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Exchange of Information Upon Request – The obligations of individuals and entities under the rules

"The Commissioner has the power to obtain and provide information referred to in regulation 4 that is held by or is in the possession or control of person in Malta, including any: -
(d) lawyer, notary and other independent legal professional, real estate agent, accountant, auditor, tax advisor, company service provider, person licensed to carry on investment business, stockbroker;" (Reg 5 S.L. 123.127)

Pursuant to Directive 2011/16/EC as revised (the "Directive on Administrative Co-operation" or "DAC"), EU Member States have undertaken to cooperate so as to combat tax fraud and evasion. The Directive regulates the administrative cooperation of the tax authorities of all Member States, establishing obligations and processes for the exchange of information (on taxes, excluding VAT, customs duties, excise duties and social security contributions) in three main forms: Spontaneous Exchange of Information, Exchange of Information Upon Request and Automatic Exchange of Information.

This information paper focuses on the *Exchange of Information Upon Request*, and in particular, on the obligations of persons from whom the Office of the CfR seeks to obtain the information so as to enable it to fulfil its obligations under the DAC.

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Scope of the rules

The CfR may, at any time, be requested by its counterpart in another jurisdiction, to submit information concerning taxpayers. For this purpose, certain persons have **an obligation** to maintain certain information and to make this information available to the Office of the CfR so as to enable it to fulfil its obligations under DAC.

The rights of the Office of the CfR and the obligations of the relevant persons are set out in the **S.L. 123.127** - **Cooperation with Other Jurisdictions on Tax Matters Regulations** (the "Regulations").

What information must be kept and by whom?

Regulation 4 specifies the information and documentation which must be kept concerning the **ownership structure** of entities, the **transactions** executed by persons, as well as **banking activity**. In summary, the obligations arising to entities and individuals are the following:

1. **Entities** (as defined in Regulation 2) are required to keep updated information that identifies legal and beneficial owners (see Regulation 4(1) – (3) and CfR Guidelines);

2. **Trustees** must ensure that updated information which identifies the settlor, beneficiaries and the protector is kept (see regulation 4(4) and CfR Guidelines);

3. **Individuals** (engaged in a trade, business, profession or vocation), **Entities** and **Trustees** are to ensure that reliable books of account are kept, as well as underlying documentation such as invoices and contracts (Regulation 4(7));

4. **Banks** must ensure that banking information is kept on all account-holders in relation to their banking activity in Malta (Regulation 4(11)).

*"The Commissioner may, when and as often as he deems necessary, give notice in writing to **any person** to furnish him, within a reasonable time stated in such notice, not being less than thirty days, such information as may be necessary in order to provide information, including documents, to foreign taxauthorities where arrangements between Malta and the respective State or its tax authorities exist for the reciprocal exchange of information for tax purposes." (art. 10 ITMA)*

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Broad powers of the CfR to obtain information from any person

"…each of the following constitute a **criminal offence**, which upon conviction, carries a fine (*multa*) of between €5,000 and €30,000, or imprisonment for a period of not exceeding two years, or both such fine (*multa*) and imprisonment…"

The information that must be kept by the relevant persons in terms of Regulation 4 must be kept in such a way that it may be submitted without difficulty to the CfR following a request made pursuant to article 10A of the Income Tax Management Act. The said article 10A permits the CfR to make a written request for information and to stipulate a submission deadline, which cannot be less than 30 days.

Article 10 A of the Income Tax Management Act affords broad powers to the CfR to obtain any information and/or documentation required from *any person*, for example:

- To require any person to complete and deliver any return specified;
- To summon and question on oath any person who, he has reason to believe, is able to give information required
- To require any person to produce any books, documents, accounts (including bank statements, passbooks and other bank documents) and any other document which the Commissioner may require;
- To require any person to give information by means of written statements.

The broad powers of the CfR in this respect are further highlighted by Regulation 5 of the Regulations which requires that the provisions of article 10A of the Income Tax Management Act are to be interpreted to give the widest possible powers in order to obtain and provide information to the competent authorities of jurisdictions with which Malta has an arrangement for the exchange of information. The said power enables the CfR to obtain such information from any person, **including any legal or tax professional, accountant, auditor and company service provider**.[1]

[1] Regulation 5(1) provides a non-exhaustive list of persons who may be requested to provide information, which also includes banks, insurance companies, real estate agents and regulatory authorities.

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This power applies irrespective of any professional secrecy obligations that may apply, with certain specified exceptions, including an exception for information which is the subject of attorney-client privilege, as defined (see Regulation 5).

The Regulations also grant the Office of the CfR access to the Malta Business Registry's Register of Beneficial Owners of Commercial Partnerships and the MFSA's Register of Beneficial Ownership of Trusts.

Implications of non-compliance with information requests

A person who does not comply with a request for information within the specified time-period shall be liable to an **administrative penalty** of:

1. €1,000; and
2. €50 for every day during which the default existed.

The administrative penalty for late submission is capped at €19,250.

However, where the information was not provided because it was not kept or properly updated as required under the Regulations, the person who had the duty to keep or update such information shall be liable to a penalty of €19,250.

Notwithstanding any action that may be taken in accordance with the above (i.e. penalties for late submission), each of the following constitute a **criminal offence**, which upon conviction, carries a fine (*multa*) of between €5,000 and €30,000, or imprisonment for a period of not exceeding two years, or both such fine (*multa*) and imprisonment:

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- where the failure to comply with a request persists for more than 6 months or
- where the requested party who is the proper addressee refuses to be served with the notice either personally or through registered mail or
- where the information submitted by the requested party is found to be incorrect in such a way that it is misleading, deceitful or false.

Go to the source

For details on the specific obligations arising pursuant to the Exchange of Information on Request procedures:
S.L. 123.127 - Cooperation with Other Jurisdictions on Tax Matters Regulations
CAP 372 – Income Tax Management Act
CfR Guidelines on Exchange of Information Upon Request

This document is for information purposes only and does not constitute official guidance, nor advice, and should not be relied upon as such.

Any comments or queries concerning the contents of this document should be addressed to the Chief Technical Officer on CTO@maintax.org or MIT@maintax.org

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