FAQs on the Mandatory Automatic Exchange of Information in relation to Cross-Border Arrangements (‘DAC6’)

(S.L. 123.127)

The Commissioner for Revenue maintains and regularly updates this list of frequently asked questions (FAQs) on the application of Automatic Exchange of Information in relation to Cross-Border Arrangements (‘DAC6’).

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Glossary

CfR	Commissioner for Revenue
DAC 6	Council Directive (EU) 2018/8222 regarding the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements
EBIT	Earnings Before Interest and Taxes
Guidelines	Guidelines on the Mandatory Automatic Exchange of Information in relation to Cross-Border Arrangements
MBT	Main Benefit Test
Professional Secrecy Act	Chapter 377 of laws of Malta
SL 123.127	Subsidiary Legislation 123.127 - 'Cooperation with Other Jurisdiction on Tax Matters Regulations'

DEFINITION OF AN INTERMEDIARY

1. **If one has historically (and going forward) only provided book-keeping, audit and tax compliance services and hence was in no way involved in setting up or advising any cross-border structures, is he required to register and report some form of nil report all the same?**
   Where a person does not fall within the definition of intermediary there is no requirement to register for DAC6 purposes and there is not the need to file a 'nil' report. It should be noted that an intermediary also includes a service provider that, based on available information and the relevant expertise and understanding to provide the relevant services, knows or could be reasonably expected to know that he has 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.

2. **Is the liquidator of a company classified as an intermediary and obliged to report the dissolution and consequential winding up instead of the relevant taxpayer?**
   The liquidator assumes all obligations that the director has and will therefore not be classified as an intermediary with respect to his duties as liquidator. Unless another intermediary is involved, reporting obligations in terms of DAC6, if any, would fall on to the relevant taxpayer. The dissolution and consequential winding up in themselves do not normally trigger any hallmark.

3. **Where a tax advisor has insufficient knowledge to assess the tests within a hallmark, can it be safely concluded that such tax advisor does not qualify as a 'secondary intermediary' on the basis that he does not know or cannot be reasonably expected to know that the arrangement is a reportable one?**
   With reference to the definition of 'intermediary' in regulation 13(9) of SL 123.127, a person will fall within such definition after having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding that is required to provide such service. Therefore, in the absence of such expertise and understanding that is required to provide the service, it is unlikely that the person will satisfy the definition of 'intermediary'. However, where a person chooses to be wilfully ignorant, such person may still meet the test to fall within the definition of an intermediary if an arrangement is reportable.

4. **Would a service provider offering a one-time service to a client of assisting with the process of opening a bank account be considered as implementing a reportable cross-border arrangement and thus an 'intermediary' (provided that either of the Hallmarks are satisfied for the arrangement to be reportable)?**
   A service provider providing assistance solely with the process of opening a bank account does not fall within the definition of an intermediary given that in such case it is unlikely that the service provider would have sufficient information or expertise to be reasonably expected to know that they are involved in a reportable cross-border arrangement.

5. **The role of a transfer agent includes the maintaining of register, maintenance of investor capital account, handling capital calls, distributions, transfer/conversion of shares. Would the processing and handling of capital calls, transfer of founder shares, redemptions and subscriptions of units be construed as provision of services post-implementation and thus the transfer agent would fall outside the definition of an intermediary?**
   Such services could be considered to be provided as part of the implementation of an arrangement. However, to fall within the definition of a secondary intermediary, one would need to consider whether the transfer agent would have sufficient information to know or be reasonably expected to know that he is involved in a reportable cross-border arrangement.

REPORTING DEADLINES AND OBLIGATIONS

1. **A reportable cross border arrangement is promoted by a professional or an advisor outside the EU who would have the obligation to report had such professional or advisor been in the EU. Who is obliged to report that reportable cross border arrangement?**
   In the absence of another intermediary having an EU nexus, the reporting obligation falls on to the relevant taxpayer as per regulation 13(7)(e) of SL 123.127.

2. **What happens when a Maltese professional or advisor concludes that a transaction is not reportable based on Maltese law/guidance, however other EU intermediaries conclude that the transaction is reportable based on foreign laws? Should the Maltese professional or advisor rely on its assessment that the transaction is not reportable or file the annual notification to the CFR?**
   The Maltese professional or advisor is only expected to comply with Maltese legislation and interpretation. The fact that an EU intermediary concluded that the transaction is reportable based on foreign laws does not mean that the Maltese professional or advisor has a reporting obligation in Malta. The annual notification to the CfR is due only in cases where the intermediary has a reporting obligation and exercises his right to waive the said reporting obligation.

