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KPMG

Mandatory Disclosure Rules

DAC6 transposition in Italy – legislation approved and Ministerial Decree and Italian Revenue Agency's guidelines published; further guidance expected

This article provides a summary of the Italian transposition of mandatory disclosure rules under DAC6 into domestic law.

Status

On July 30, 2020, the Italian Government approved the Legislative Decree no. 100 to transpose Directive (EU) 2018/822 on mandatory disclosure rules (hereinafter "DAC6" or "the Directive") into Italian domestic law.

The Legislative Decree was published in the Italian Republic Official Gazette of August 11, 2020 and entered into force on August 26, 2020.

On November 17, 2020 the Italian Finance Minister issued the Ministerial Decree (hereinafter "Implementation Decree") aimed at clarifying the interpretation of certain key aspects of the Directive (e.g. the application of the main benefit test), as transposed in Italy. The Implementation Decree was published in the Italian Republic Official Gazette of November 30, 2020.

On November 26, 2020 the Director of the Italian Revenue Agency issued the Statement of Practice on the practical requirements for DAC6 reporting purposes.

Following a public consultation process, on February 10, 2021 the Italian Revenue Agency issued a circular letter providing the first clarifications on the interpretation and application of the Italian DAC6 Law (hereinafter "Circular Letter").

Further guidelines from the Italian Revenue Agency are expected in order to address several issues raised during the public consultation.

Please note that this summary is based on information available as at March 31, 2021.

Scope

The scope of the legislation is closely aligned with the Directive, with no extension of scope proposed for VAT, customs duties or excise duties. Italian mandatory disclosure rules (MDRs) will only apply to "cross-border arrangements" (i.e. domestic transactions will not be in scope).

Definitions

The definitions in the Legislative Decree are closely aligned with the Directive. In particular, the definitions of "relevant taxpayer", "associated enterprise", "marketable arrangement" and "cross-border arrangement" have the same meaning as in the Directive.

In addition, the legislation includes the following clarifications:

Intermediary

The definition of intermediary mirrors the definition in the Directive, i.e. any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement. The Circular Letter provides further insights into the concepts of "design", "marketing", "organization", "making available for implementation" and "managing the implementation".

In line with the Directive, to qualify as an intermediary, a service provider must also have a sufficient level of knowledge of the arrangement.

Based on the Implementation Decree, a party's level of knowledge shall be assessed by reference to:

a) the actual information that it possesses in relation to the cross-border arrangement, based on information that is readily available as a result of assistance or advice provided to the client; and

b) the degree of expertise needed to provide the assistance or advice and the level of experience normally required to provide the service.

It has also been specified in the Implementation Decree that, unless there is proof to the contrary, parties shall not be deemed to have this level of knowledge in the case of routine banking and financial transactions.

The report accompanying the Legislative Decree also clarified that actual knowledge is based on readily available information, implying that the service provider does not have to fulfil any further due diligence requirements other than those ordinarily imposed by law or business purposes.

The Circular Letter provides for a "white-list" of activities for the purposes of the definition of intermediary, i.e. a list of activities that that do not make a person an intermediary, provided that the arrangement is not updated or improved as a result and, more generally, that it is not substantially changed. Examples of such activities are:

- the mere interpretation of tax rules connected with the arrangement;
- becoming aware of the arrangement during the auditing of accounts;
- the submission of tax returns;
- assistance during tax audits and tax litigation.

Taxpayer

In accordance with the Circular Letter, a taxpayer may qualify as an intermediary if, within a corporate group, it designs the arrangement and makes it available to the other group companies for implementation (promoter) or provides assistance or advice during its implementation (service provider).

Cross-border arrangement

Though Italian DAC6 Law does not provide for a specific definition of the term "arrangement", the meaning of such a term can be inferred from the definition of "cross-border arrangement", i.e. a scheme, agreement or design involving Italy and one or more foreign jurisdictions.

The Circular Letter clarifies that:

- the term "scheme" means an arrangement whereby a number of entities are involved and transactions are interrelated;
- the term "agreement" means a transaction or arrangement which in itself is likely to give rise to one of the effects that may lead to the reporting obligation for the cross-border arrangement;
- the term "design" means the set of theoretical assumptions that make up a "scheme" which, if realized, result in the achievement of one of the effects from which the reporting obligation may derive.

