ΓΕΝΙΚΗ ΕΓΚΥΚΛΙΟΣ:	**10/2020 [ΓΕ 10_2020]**
Προς:	**ΟΛΑ ΤΑ ΜΕΛΗ ΤΟΥ ΣΥΝΔΕΣΜΟΥ**
Ημερομηνία:	**27 Μαΐου 2020**
Θέμα:	**Οδηγία (ΕΕ) 2018/822 για την υποχρεωτική αυτόματη ανταλλαγή πληροφοριών στον τομέα της φορολογίας σχετικά με δηλωτέες διασυνοριακές ρυθμίσεις [DAC 6]**

Σύνδεσμος Εγκεκριμένων Λογιστών Κύπρου (ΣΕΛΚ) με την παρούσα εγκύκλιο επιθυμεί να επιστήσει την προσοχή όλων των Μελών στο πιο κάτω ενημερωτικό σημείωμα που ετοιμάστηκε από την Επιτροπή Φορολογικού Σχεδιασμού και Πολιτικής του ΣΕΛΚ σε σχέση με την Οδηγία (ΕΕ) 2018/822 του Συμβουλίου της 25ης Μαΐου 2018 για την τροποποίηση της Οδηγίας 2011/16/ΕΕ όσον αφορά την υποχρεωτική αυτόματη ανταλλαγή πληροφοριών στον τομέα της φορολογίας σχετικά με δηλωτέες διασυνοριακές ρυθμίσεις, γνωστή και ως DAC 6.

Η παρούσα αποστέλλεται για ενημέρωση των Μελών σε σχέση με την πιο πάνω Οδηγία, ενόψει και της επικείμενης έναρξης της εφαρμογής της (1 Ιουλίου 2020) και της πρώτης υποβολής της έκθεσης (31 Αυγούστου 2020).

Αξίζει να σημειωθεί ότι, λόγω της κατάστασης που έχει δημιουργηθεί με την εξάπλωση της πανδημίας του ιού COVID 19, η Ευρωπαϊκή Επιτροπή εξετάζει το ενδεχόμενο να παραχωρηθεί παράταση στην εφαρμογή μέχρι και 6 μήνες.

Αναμένεται επίσης, ότι το σχετικό νομοσχέδιο θα κατατεθεί στη Βουλή των Αντιπροσώπων σύντομα, έτσι ώστε να μεταφερθεί η Ευρωπαϊκή Οδηγία σε εθνικό δίκαιο πριν από την επίσημη εφαρμογή της Οδηγίας.

Ο ΣΕΛΚ επιθυμεί επίσης να κοινοποιήσει για ενημέρωσή σας, την ανακοίνωση που εκδόθηκε από το **Τμήμα Φορολογίας** για την ενδεχόμενη παράταση ημερομηνίας υποβολής στοιχείων αναφορικά με την Αυτόματη Ανταλλαγή Φορολογικών Πληροφοριών. Η ανακοίνωση είναι διαθέσιμη μέσω του ακόλουθου συνδέσμου.

Περισσότερες πληροφορίες θα κοινοποιηθούν σε κατοπινό στάδιο.

Ενημερωτικό Σημείωμα

Mandatory Disclosure Requirements for Intermediaries

On May 25, 2018, the most recent amendments to the **Directive on administrative cooperation in the field of taxation ("DAC 6"),** which introduces mandatory disclosure requirements for tax intermediaries, were formally adopted by the Economic and Financial Affairs Council (ECOFIN). The Directive **(COUNCIL DIRECTIVE (EU) 2018/822 of 25 May 2018)** has entered into force on June 25, 2018.

Member States have until December 31, 2019 to change their domestic law, which will be applicable from July 1, 2020. However, intermediaries and relevant taxpayers will also be required to disclose information on reportable cross-border arrangements, the first step of which was implemented between the date of entry into force of the Directive (June 25, 2018) and the date of application (**July 1, 2020**). This information should be filed by **August 31, 2020**.

There is currently a discussion at an EU level for deferring the July 1st deadline for a period of three to six months due to the devastating effect of COVID 19 and the inevitable shifting of attention by companies to other pressing matters that have arisen as a result of the pandemic.