3. **Where tax advice has been given about tax implications of a proposed structure, but the advisor does not have information on whether the transaction was**

implemented, is there a duty to check with the client if this has been implemented or simply report irrespective of implementation considering that it is made available to client?

With reference to regulation 13(7)(a) one of the trigger points for reporting is that a reportable cross-border arrangement is made available for implementation, thus it is not necessary that the arrangement is implemented.

4. **Where tax advice was given by an intermediary (CoA) to another intermediary (CoB) about their clients (clients of CoB) with a no name basis (no underlying client details), would CoA be obliged to report and request necessary information from CoB?**

   CoA is obliged to report provided that the tax advice is in relation to a reportable cross-border arrangement. This applies insofar as CoA does not exercise its right to waive the reporting obligation or does not have proof that CoB has reported the same information with the CfR or the tax authorities of another Member State. Reference can be made to section 3.4 of the Guidelines.

5. **Where an intermediary has a meeting/corresponds with a potential client, is the intermediary obliged to collect information that he would not otherwise collect to ensure that said intermediary is then able to report that marketed/reportable cross-border arrangement?**

   In this regard, potential secondary intermediaries are not required to seek out additional information or to do any additional checking or due diligence beyond what they would normally do in the course of their business and in compliance with their existing obligations. Reference can be made to section 2.4.1 of the Guidelines.

6. **Does the provision of a registered office address or the provision of company secretary services fall within scope of DAC6 reporting?**

   A reporting obligation depends on the extent of the involvement and whether the service provider knows or could reasonably be expected to know that there is a reportable cross-border arrangement. In the case of the provision of the mentioned services, the information that is readily available to the person providing such service does not typically meet the ''reasonably be expected to know'' standard that is laid down in the Directive.

7. **The taxpayer receives from a legal advisor a notification with a waiver to report a transaction based on the Professional Secrecy Act (Chapter 377 of the Laws of Malta), however the intermediary does not specify which transactions should be considered as reportable. Is the intermediary obliged to disclose to the taxpayer those transactions which are considered reportable?**

   As clarified in section 2.6 of the Guidelines a notification by the intermediary should be made on an *ad hoc* basis. When the intermediary notifies another intermediary or the relevant taxpayer of the obligation to report, such intermediary should clearly identify the reportable cross-border arrangement in respect of which the obligation to report is being waived.

8. **A marketable arrangement is presented to a potential client in January. Client takes it up on 2nd of February. Is the 30-day deadline triggered as from the 2nd of February? Also, would there still be the need to report the marketable arrangement in April?**

   This depends on which trigger point in regulation 13(7)(a) of SL 123.127 is met first. In the above example, given that the marketable arrangement was made available to the client in January, the 30-day deadline would be triggered from such date and not in February. The periodic report is required to be filed where there is new information that needs to be reported with respect to the marketable arrangement. New information that needs to be reported refers to information listed in sub-paragraph (i), (vii) and (viii) of paragraph 13(7)(o) of SL 123.127. For example, if during the 3-month period the marketable arrangement was taken up by a new taxpayer a further report would need to be made to include the details of the new taxpayer.

9. **In the case of Hallmark A3 – Standardised structure (together with MBT), would the trigger point be the initial meeting with the client? As this is when the structure is made available to the client. Having said this, at that point information available on the client may be minimal – is there a secondary reporting obligation when the client is then onboarded, and the structure is implemented?**

   The fact that the structure was made available to the client in the initial meeting indicates that this is a marketable arrangement. In this regard, 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.

10. **When is the client referred to in question 9 considered to have taken up the arrangement? Can the intermediary refer to the date on which the client signed the Letter of Engagement?**

    Yes, the intermediary can refer to the date on which the client signed the Letter of Engagement.

11. **When a taxpayer merely considers a hypothetical/potential transaction or arrangement with an intermediary but does not begin implementation, and the taxpayer will only consider implementation after further analysing the suggested transaction or arrangement by weighing various other options. Is the transaction or arrangement considered to be 'ready' or 'made available' for implementation, and hence resulting into a DAC6 reporting obligation?**

    An arrangement should be considered as 'made available' for implementation if it is capable of being implemented in practice. The fact that there are a number of options available to the taxpayer does not mean that the arrangement should not be considered as 'made available' for implementation i.e., if the taxpayer can choose an option and proceed with its implementation without the need to make material changes to the proposed arrangement or to undertake further analysis it is still considered as 'made available' for implementation thus triggering a reporting obligation.

OTHER GENERAL QUESTIONS

1. **In cases where the taxpayer company was imposed a penalty or penalties, would these constitute the company's liability, or will the company's officers also have a personal liability for DAC6 penalties?**
   The penalties constitute a liability of the company.

