hallmarks of reportable arrangements

An arrangement will have to be reported if it features at least one of the indicators or "hallmarks" outlined in Annex IV of the directive.

Certain hallmarks would be subject to a "*main benefit test*", which would be satisfied if it can be established that the main benefit or one of the main benefits a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage. The following are some of the hallmarks that would be linked to the main benefit test:

- *Generic hallmarks*, including the existence of confidentiality clauses, contingent fees and standardized structures that would require limited customization for implementation;
- *Specific hallmarks* relating to the transfer of losses or conversion of income into other categories of revenue that are taxed at a lower level or are exempt from tax (e.g. capital gains, gifts) or transactions that result in the round-tripping of funds; and
- *Certain hallmarks* relating to cross-border transactions, such as transactions involving a jurisdiction that does not impose corporate tax or imposes corporate tax at the rate of zero or almost zero, or where a payment benefits from a full exemption from tax or from a preferential regime in the jurisdiction where the recipient is established for tax purposes.

Other hallmarks not subject to the main benefit test would include:

- Deductions for the same depreciation or relief from double taxation claimed in more than one jurisdiction;
- Hallmarks relating to transactions that aim at circumventing existing obligations on exchange of information or on beneficial ownership;
- Hallmarks involving non transparent legal or beneficial ownership arrangements or structures, and
- Hallmarks concerning transfer pricing, including transfer of hard-to-value intangibles and also arrangements involving an intragroup cross-border transfer of functions, risks, and/or assets, if the transfer is estimated to reduce the earnings before interest and taxes of the transferor by 50% or more during the three-year period after the transfer.

Reporting and exchange of information

Tax intermediaries will have to report arrangements that fall within the scope of the directive within 30 days after the arrangement is made available for implementation/ready for implementation or the first step in the implementation has taken place (although in certain situations, the intermediary will be required to submit a report every three months). Where an intermediary (or taxpayer) is required to submit information on covered arrangements with the competent authorities of more than one member state, the information must be filed with one member state according to a specified hierarchy.

Information on the arrangement would include:

- Identification of the intermediaries and relevant taxpayers, including their names, dates and place of birth (in case of an individual), residence for tax purposes, taxpayer identification numbers and, where appropriate, persons that are associated enterprises of the relevant taxpayer;
- Details of the hallmarks that make the cross-border arrangement reportable;
- Summary of the arrangement, including a reference to the name by which it is commonly known (if any) and a general description of the relevant business activities or arrangements, without leading to the disclosure of business secrets or processes that would be contrary to public policy;
- Date the first step in implementing the arrangement was or will be made;
- Details of the member state provisions that form the basis of the arrangement;
- Value of the arrangement;
- Identification of the member state of the relevant taxpayer(s) and any other member states that are likely to be concerned by the arrangement, as well as any other person likely to be affected by the arrangement including to which member state(s) that person is linked.

Member state tax authorities are required to exchange information automatically about the reportable cross-border arrangement within one month from the end of the quarter in which the information was filed, with the first exchanges to take place by 31 October 2020. The quarterly exchanges, made through a centralized EU database, should help to ensure that potentially aggressive tax planning arrangements are brought to the attention of the tax authorities before the schemes are implemented.

Comments

Taxpayers and intermediaries should closely monitor all potentially reportable cross-border arrangements in light of the above provisions of the Directive, as well as the transposition and implementation process at the EU member state level.

We are at your disposal to discuss the above developments with you.

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