

## About this newsletter

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# Mandatory Disclosure Rules: Implementation of DAC 6 in domestic law

## 1. Introduction

Mandatory Disclosure of information has been introduced in the European Union through Directive 2018/822<sup>1</sup> on Administrative Cooperation, also known as DAC6 ('Directive' or 'DAC6'). This Directive provides for disclosure of "reportable cross-border arrangements" which may constitute aggressive tax planning by "intermediaries" or taxpayers in order to facilitate Exchange of Information and enhance Tax Transparency in the European Union.

### 1.1 Legal Framework

On March 18, 2021 the Cyprus Parliament transposed into domestic law the Mutual Assistance Directive (2018/822) through the Administrative Cooperation in the Field of Taxation (Amendment) Law N. 41(I)/2021, amending the Administrative Cooperation in the Field of Taxation Law N. 205(I)/2012 ('the Law'). The Law is closely aligned with the scope and requirements of the Directive. The scope of the Law relates only to cross-border arrangements reportable if certain characteristics ("hallmarks") included in the DAC6 are triggered.

According to Article 7D(1)(a) of the Law, reporting must take place within 30 days beginning:

- (i) on the day after the reportable cross-border arrangement is made available for implementation; or
- (ii) on the day after the reportable cross-border arrangement is ready for implementation; or
- (iii) when the first step in the implementation of the reportable cross-border arrangement has been made, whichever occurs first.

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<sup>1</sup> Directive 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

For arrangements which are ready for implementation or have been implemented between July 1<sup>st</sup>, 2020 and December 31<sup>st</sup>, 2020 the 30 days begins from January 1<sup>st</sup> 2021. The first periodic report on general purpose settings is submitted by April 30, 2021. However, according to the Cyprus Tax Authorities ('CTA') announcement of February 26, 2021, no administrative fines will be imposed for late submission of DAC6 information, which will be submitted until June 30, 2021 regarding the following circumstances:

- Any reportable cross-border arrangement that has been carried out between June 25, 2018 and June 30, 2020, and should have been submitted by February 28, 2021.
- Any reportable cross-border arrangement that has been carried out between July 1, 2020 and December 31, 2020 and should have been submitted by January 31, 2021.
- Any reportable cross-border arrangement that has been carried out from January 1, 2021 and May 31, 2021 and should have been submitted within 30 days from the date it became available for implementation or was ready for implementation or the first step towards its implementation had been taken, whichever occurred first.
- Any reportable cross-border arrangement for which secondary intermediaries have provided any aid, assistance or advice between January 1, 2021 and May 31, 2021 and should have submitted information within 30 days including the day after they have provided aid, assistance or advice.

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## 2. What is an arrangement?

Article 2 of the Law defines a “cross-border arrangement” as: an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the following conditions is met:

- (a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;
- (b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;
- (c) 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;
- (d) 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;
- (e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

An arrangement shall also include a series of arrangements and an arrangement may comprise more than one step or part.

This means that a purely domestic arrangement will not fall within the scope of the Directive whereas a domestic arrangement having tax implications in another jurisdiction (both an EU Member State or a third country) will trigger the reporting obligation.

## 3. Who must report?

### (a) The Intermediary

The primary obligation to report rests with the intermediary. Article 2 of the Law defines an intermediary as:

- any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement; or
- 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.

An intermediary must also meet one of the following additional conditions:

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

The same conditions are applicable for choosing the Member State in which the reporting will take place.

Tax advisors, accountants, auditors, lawyers and consultants are likely to qualify as intermediaries.

There are two cases where the intermediary does not have to report:

- According to Article 7D(4) of the Law, the intermediary is exempt from reporting where there is a multiple reporting obligation and the intermediary has proof that the same information has been filed in another Member State.
- Under Article 7D(5) of the Law, the intermediary can waive the reporting obligation where there would be a breach of the legal professional privilege ○ Article 7D(5)(b) of the Law provides that the legal professional privilege of a lawyer applies only where the intermediary is a lawyer practicing in accordance with the Cyprus Lawyers Law.

Where the intermediary is exempt from reporting, Article 7D(5)(b) of the Law requires the intermediary to notify another intermediary, or if no other intermediary exists the taxpayer to make the disclosure.

## **(b) The taxpayer**

The relevant taxpayer is defined by Article 2 of the Law 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.

### **The reporting obligation falls on the relevant taxpayer when:**

1. an intermediary is a **non-EU intermediary**. An intermediary is considered non-EU when it is neither:
  - resident in a Member State; nor
  - Maintains a PE in a Member State through which the services in respect of the arrangement are provided; nor
  - Incorporated/governed by the laws of a Member State; not ○ A member of a professional association in a Member State

2. there is no intermediary involved e.g. An **in-house arrangement**
3. the taxpayer is notified that an intermediary has the right to a waiver due **to legal professional privilege**.

