

An aerial photograph of a rocky coastline with clear, turquoise water. A small white boat is visible in the upper center, and several people are swimming in the water. The water transitions from a deep blue to a lighter turquoise near the shore. The rocks are light-colored and jagged.

Malta

DAC 6 Domestic Implementation

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General information

Territory	Malta
Tax authority	Commissioner for Revenue
Status of legislation	<p>Implemented</p> <p>Reportable cross border arrangements made available for implementation/ ready for implementation/ advised on between:</p> <ul style="list-style-type: none">• 25 June 2018 and 30 June 2020 need to be reported by 1 March 2021• 1 July 2020 and 30 December 2020 need to be reported by 1 February 2021. <p>The Directive was transposed into Maltese domestic law through Legal Notice 342 of 2019 on 17 December 2019.</p> <p>The Guidelines on interpretation and administrative procedures were published by the Commissioner for Revenue (CfR) on January 2021.</p>
Taxes covered	Income Tax and Duty on Documents and Transfers.
Taxes excluded	Value Added Tax, custom duties, excise duties and compulsory social security contributions.
Domestic transactions	No

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Definitions further clarified by guidance

Relevant taxpayer	<p>The Subsidiary Legislation through which the Directive is transposed into Maltese Legislation, defines a 'relevant taxpayer' 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.</p> <p>The Guidelines published by the CfR clarifies that a relevant taxpayer has the obligation to disclose information in relation to a reportable cross-border arrangement where it has a nexus with an EU Member State, and:</p> <ul style="list-style-type: none">• an intermediary involved in the arrangement has the right of non-disclosure and waives the obligation to report and no other intermediary has the duty to report the arrangement in the EU; or• no intermediary (as defined in the Cooperation Regulations) is involved in the arrangement. <p>In this regard, it should be noted that an individual in-house tax advisor cannot qualify as an intermediary itself. If such advisors are employed by the taxpayer and devise an arrangement for the taxpayer, then the scheme would qualify as in-house and the person responsible for reporting would be the relevant taxpayer themselves.</p>
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Associated enterprise

The Subsidiary Legislation through which the Directive is transposed into Maltese Legislation, defines an 'associated enterprise' as:

A person who is related to another person in at least one of the following ways: (a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person; (b) a person participates in the control of another person through a holding that exceeds 25% of the voting rights; (c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25% of the capital; (d) a person is entitled to 25% or more of the profits of another person:

Provided that:

- If more than one person participates, as referred to in paragraphs (a) to (d), in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises
- If the same persons participate, as referred to in paragraphs (a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises
- For the purposes of this definition, a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person
- In indirect participations, the fulfilment of requirements under paragraph (c) shall be determined by multiplying the rates of holding through the successive tiers. A person holding more than 50% of the voting rights shall be deemed to hold 100%
- An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single person.

Marketable arrangement

The Subsidiary Legislation through which the Directive is transposed into Maltese Legislation, defines a 'marketable arrangement' as a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised.

The Guidelines entail that the key feature of a marketable arrangement is that it can be marketed and made available for use without the need for any substantial adjustments for a specific taxpayer. If a marketable arrangement is marketed by an intermediary and is then taken up by a client, additional reporting requirements will apply. In this respect, information in relation to the reportable cross-border arrangement will be reported initially when the arrangement is marketed and a further report would then need to be submitted when the client takes this up.

Cross-border arrangement

The Subsidiary Legislation through which the Directive is transposed into Maltese Legislation, defines a 'cross-border arrangement' as an arrangement concerning either more than one EU Member State or an EU Member State and a third country where at least one of the following conditions is met:

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

The Guidelines clarifies that, for an arrangement to fall within the definition of a cross-border arrangement it must 'concern' multiple jurisdictions, one of which should be an EU Member State.

In determining whether there is a cross-border element, a jurisdiction must be material to the arrangement. This will depend on the facts and circumstances of the particular arrangement. However, as a rule of thumb, if there are tax consequences in a particular jurisdiction triggered by an arrangement, then such arrangement will concern that jurisdiction.

Intermediary

The Subsidiary Legislation through which the Directive was transposed into Maltese legislation defines an 'Intermediary' as a person:

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

Provided that any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding.

In addition to the above, in order to be an intermediary, a person shall meet at least one of the following additional conditions:

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

Tax advantage

The Guidelines clarifies that the term 'tax advantage' is broadly interpreted and includes a repayment of tax, a tax relief, a reduction in the tax charge, a tax deferral or an absence of taxation. In interpreting this term, reference should also be made to the Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU).

It further clarifies that a tax advantage is considered for the purposes of the main benefit test to the extent that it is not consistent with the legislator's intention for the particular provision in terms of which the tax advantage is being obtained. In this regard, it is however necessary to look at the arrangement as a whole.

Made available for implementation

The Guidelines clarifies that an arrangement should be considered as 'made available' for implementation if it is capable of being implemented in practice and no further material amendments are expected before implementation by the relevant taxpayer.

In this regard, the fact that there are a number of options available to the relevant taxpayer, does not mean that the arrangement should not be considered as 'made available' for implementation if the relevant taxpayer can choose such option and proceed with its implementation without the need to make material changes to the proposed arrangement or to undertake further analysis.

Hallmark

The Subsidiary Legislation through which the Directive is transposed into Maltese Legislation defines a 'hallmark' as a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance.