Moreover, the Circular Letter specifies that an arrangements between a permanent establishment and its foreign head-office (e.g. internal dealings) are deemed to be cross-border from a DAC6 perspective.

Hallmarks & Main Benefit Test

The list of hallmarks, included in Annex I of the Legislative Decree, is aligned with Annex IV of the Directive. The main benefit test applies to the category A and B hallmarks and paragraph 1(b)(i), (c) and (d) of category C hallmarks.

Both the Implementation Decree and the Circular Letter provide additional clarity on the application of the hallmarks and main benefit test.

Potential reduction in amount of tax due

The Implementation Decree specifies that the hallmarks, with the exception of the specific category D hallmarks (concerning the automatic exchange of information (AEOI) and beneficial ownership), will apply only if liable to result in a reduction in the amount of taxes, covered by Directive 2011/16/EU, due by a taxpayer in a Member State of the European Union or in another foreign jurisdiction with which an agreement on the exchange of information for MDR purposes has been concluded.

A cross-border arrangement would therefore only be reportable if the arrangement triggering a hallmark results in a reduction of the amount of tax due (with the exception of arrangements designed to circumvent AEOI or obscure beneficial ownership).

According to the Circular Letter, a potential tax advantage could occur in one of the following situations:

- Reduction in the taxable basis or in the tax due compared with what would be due in the absence of the arrangement;
- WHT exemption/reduction;
- Relief from double taxation or an increase in such a relief compared with that due in the absence of the arrangement;
- Long-term tax deferral.

The Circular Letter further specifies that, in determining the tax effects of the cross-border arrangement, tax reductions should be evaluated at the time of the assessment. Therefore any reductions that are not neutralized by other tax rules (e.g. CFC rules, anti-hybrid rules) when the reporting obligation arises, are relevant from an Italian DAC6 perspective, even if potentially neutralized at a later date.

Main benefit test

The Implementation Decree also clarifies that the main benefit test would be satisfied in Italy when the tax advantage that could be obtained by one or more taxpayers with an Italian nexus from the implementation of one or more cross-border arrangements is greater than 50% of the sum of all advantages derived from that arrangement, i.e. tax advantage plus any other advantages.

Therefore, as clarified in the Circular Letter, in order for the main benefit test to be satisfied, the following conditions should be met:

- The arrangement shall lead to a tax advantage in the hands of the relevant taxpayer(s) in Italy, and
- The tax advantage derived from the arrangement shall be higher than other advantages derived from the same arrangement.

In this regard, the Implementation Decree specifies that:

- the tax advantage should be the difference between the taxes to be paid under one or more cross-border arrangements and the same taxes that would be due in the absence of said arrangements;
- the term "other advantage" should mean any other quantifiable economic benefit that derives from the cross-border arrangement and that is not a tax benefit.

In calculating the tax advantage, any taxes that were paid in a foreign jurisdiction with respect to the arrangement should also be taken into account.

Hallmarks linked to the main benefit test

- Hallmark A(1) (confidentiality clauses): the Circular Letter states that confidentiality clauses that do not concern tax matters (e.g. confidentiality clauses to protect a pure commercial or industrial secret) should not trigger hallmark A(1) provided that these clauses do not prevent the disclosure of information on how the arrangement could provide a tax advantage;
- Hallmark A(3) (standardized documentation and/or structures): according to the Implementation Decree an arrangement does not trigger hallmark A3 if it is designed to result in a benefit from a single form of tax relief provided by the Italian legal system and satisfies the requirements for that relief and, as further clarified in the Circular Letter, provided that the standardized product is not part of a broader aggressive tax planning scheme. Moreover, the Circular Letter clarifies that the use of substantial standardization is not deemed to be a sufficient characteristic to qualify an arrangement as a "marketable arrangement";
- Hallmark B(2) (conversion of income): the Circular Letter states that this hallmark captures, inter alia, the conversions of income obtained through derivative instruments and hybrid instruments;
- Hallmark B(3) (circular transactions that have an offsetting or cancelling effect): according to the Circular Letter, offsetting can take place either at the level of the individual company or the corporate group. For example, income could be realized by one group entity while costs could be registered by another one, resulting in offsetting at a consolidated level.
- Hallmark C1(b)(i) (deductible cross-border payments to a related party which, in its country of residence, does not pay any corporate income tax or is liable to zero or