2. **Could payments such as dividend payments be reportable under Hallmark C1 if paid from a MaltaCo to a recipient in a non-cooperative jurisdiction or a no or only nominal tax jurisdiction?**
   To fall within scope of Hallmark C1 a payment must be a deductible payment. A deductible payment includes a payment that is in principle deductible for tax purposes even though the deduction has not yet crystallised, for example because there is insufficient income, and it will be carried forward to subsequent years.

3. **Should transfers of cash be analysed under Hallmark E3?**
   No, transfers of cash should not be analysed under Hallmark E3.

4. **Under Hallmark C(1)(d) should Maltese preferential tax regimes be interpreted as being limited to regimes considered 'harmful' by EU/OECD (thereby excluding regimes liked the tonnage tax regime)?**
   Hallmark C(1)(d) makes reference to preferential tax regimes irrespective if these are considered to be harmful or otherwise.

5. **Is information on the application of the refundable tax credit system in Malta which can be made available through email, meeting or through the intermediary's website considered a marketable arrangement?**
   Standardised structures could potentially fall within scope of Hallmark A3 subject to the satisfaction of the main benefit test. In this regard, as clarified in the Guidelines issued by the CfR, a tax advantage would not be considered for the purposes of the main benefit test to the extent that it is consistent with the legislator's intent. It should be noted that an initial disclosure of a marketable arrangement would not necessarily include the details of any relevant taxpayer. Such details would thereafter be included in the quarterly updates if the arrangement is taken up by a client.

6. **When implementing a 1-tier or 2-tier structure that would qualify for the refundable tax credit system in Malta, what should the advisor compare it with for the purposes of applying the MBT?**
   Reference is made to the answer to question 5 above. In addition, one would need to consider also whether the structure is part of a wider arrangement resulting in a tax advantage the outcome of which is not consistent with the underlying legislative intent.

7. **If the shareholders took a decision to liquidate a company and pre-liquidation, advise the board to clean up the balance sheet pre-liquidation (including transferring assets), any form of projections will take the intention to liquidate into account and will (in most cases) be 'nil' both pre-transfer and post-transfer. Thus, how can one say (in most cases) that projections would show a profit pre-transfer once the intention is to liquidate?**

   An assessment under Hallmark E3 is required where functions and/or risks and/or assets are transferred prior to liquidation. Projections are required to be made on a going concern basis without taking into account the cross-border transfer of functions and/or risks and/or assets by the transferor.

8. **A MT Holding Company receiving interest income and dividend income from a foreign subsidiary. This income would fall under the Participation Exemption or have the Notional Interest deduction for the MT Holding. Would Hallmark C be triggered given that they are provided for in the Maltese Tax legislation, or would they still be regarded as a preferential regime?**

   A tax regime is considered to be preferential if it is a preferential tax regime assessed by the OECD's Forum on Harmful Tax Practices or by the EU Code of Conduct Group. For Hallmark C(1)(d) to apply, one would need to assess also whether the cross-border payments are deductible in the hands of the payer. It should also be noted that Hallmark C(1)(d) is linked to the main benefit test.

9. **A company provides tax advice, where such tax advice is signed by an advocate or a lawyer who is the director or employee of the company. Can such advice be covered by the Professional Secrecy waiver for DAC6 purposes?**

   Yes. Advice given by intermediaries whose profession or office is listed in Article 3 of the Professional Secrecy Act is covered by professional secrecy. Professions include advocates, notaries, legal procurators, accountants, auditors, employees and officers of financial and credit institutions, trustees, officers of nominee companies or licensed nominees, persons licensed to provide investments 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. To clarify further, the waiver does not apply in cases where an employee whose profession is listed in Article 3 of the Professional Secrecy Act is signing an advice on behalf of an entity which is not covered by the said professional secrecy.

10. **The definition of cross border mentions the term participants. Does this also include a foreign shareholder of a Malta company benefitting from the refund system or the Participation Exemption? Are all shareholders or ultimate beneficial owners participants?**

    The shareholders or ultimate beneficial owners are not necessarily participants in an arrangement. This depends on the facts and circumstances of the arrangement and whether such shareholders have an active role in it.

11. **If the transferor, which is a company registered in Malta, is going to be put into liquidation straight after the transfer of the functions, risks and assets to a related entity. The company is expected to be liquidated within the first year after the transfer is made. Would this still trigger Hallmark E3?**
    Given that the company will be put into liquidation its expected EBIT after the transfer will amount to nil. If the company would be projected to make a profit in the absence of the transfer, the expected EBIT after the transfer will therefore be less than 50% of the EBIT had the transfer not taken place. On this basis the arrangement would still fall within scope of Hallmark E3.