3 Additional hallmarks

Additional hallmarks

None

4 Operation of legal profesional privilege (LPP)

Operation of legal profesional privilege (LPP)

An intermediary whose profession is referred to in article 3 of the Professional Secrecy Act has the right to a waiver from filing information on a reportable cross-border arrangement where the reporting of such information would constitute an offence under article 257 of the Criminal Code.

Article 3 of the Professional Secrecy Act - Members of a profession regulated by the Medical and Kindred, Professions Ordinance, advocates, notaries, legal procurators, social workers, psychologists, accountants, auditors, employees and officers of financial and credit institutions, trustees, officers of nominee companies or licensed nominees, persons licensed to provide investment services under the Investment Services Act, stockbrokers licensed under the Financial Markets Act, insurers, insurance agents, insurance managers, insurance brokers and insurance sub-agents, officials and employees of the State.

Operation of legal professional privilege (LPP)

Article 257 of the Criminal Code - Any person, who by reason of his calling, profession or office, becomes the depositary of any secret confided in him, shall, except when compelled by law to give information to a public authority, disclose such secret, he shall on conviction be liable to a fine not exceeding EUR 46,587.47 or to imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.

5 Reporting deadline

Intermediaries

Intermediaries shall file information that is within their knowledge, possession or control on reportable cross-border arrangements with the Commissioner for Revenue within 30 days beginning:

- on the day after the reportable cross-border arrangement is made available for implementation; or
- on the day after the reportable cross-border arrangement is ready for implementation; or
- when the first step in the implementation of the reportable cross-border arrangement has been made;

whichever occurs first.

Users (where LPP applies)

The intermediary must notify, without delay and in any event no later than 7 working days from the relevant date, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations.

Where an intermediary has waived such reporting obligation, the intermediary shall provide an annual update to the Commissioner for Revenue, consisting of a list of the reportable cross-border arrangements where the reporting obligation has been waived on to another intermediary or the relevant taxpayer.

6 Reporting principles for intermediary

Circumstances in which intermediary is obliged to report

The intermediary is obliged to report information that is within his/her knowledge, possession or control on reportable cross-border arrangements, unless he/she waives his/her obligation to report in terms of the provisions of Professional Secrecy, in which case an annual notification should be sent to the Cfr.

Obligation to inform user what data was communicated

The person submitting the said report should share the Arrangement ID with other intermediaries and relevant taxpayers as applicable, where such would have been requested.

Priority of reporting where multi member state reporting obligations exist

In case of multiple intermediaries involved in an arrangement, each and every intermediary has an obligation to report, unless an intermediary exercises the right of waiver allowed in terms of Professional Secrecy.

However, in order to avoid duplicate reporting, an intermediary that does not have or does not exercise the right of waiver, will in any case be exempt from the obligation to file a return with the CfR where the same information is filed by another intermediary.

Circumstances under which intermediary not required to report

The intermediary is not required to report in the following instances:

- Where there is more than one intermediary, provided that proof that the same information has already been filed by another intermediary
- Where the intermediary has his profession referred in Article 3 of the Professional Secrecy Act and has waived his obligation to report a reportable cross border arrangement (where the reporting of such information would constitute an offence under article 257 of the Criminal Code).

The intermediary shall also be exempt from filing the information if he is bound by legal professional privilege and has notified the other intermediaries or in absence thereof, the relevant taxpayer.

What will the tax authorities provide for the notification received

The Guidelines clarifies that upon submission of a report that has passed all validation checks, an arrangement reference number ('Arrangement ID') will be assigned to the arrangement. In addition, a disclosure reference number ('Disclosure ID') will be issued to the person submitting the report.

7 Reporting principles for taxpayer

Circumstances in which taxpayer is obliged to report

The relevant taxpayer is obliged to report if:

- no intermediary was involved in the design, marketing, organizing or making available for implementation or managing the implementation of a reportable cross-border arrangement; or
- the taxpayer has been notified by the intermediary that the intermediary is waiving his/her right to report in accordance with Professional Secrecy.

Priority of reporting where multiple taxpayers are involved

Where the reporting obligation lies with the relevant taxpayer and where there is more than one relevant taxpayer, the relevant taxpayer that is to file information shall be the one that features first in the list on the next page:

Priority of reporting where multiple taxpayers are involved

- The relevant taxpayer that agreed the reportable cross-border arrangement with the intermediary
- The relevant taxpayer that manages the implementation of the arrangement.

Circumstances under which taxpayer not required to report

Where there is a multiple reporting obligation, the relevant taxpayer shall be exempt from filing the information if it has proof that the same information has been filed by another taxpayer.

Proof that reporting obligation is satisfied by other taxpayer

Yes

8 Reporting principles applicable to all

Language

Reports should be made in English.

9 Penalties

Circumstances in which penalties may apply

Intermediaries and relevant taxpayers (i) failing to report the information required within the time stipulated in the Regulations; or (ii) failing to report the information in a complete and accurate manner, are liable to a one-off penalty of EUR 200 and EUR 100 for every day during which the default existed, provided that the penalty shall not exceed in total EUR 20,000.

Intermediaries and relevant taxpayers failing to comply with a request for information made by the Commissioner, are liable to a one-off penalty of EUR 1000 and EUR 100 for every day during which the default existed, provided that the penalty shall not exceed in total EUR 30,000.

A penalty of EUR 2,500 is imposed on intermediaries or relevant taxpayers failing to retain the documentation for a minimum period of five years.

Amount

As per above

10 Country specifics

Country specifics / deviation from EU directive

None



Donald Sant
Managing Partner
donald.sant@bakertilly.mt



Jessica Vella
Tax Manager
jessica.vella@bakertilly.mt