- almost zero corporate income tax): the Implementation Decree notes that this hallmark does not apply in the case of payees who fall within the scope of the Italian tax transparency (i.e. look-through) regime or those that are resident abroad for tax purposes and are subject to equivalent tax transparency regimes in the country where they are resident, established or effectively managed (e.g. partnerships). In such cases, therefore, a look-through approach should apply. Moreover, the Circular Letter clarifies that "almost zero" means a statutory rate of less than 1%;
- Hallmark C(1)(c) (full tax exemption from tax): according to the Circular Letter, this hallmark should address objective exemptions only, i.e. should not apply to a payment received by a recipient that is a tax-exempt person because of its status;
- Hallmark C(1)(d) (preferential tax regime): the Circular Letter notes that tax regimes can only be deemed to be non-preferential once they have been assessed by the OECD and found to be "not harmful".

Hallmarks not linked to the main benefit test

- Hallmark C(1)(b)(ii) (non cooperative jurisdictions): the Circular Letter states that the OECD List relevant for the purposes of this hallmark is the OECD List of Jurisdictions which have not made satisfactory progress in implementing the international tax transparency standards, as per the regular OECD's report to G20 leaders;
- Hallmark C(4) (cross-border transfers of assets with a material difference in the amount being treated as payable): the Implementation Decree notes that, for the purposes of Hallmark C4, the material difference in the amount deriving from the transfer of assets should be considered as the difference between the amount being treated as payable in consideration for the assets in the jurisdictions involved and the fair market value of the assets transferred. Moreover, according to the Circular Letter, a difference of less than 10% should not be considered material.
- Hallmarks D(1) and D(2) (automatic exchange of information and beneficial ownership): the Circular Letter suggests that the work undertaken by the OECD (such as "the reasonable to conclude test") can be used to assess, interpret and apply section D hallmarks. Moreover, it has been clarified that hallmark D(1)(b) would be met when arrangements result in the transfer of financial assets whose value is higher than 50 percent of the average annual balance of the individual financial account on 31 December of the previous calendar year or, in the case of an account opened after that date, on another appropriate account statement date. Further clarifications have been provided in both the Implementation Decree and the Circular Letter with respect to category D hallmarks .
- Hallmark E(1) (unilateral safe harbor rules): the term "unilateral safe harbor rules" means a regime that is not consistent with international standards laid down in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. In addition, the Circular Letter specifies that, even if a practice is not specifically established by law, it may qualify as a regime falling within the scope of unilateral safe-harbor rules if (i) it leads to a series of agreements between a tax authority and taxpayers that is characterized by a systematic and non-discretionary approach by the public administration, and (ii) with reference to individual transactions or operations, it produces effects that are substantially the same as a safe-harbor regime.
- Hallmark E(2) (hard-to-value intangibles): the Circular Letter notes that the term "hard-to-value intangibles" should be interpreted in accordance with its definition in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations;
- Hallmark E(3) (intragroup cross-border transfer of functions, risks and/or assets): according to the Circular Letter, the term "EBIT" refers to operating result, as calculated in accordance with Legislative Decree no. 446/1997 (i.e. based on the P&L drafted in compliance with the relevant

- accounting principles) and the EBIT test must be performed based on the projected financial statements of the individual entities concerned. The Circular Letter notes that the cross-border transfer of functions, risks and or assets between the Italian PE of a foreign company and Italian company belonging to the same group could trigger this hallmark, provided that the other conditions under the Italian DAC6 Law are met.

Reporting - Intermediaries

Under the Legislative Decree, an intermediary will only have a reporting obligation in Italy if it meets one of the following conditions:

- tax residence in Italy;
- permanent establishment (PE) in Italy through which the services with respect to the reportable cross-border arrangement are provided;
- incorporation in Italy; or
- registration with a professional association in Italy.

According to the Legislative Decree, an intermediary will not be required to report if:

a) they reported the same information regarding the cross-border arrangement to the competent tax authorities of another EU Member State;

b) they have evidence that the same information regarding the cross-border arrangement has been reported by another intermediary;

c) the information is received from their clients during the intermediary's analysis of their legal position or while representing their clients before a court (legal professional privilege);

d) the report would trigger their own criminal liability.