Background

In the light of recent revelations on harmful practices and the use of offshore companies (the so-called "Lux Leaks", "Panama Papers" and "Malta Leaks"), the

European Parliament, in its July 2016 resolution on tax rulings, has called on the Commission to introduce tougher transparency requirements for intermediaries. The ECOFIN Council also invited the Commission to consider initiatives on mandatory disclosure rules in line with those proposed by the OECD in Action 12 of the Base Erosion and Profit Shifting (BEPS) initiative.

On June 21, 2017, the European Commission published its proposal for mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. The proposal comes in the form of an amendment to the Directive on Administrative Cooperation in the field of taxation (the DAC) and introduces an obligation on intermediaries and, in certain cases, taxpayers, to disclose potentially aggressive tax planning arrangements and also the means for tax administrations to exchange information on these structures. This is the latest in a series of EU initiatives in the field of automatic exchange of information in tax matters:

Council Directive

While the Commission recognizes that some cross-border transactions and structures are used for genuine reasons, it also notes that others may not be legitimate. It is therefore considered necessary for intermediaries – or the relevant taxpayers, in the absence of an intermediary, to be required to report to the tax authorities on potentially aggressive tax planning arrangements in which they are involved.

Disclosure obligation

Who bears the burden of disclosure?

The primary obligation to disclose this information to the tax authorities rests with the "**intermediary**". An intermediary is defined as "***any person that designs,***

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

The definition is also extended to "***any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could reasonably not be expected to know that this person was involved in a reportable cross-border arrangement. For this purpose, a person may refer to all relevant facts and circumstances as well as available information and its relevant expertise and understanding***".

In addition, at least one of the following conditions must be met in order for a person to qualify as an intermediary:

- Be resident for tax purposes in a Member State;
- Have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;
- Be incorporated in, or governed by the laws of a Member State; or
- Be registered with a professional association related to legal, taxation or consultancy services in a Member State.

The above list is also relevant for cases where an intermediary is liable to file information on reportable cross-border arrangements in more than one Member State, in which case disclosure will only be made in the Member State that features first in the list. The intermediary will be exempt from the reporting obligation in any other Member State, subject to proof that the information has been filed in another

Member State. There is also an exemption where the intermediary is covered by legal professional privilege.

In the absence of an intermediary (e.g. the obligation is not enforceable upon an intermediary due to legal professional privilege, the intermediary is located outside the EU or because an arrangement is developed in-house), the obligation to disclose falls on the relevant taxpayer. A "relevant taxpayer" is defined as "any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement". Note that the disclosure requirement is not limited to reportable cross-border arrangements made available to EU taxpayers (but it does have to involve at least on EU Member State).

Regarding the legal professional privilege waiver, the text refers to the domestic law of each Member State. Member States must also ensure that exempt intermediaries notify the relevant taxpayer or another intermediary to which the obligation is passed on, of their disclosure responsibility.

Furthermore, in cases where there is more than one intermediary, the obligation to report lies with all intermediaries involved in the arrangement.

Where the reporting obligation falls on the relevant taxpayer and it arises in more than one Member State, the information should only be filed with the competent authorities of the Member State where in this order:

- the relevant taxpayer is resident for tax purposes, or
- where the relevant taxpayer has a permanent establishment (emphasis on the PE that benefits from the arrangement),
- where the relevant taxpayer receives income or generates profits,
- where the relevant taxpayer carries on an activity.

The last two situations featured in the list widen the reporting obligation to states where the relevant taxpayer is not resident for tax purposes and does not have a Permanent Establishment - PE.

Where there is more than one relevant taxpayer, the reporting obligation rests with the taxpayer that agreed the reportable cross-border arrangement with the intermediary, or – in its absence, with the taxpayer that manages the implementation of the arrangement.

In these cases, an intermediary or a taxpayer shall be exempt from the reporting obligation if it has proof that another intermediary (or taxpayer, respectively) has already reported that information in another Member State.

Disclosure deadline

The person(s) with whom the reporting obligation lies is required to file the information with the relevant authorities within 30 days, beginning on:

- the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or
- is ready for implementation by the relevant taxpayer, or
- 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 intermediary but have provided assistance with respect to a reportable cross-border arrangement – as described 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.

Qualifying arrangements

The scope of the Directive on Administrative Cooperation includes all taxes of any kind with the exception of VAT, customs duties, excise duties and compulsory social contributions.