#### 4. Hallmarks and the Main Benefit Test

A cross-border arrangement is reportable if it contains at least one of the hallmarks set out in Annex IV of the Law. A hallmark is defined in Article 2 of the Law as “a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance”. There are five categories of hallmarks. It is important to note that certain hallmarks are only met if they fulfil the Main Benefit Test (“MBT”).

The MBT is met “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 be reasonably expect to derive from an arrangement is the obtaining of a tax advantage”. For the hallmarks not subject to the MBT it means that any arrangement which might not even have tax implications must be reported.

The following table presents the hallmarks and indicates those which must fulfil the MBT.

Categories	Hallmarks	MBT
A. Generic Hallmarks	1. taxpayer or participant under confidentiality condition as to how the arrangements secure a tax advantage	✓
	2. intermediary receives performance-based remuneration by reference to the amount of the tax advantage derived or the effectiveness of the arrangement	✓
	3. Standardised documentation and/or structure available to more than one taxpayer without need for substantial customisation	✓
B. Specific Hallmarks linked to MBT	1. Participant acquiring loss-making company and using its losses to reduce its tax liability	✓
	2. Arrangement which has the effect of converting income into capital, gifts or a category which is subject to low tax or tax exempt.	✓
	3. Arrangements including circular transactions resulting in round-tripping of funds with no other primary commercial function	✓
C. Specific Hallmarks related to crossborder transactions	1. Arrangements involving deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:	
	(a) recipient is not resident for tax purposes in any tax jurisdiction	

	(b) although the recipient is resident for tax purposes in any tax jurisdiction, the jurisdiction:	
	(i) does not impose any corporate tax, or imposes corporate tax at the rate of zero or almost zero	✓
	(ii) is included in a list of non-cooperative tax jurisdictions	
	(c) the payment benefits from full exemption from tax in jurisdiction where recipient is resident for tax purposes	✓
	(d) the payment benefits from a preferential regime in jurisdiction where recipient is resident for tax purposes	✓
	2. deductions for the same depreciation on the asset are claimed in more than one jurisdiction	
	3. relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction	
	4. Asset transfer arrangement where there is material difference on amount treated as payable in consideration between jurisdictions involved.	
D. Specific Hallmarks concerning AEOI and beneficial ownership (BO)	1. arrangement which undermines reporting obligation for automatic exchange of Financial Account information. Such arrangements include at least the following:	
	(a) use of account/product/investment that does not purport to be a Financial Account but has features substantially similar to those of a Financial Account	
	(b) transfer of Financial Accounts or assets to jurisdictions that are not bound by AEOI for Financial Accounts with State of resident of the relevant taxpayer	
	(c) reclassification of income and capital into products/payments not subject to AEOI for Financial Accounts	
	(d) transfer or conversion of Financial Institution or Financial Account or assets therein into one not subject to reporting under AEOI for Financial Accounts	
	(e) use of legal entities/arrangements/structures that eliminate reporting of one or more Account	
	Holders or Controlling Persons under AEOI for Financial Accounts	

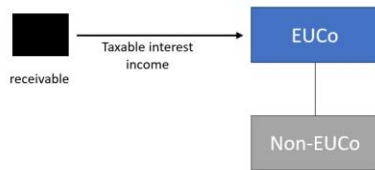
	(f) arrangements that undermine or exploit weaknesses in due diligence procedures used by Financial Institutions to comply with obligations to report Financial Account information, including use of jurisdictions with inadequate or weak regimes of enforcement of anti-money laundering legislation or with weak transparency requirements or legal persons or legal arrangements	
	2. Arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures: (a) that do not carry 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 BOs of the assets held by such persons, legal arrangements or structures; and (c) where the BOs of such persons, legal arrangements or structures as defined in Directive 2015/849, are made unidentifiable.	
E. Specific Hallmarks Concerning Transfer Pricing	1. arrangement which involves the use of unilateral safe harbour rules	
	2. arrangement involving the transfer of hard-to-value intangibles.	
	3. arrangement involving an intragroup crossborder transfer of functions and/or risks and/or assets, if the projected actual earning 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.	