In the case of c) and d), the intermediary is required to notify any other intermediary or, if there is no such intermediary, the relevant taxpayer, of their reporting obligations within 30 days of:

- the day after the reportable cross-border arrangement is made available for implementation or has been implemented, if the intermediary qualifies as a primary intermediary (promoter);
- the day after the intermediary has provided, directly or by means of other persons, assistance or advice with respect to the implementation of the reportable cross-border arrangement, if the intermediary qualifies as a secondary intermediary (service provider).

Reporting timelines mirror the requirements of the Directive, i.e. for bespoke arrangements, 30 days as of the relevant reporting trigger.

The information that is required to be disclosed by an intermediary largely mirrors the requirements of the Directive.

Reporting – Relevant Taxpayer

The relevant taxpayer is required to report the cross-border arrangement within 30 days of the day after the reportable cross-border arrangement is made available for implementation or has been implemented. Relevant taxpayers should also report on the use of reported arrangements, by indicating the reference numbers of these arrangements in the relevant tax returns for each fiscal year in which the arrangement is used.

Under the Legislative Decree, a relevant taxpayer will be obliged to report arrangements in Italy if they:

- are resident for tax purposes in Italy;
- have a permanent establishment in Italy that benefits from the arrangement;
- receive or produce Italian income.
- carry on an activity in Italy.

A taxpayer will be required to report in the following cases:

a) there is no reporting intermediary;

b) the intermediary is exempt from the reporting obligation, due to legal professional privilege requirements LPP or when disclosure would trigger criminal liability under Italian law;

c) the intermediary does not provide the relevant taxpayer with the documentation proving that the relevant information has been reported to the competent Tax Authorities.

According to the Legislative Decree, when multiple taxpayers are involved, the relevant

taxpayer that has to file information will be the taxpayer that has agreed the arrangement with the intermediary or, if there is no such taxpayer, the one that has managed the implementation of the arrangement.

The relevant taxpayer will not be required to report if:

a) the reporting obligation would trigger their criminal liability;

b) the taxpayer has evidence that the intermediary or another taxpayer has reported the same information to the competent tax authorities.

In the case of b), the taxpayer is exempted from reporting if it receives appropriate documentation attesting (i) receipt of the report by the competent authority and (ii) the contents of the report.

Deferral

Following the adoption of Council Directive 2020/ 876, allowing EU Member States to defer the DAC6 reporting deadlines by up to six months, Italy opted to defer the reporting deadlines as follows:

- February 28, 2021 for "historical arrangements", i.e. reportable cross-border arrangements the first step of which was implemented between June 25, 2018 and June 30, 2020.
- The start date for the 30 days reporting deadline to begin by January 1, 2021 (originally July 1, 2020).
- January 31, 2021 for reportable cross-border arrangements made available for implementation, ready for implementation, or where the first step in its implementation is made during the deferral period (July 1 – 31 December 2020).
- April 30, 2021 for the first periodic report on marketable arrangements.

Exchange of information

Under the Legislative Decree, the Italian tax authorities will not automatically exchange certain categories of sensitive information (e.g. intellectual or industrial property rights) automatically with other EU tax authorities.

Penalties

According to the Legislative Decree, administrative penalties for failing to comply with the reporting obligations vary depending on the type of failure and are set by reference to a range of penalties (EUR 2,000 to EUR 21,000) set out in an existing Sanctions Decree (no. 471/1997), as follows:

- when the reporting obligation is omitted, penalties ranging from EUR 3,000 to EUR 31,500 (i.e. amounts as per Sanctions Decree, increased by half) will apply;
- when the reported information is incorrect or incomplete, penalties ranging from EUR 1,000 to EUR 10,500 (i.e. amounts as per Sanctions Decree, decreased by half) will apply.

The Circular Letter confirms that the reduction in penalties granted under so-called "voluntary compliance" (pursuant to Legislative Decree no. 472 of 1997) is applicable.

Moreover, the Circular Letter specifies that relief from penalties shall apply to arrangements that should have been disclosed in January and February 2021 (i.e. arrangements for which reporting was triggered during the deferral period and between January 1 and 31, 2021), for which the reporting deadline expired before February 28, 2021, provided that they were filed by February 28, 2021.

For more information, please refer to KPMG's EU Mandatory Disclosure Rules page or contact the following:

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