Cross-border situations

According to the text, only "**cross-border arrangements**" must be disclosed, i.e. arrangements that affect more than one Member States or a Member State and a non-EU Member State, if disclosure requirements are met.

A (potentially aggressive) arrangement is reportable if it satisfies at least one of the features and elements that are considered an indication of tax avoidance or abuse – referred to as **'hallmarks'** and listed in Annex IV of the directive. Both generic hallmarks (under heading A) and specific hallmarks (under headings B to E) are listed. Certain hallmarks (under A, B and paragraph 1 of C) with exceptions can only be taken into account if a "main benefit" test is also satisfied.

The “main benefit” test

The “main benefit” test is satisfied 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.

Hallmarks

Generic hallmarks (under heading A) include arrangements where:

- The taxpayer undertakes to comply with a confidentiality condition (in relation to other intermediaries or the tax authorities);
- The intermediary is entitled to a fee contingent on either the amount of tax advantage derived from the arrangement or on the advantage being obtained;
- Standardized documentation (including standard forms) is used.

Specific hallmarks are classified as follows:

Heading B – Specific hallmarks linked to the main benefit test: the use of losses to reduce a taxpayer's tax liability, conversion of income into categories that are taxed at a lower level and circular transactions that result in the round-tripping of funds;

Heading C – Specific hallmarks relating to cross-border transactions:

- Cross-border payments between associated enterprises, where:
  The recipient is:
  a. not resident for tax purposes in any jurisdiction; or
  b. resident for tax purposes in a jurisdiction that:
     i. does not impose a corporate income tax, or imposes a CIT at a 0% rate or almost zero or,
     ii. is on list of countries which have been assessed either by the Member States collectively or by the OECD as non-cooperative, i.e. a blacklist;
  c. The payment benefits from a full exemption from tax in the recipient's jurisdiction.
  d. The payment benefits from a preferential tax regime.

The arrangements covered by points b) (i), c) and d) are subject to the main benefits test.

- The same asset is subject to depreciation in two or more jurisdictions;
- Relief from double taxation is claimed in different jurisdictions in respect of the same item of income or capital;
- An arrangement that includes transfers of assets and there is a material difference in the amount of consideration paid.

Heading D – Arrangements designed to circumvent automatic exchange of information and beneficial ownership (with reference to the definition in the AML Directive), which may have the effect of avoiding the reporting of income to the state of residence;

Heading E – Specific hallmarks on transfer pricing:

- Arrangements which involve the use of unilateral safe harbor rules;
- Arrangements involving the transfer of hard-to value intangibles;
- Arrangements involving an intra-group cross-border transfer of functions and/or risks, and/or assets, where the transfer results in a decline of 50% or more of EBIT in the transferring jurisdiction, over a period of three years.

Member States and the Commission will evaluate the relevance of these hallmarks every two years after the entry into force of the Directive (July 1, 2020). The Commission will present a report to the Council, together with a legislative proposal should the need arise for Annex IV to be amended.

Formal requirements to disclose and information exchange

What information should be disclosed?

A standard form will be developed and will include: the identification of the taxpayers and intermediaries involved, the hallmarks 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 as made, the value of the arrangement, 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. The Commission will hence not have access to the identification of intermediaries, relevant taxpayers and any other person likely to be affected by the arrangement (all of which is reportable), nor to information on the reportable cross-border arrangement.

It is noted that absence of reaction by a tax administration to a cross-border arrangement that was reported will not imply their acceptance of the validity or tax treatment of that arrangement.

Penalties for non-compliance

The text of the Directive leaves it to the Member States to lay down the rules on penalties applicable for infringements of the mandatory disclosure rules, with the only requirement that any penalties are effective, proportionate and dissuasive.

When will Mandatory Disclosure requirements become applicable?

The Directive was formally adopted during the ECOFIN meeting on May 25, 2018 and has entered into force on June 25, 2018.

Intermediaries and relevant taxpayers will be required to file information on reportable cross-border arrangements the first step of which was implemented between the date of entry into force (**June 25, 2018**) and the date of application of the Directive (**July 1, 2020**).

Once the Directive becomes applicable, the reported information will be automatically exchanged **quarterly** by the competent authorities of each Member State via a central directory on administrative cooperation in the field of taxation, to be developed by the Commission. The automatic exchange of information will take place within one month from the end of the quarter in which the information was filed, while the first information will be communicated by October 31, 2020.