## 5. Practical examples

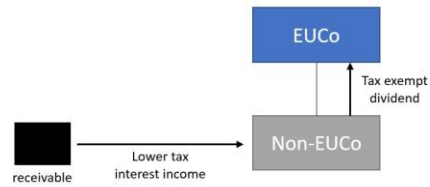
The following are examples of common structures that are potentially reportable:

Example 1: Contribution of an interest-bearing receivable

Before contribution

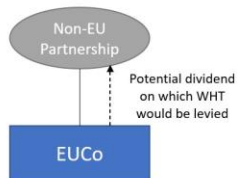


After contribution

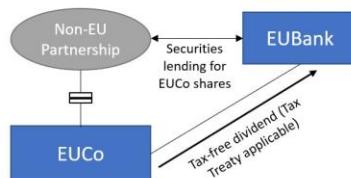


### Example 2: Lending of securities

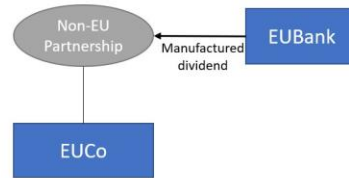
Initial position



Before manufactured dividend

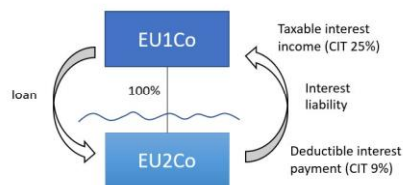


After manufactured dividend

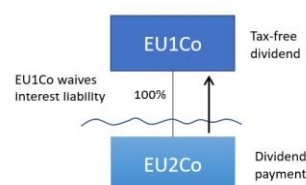


### Example 3: Debt/Equity Swap

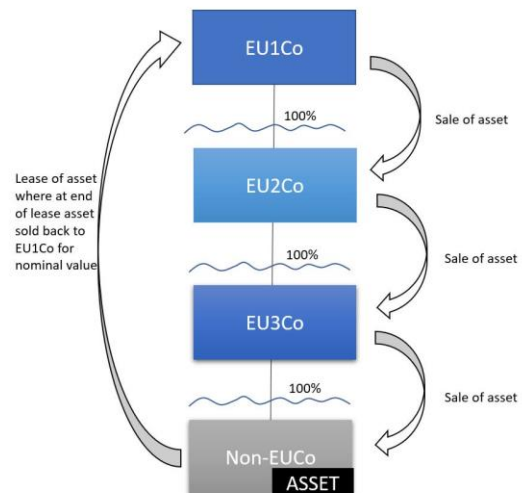
Debt payments



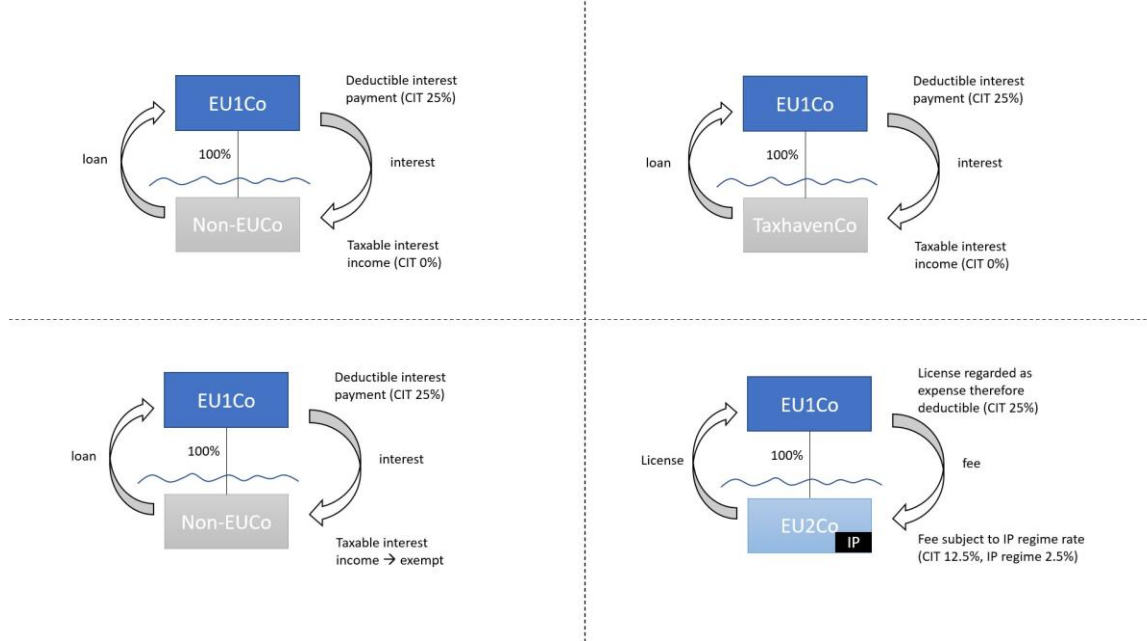
Equity payments



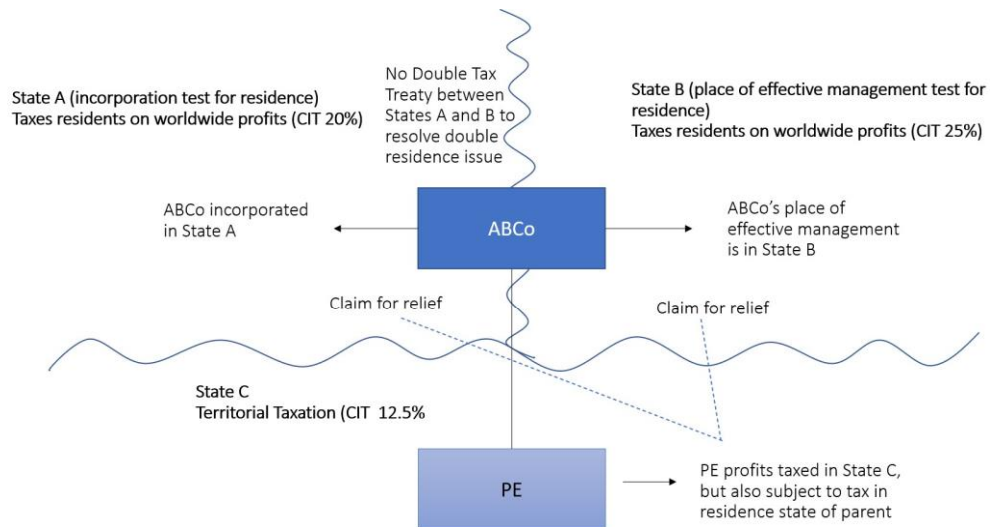
