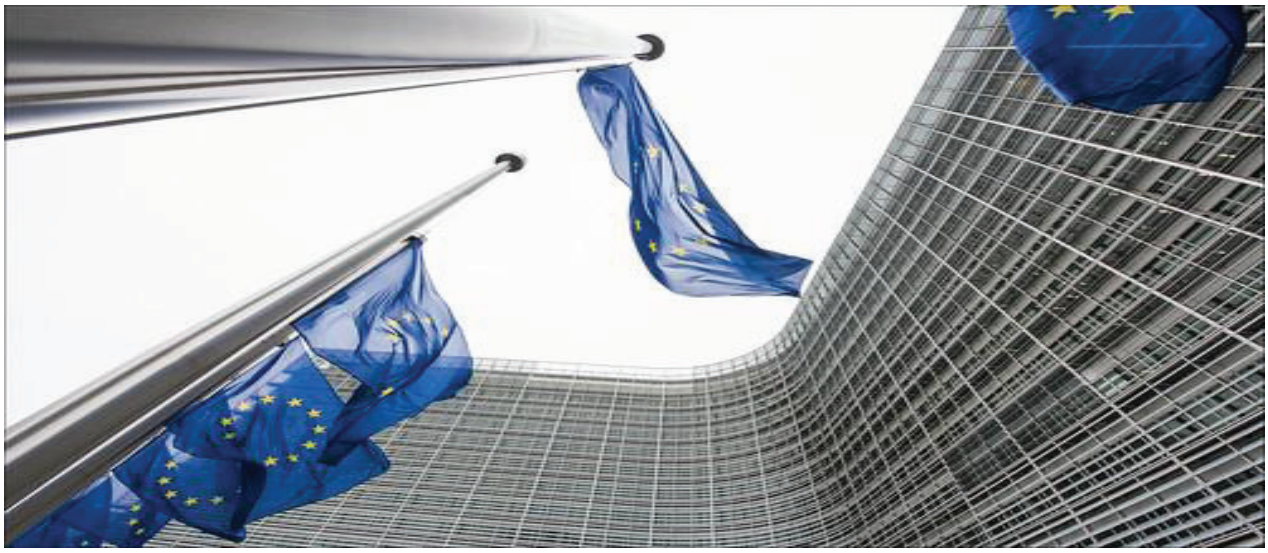
CONSTANTINOU-PANAYIOTOU
ADVOCATES-LEGAL CONSULTANTS

DAC6 NEWSLETTER



What is DAC6?

The Council of the European Union (EU) has adopted Directive 2018/822 (DAC6 or the Directive) on the mandatory disclosure and exchange of cross-border tax arrangements. It sets out to strengthen transparency in the tax ecosystem. DAC6 compliance is a continuous marathon for taxpayers and it's part of the "new normal" of the tax ecosystem.

The information about the cross border reportable arrangements will be automatically exchanged between the EU Member States. DAC6 has broadened the reporting requirement by imposing reporting obligations on the intermediaries who are involved in certain reportable cross-border arrangements (RCBA) and requires reporting detailed information on a broad range of cross-border tax arrangements.

The Republic of Cyprus has published draft legislation to transpose Directive 2018/822/EU.

What are the key provisions of the DAC6 Directive?

Given that the obligation to report seems to mainly fall on intermediaries, it is important to know which intermediaries are included in the scope of the DAC6 Directive. An intermediary is anyone:

- that designs, markets, organizes or makes available for implementation or manages the implementation of an RCBA; or
- that provides, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of an RCBA.

A "cross-border arrangement" means an arrangement between at least one member state and another country (EU or non-EU), pursuant to meeting at least one of the prescribed conditions.

A "reportable cross-border arrangement" (RCBA) means any cross-border arrangement that contains at least one of the hallmarks in categories A through E.

Also important to define is an "intermediary," which is a taxpayer that meets one of the following conditions in a member state:

1. tax resident;
2. permanent establishment (PE);
3. incorporated, or governed; or
4. registered with a professional association re: legal, tax, or consulting

Notwithstanding the fact that the purpose DAC6 seems to be to establish a reporting obligation for intermediaries, there are certain situations where the reporting obligation will fall on the taxpayers themselves. For example, if an RCBA is planned and executed in-house, no intermediary will be involved, therefore the obligation will fall upon the taxpayer. Similarly, if the relevant intermediary can invoke legal professional privilege, then the obligation to report falls on the taxpayer.

Despite the fact that DAC6 has not yet been implemented in local law, it is already in force unofficially, since it covers cross-border arrangements that took place after June 25th 2018. As such, intermediaries will need to evaluate whether cross-border arrangements that took place after June 25th 2018 are reportable.