### Example 4: circular transactions with no commercial function



### Examples 5-8: deductible cross border payments between associated persons

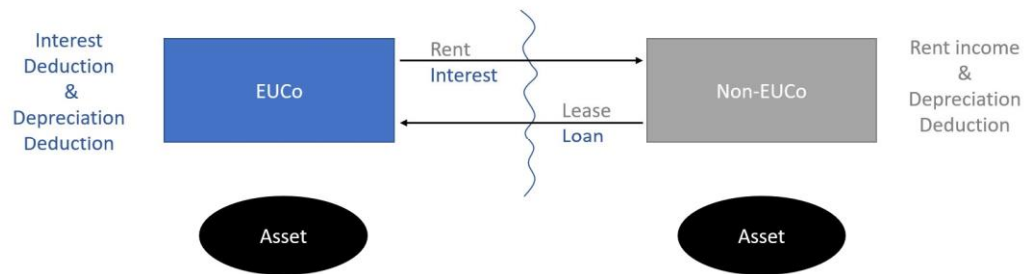


### Example 9: Double Tax Relief claimed in more than one jurisdiction

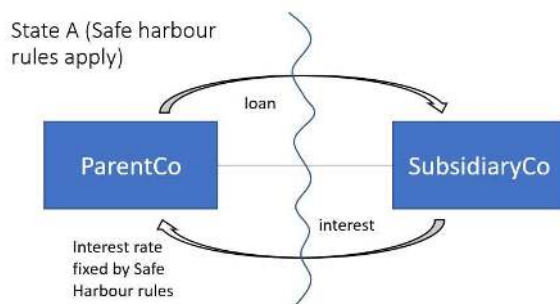




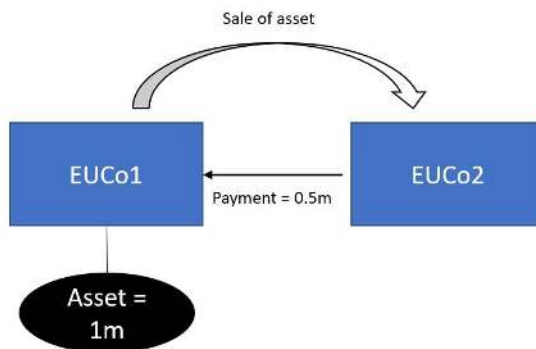
Example 10: Deductions for depreciation claimed in more than one jurisdiction.



Example 11: Arrangements involving the use of unilateral transfer pricing safe harbour rules



Example 12: Asset transfer where amount treated as payable materially different between jurisdictions



*\* The information provided above is purely a courtesy guideline and should not be constituted as advice. Please contact us for an updated profile. Specialist advice may be sought*