Hallmarks

In order for a cross-border arrangement to be reportable, it must contain one of the hallmarks outlined by the DAC6. The hallmarks are essentially five categories of potential characteristics of an arrangement, which could indicate aggressive tax planning. However, some of the hallmarks will only be reportable if they satisfy the main benefit test i.e. if it can be established that 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. Although the scope of each of the hallmarks seems to be quite broad, DAC6 lacks guidance or examples, which will likely mean that each Member State, including Cyprus, will end up implementing slightly different versions of DAC6. As such, it is expected that, at least in the beginning, the information being reported will necessarily differ from nation to nation.

The hallmarks, are divided into five distinct categories:

A. Generic hallmarks linked to the main benefit test

B. Specific hallmarks linked to the main benefit test

C. Specific hallmarks related to cross-border transactions (some of which are linked to the main benefit test)

D. Specific hallmarks concerning automatic exchange of information and beneficial ownership

E. Specific hallmarks concerning transfer pricing

Deadlines

The person(s) with whom the reporting obligation lies is required to file the information with the relevant authorities within 30 days, beginning on: a) the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or b) is ready for implementation by the relevant taxpayer, or c) when the first step in its implementation has been made in relation to the relevant taxpayer, whichever occurs first. Persons that do not qualify as an intermediary but have provided assistance with respect to a reportable cross-border arrangement — the secondary definition mentioned above — will be required to file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.

What information will be disclosed

A standard form for the exchange of information developed by the European Commission includes the following: the identification of the taxpayers and intermediaries involved; the hallmark(s) that generated the reporting obligation; a summary of the arrangement; details of the relevant domestic tax rules; the date on which the first step in the implementation was made; the value of the arrangement; and identification of any other person or Member State likely to be affected by the arrangement. National tax authorities of all Member States have access to the directory. However, the exchanged information will not be made available to the public

and the Commission will only have access to it insofar as needed for the monitoring of the functioning of the Directive.

Why is this legislation important to Cyprus professionals?

DAC6 now requires Cyprus professionals to exercise caution and monitor cross-border arrangements in order to decide whether they meet the hallmark criteria of DAC6. In the event that this is the case, an arrangement may become reportable to the tax authorities. If multiple intermediaries are involved for the implementation of an RCBA or a series of RCBAs, then co-ordination between all intermediaries will be essential in order to ideally avoid multiple reports on the same arrangement.

Penalties

Since currently the Cypriot DAC6 draft law transposing the DAC6 Directive is still in draft form, it is expected that a penalty ranging between €10.000 and €20.000 will apply.

Other penalties in relation to delays in reporting, failure to notify other intermediaries, for incomplete or misleading report, and failure to pay any fines are also expected to range between €1.000 and €20.000.

NOTE: DAC6 backlog transactions obligation for assessment and possible reporting applies to all companies, either in good standing, liquidated, dissolved, or transferred out from our administration (covered period 25/06/2018-30/06/2020).

Contact: If you would like more information about how GCPLAW can help you, feel free to contact:

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Overview of the hallmarks

Hallmark	Broad description of what the hallmark entails
Category A: Generic hallmarks linked to the main benefit test	
A.1 MBT	An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.
A.2 MBT	An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to: (a) the amount of the tax advantage derived from the arrangement; or (b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.
A.3 MBT	An arrangement that has substantially standardized documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customized for implementation.
Category B: Specific hallmarks linked to the main benefit test	
B.1 MBT	An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a lossmaking company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.
B.2 MBT	An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.
B.3 MBT	An arrangement, which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.

Category C: Specific hallmarks related to cross-border transactions	
C.1	An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:
C.1a	The recipient is not resident for tax purposes in any tax jurisdiction;
C.1b.i MBT	Although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero and the arrangement meets the main benefit test.
C.1b.ii	Although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative.
C.1c MBT	The payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes and the arrangement meets the main benefit test.
C.1d MBT	The payment benefit from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes and the arrangement meets the main benefit test.
C.2	Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.
C.3	Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.
C.4	There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

Category D: Specific hallmarks concerning automatic exchange of information and beneficial ownership	
D.1	An arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of Financial Account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. Such arrangements include at least the following: (a) the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account; (b) the transfer of Financial Accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of Financial Account information with the State of residence of the relevant taxpayer; (c) the reclassification of income and capital into products or payments that are not subject to the automatic exchange of Financial Account information; (d) the transfer or conversion of a Financial Institution or a Financial Account or the assets therein into a Financial Institution or a Financial Account or assets not subject to reporting under the automatic exchange of Financial Account information; (e) the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of Financial Account information; (f) arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.
D.2	An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures: (a) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and (b) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and (c) where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable.

Category E: Specific hallmarks concerning transfer pricing	
E.1	An arrangement which involves the use of unilateral safe harbor rules
E.2	An arrangement involving the transfer of hard-to-value intangibles. The term "hard-to-value intangibles" covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises: (a) no reliable comparable exist; and (b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.
E.3	An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 % of the projected annual EBIT of such transferor or transferors if the transfer had not been made.