



Italy has brought DAC 6 into domestic legislation

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On 22 July 2020 the Italian government finally approved a legislative decree (the 'Legislative Decree') that brings Council Directive (EU) 2018/822 on mandatory disclosure ('DAC 6') into Italian law.

The Legislative Decree will shortly be published in the Italian Official Gazette and will hopefully be followed by a ministerial decree, clarifying specific aspects of DAC 6 (such as the hallmarks and main benefit test), and by an Italian Revenue Agency statement of practice about the practical reporting requirements.

In the Legislative Decree Italy has opted for a six-month deferral of the reporting deadlines, as allowed by the amendments made at EU level to DAC 6 due to the COVID-19 emergency.

Background

In 2011 the EU began to introduce a series of initiatives to raise the level of tax transparency. The first was Council Directive 2011/16/EU, which was the first piece of legislation to regulate the bases and methods for the automatic exchange of information between Member States.

Since then, tax planning structures have evolved and become particularly sophisticated, making it increasingly difficult for Member States to protect themselves against domestic tax base erosion. Therefore, although Council Directive 2011/16/EU has been modified several times⁽¹⁾, a further measure was needed, to reinforce the tools available to tax authorities to combat aggressive tax planning. This is the context of DAC 6.

(1) Council Directive 2011/16/EU has been modified by:

- Council Directive 2014/107/EU, which introduced a global standard for the automatic exchange of financial account information within the EU and provided for the mandatory automatic exchange of information between the tax administrations of Member States (the Common Reporting Standard or 'CRS');
- Council Directive (EU) 2015/2376, which provided for the automatic exchange of information on advance cross-border tax rulings and transfer pricing agreements;
- Council Directive 2016/881/EU, which provided for the automatic exchange of information for country-by-country reporting (CbCR);
- Council Directive (EU) 2016/2258, which placed an obligation on Member States to give tax authorities access to customer due diligence procedures applied by financial institutions under Directive (EU) 2015/849 of the European Parliament and of the Council (anti-money laundering rules).

DAC 6 extends the scope of application of the mechanism for the automatic exchange of information between EU tax administrations, including information about reportable cross-border arrangements potentially constituting aggressive tax planning.

The parties required to communicate reportable cross-border arrangements to the relevant EU Member State tax authority are, under DAC 6, intermediaries and, in certain cases, taxpayers, e.g. when the intermediary is located outside the EU, when the arrangement is made internally by the taxpayer, or when the intermediary cites confidentiality as a reason for not disclosing the arrangement.

DAC 6, which came into force on 25 June 2018, had to be brought into the domestic legislation of Member States by 31 December 2019 and to be fully applied from 1 July 2020. However, some EU Member States, such as Italy, brought DAC 6 into their domestic legislation after this deadline.

Moreover, as a result of the COVID-19 emergency, the Council of the EU amended DAC 6, allowing Member States to defer by up to six months the time limits for the filing and exchange of information under the EU mandatory disclosure rules.

Scope of the Legislative Decree

The scope of the Legislative Decree is fully aligned with DAC 6 and has not been extended to cover VAT, customs duties, excise duties and compulsory social security contributions.

In accordance with DAC 6, the Legislative Decree will only apply to cross-border arrangements (i.e. arrangements concerning Italy and one or more foreign jurisdictions) where at least one of the following conditions is met:

- Not all of the participants in the arrangement are resident for tax purposes in Italy.
- One or more of the participants in the arrangement is simultaneously resident for tax purposes in Italy and one or more foreign jurisdictions.
- One or more of the participants in the arrangement carries on a business in a foreign 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 a foreign jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction.
- The arrangement has a possible impact on the proper application of the procedures governing the automatic exchange of information or the identification of beneficial ownership.

This means that domestic arrangements do not fall within the scope of DAC 6.

A cross border arrangement is reportable if it satisfies at least one of certain hallmarks, i.e. indicators of a potential risk of tax avoidance.

Hallmarks and the main benefit test (MBT)

The list of hallmarks in Annex I of the Legislative Decree is aligned with that in Annex IV of DAC 6.

Under DAC 6, the MBT “*will be satisfied 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 reasonably expect to derive from an arrangement is the obtaining of a tax advantage”.

The ministerial decree – hopefully to be issued after the publication of the Legislative Decree in the Italian Official Gazette – will provide additional clarity on the application of the hallmarks and the MBT.

Who needs to report to the Italian Revenue Agency

Under the Legislative Decree, both the intermediary and the taxpayer have reporting obligations.

Definition of an intermediary

The Legislative Decree, whose wording broadly mirrors that of DAC 6, 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 (i.e. promoter);
- any person that provides, 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, if, having regard to the available information and the relevant expertise and understanding required to provide such services, he knows or could be reasonably expected to know that the arrangement is reportable under DAC 6 (i.e. service provider)⁽²⁾.

As clarified in the explanatory report accompanying the Legislative Decree, the definition of an intermediary encompasses financial institutions subject to CRS reporting obligations (e.g. banks, asset management companies, investment funds, trusts) and professionals subject to anti money-laundering obligations (e.g. lawyers, chartered accountants and public notaries).

Intermediaries are required to report cross-border arrangements when at least one of the following conditions is met.

- They are resident for tax purposes in Italy.
- They have a permanent establishment in Italy through which the services connected with the reportable cross-border arrangement are provided.
- They are incorporated in Italy or governed by Italian laws.
- They are registered with a professional association in Italy (in the field of law, tax or consultancy services).

An intermediary will be exempted from reporting if:

- a) they have evidence that the same information regarding the cross-border arrangement has been reported by another intermediary;
- b) the information is received from their clients during the intermediary’s analysis of their legal position or while representing their clients before a court;
- c) the report would trigger their own criminal liability.

(2) The ministerial decree should provide more insights into the reasonably-expected-to-know test; however, based on the explanatory report accompanying the Legislative Decree, this test should not place additional due diligence obligations on service providers.

In cases b) and c) the intermediary must notify any other intermediaries or, if there is no such intermediary, the relevant taxpayer of their reporting obligations.

Definition of a relevant taxpayer

A relevant taxpayer means any person that implements a reportable cross-border arrangement or to whom such an arrangement is made available for implementation.

Relevant taxpayers must report the relevant cross-border arrangement if any one or more of the following applies.

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

The relevant taxpayer will have to report in the following cases.

- When there is no reporting intermediary.
- When the intermediary is exempt, due to legal professional privilege (and there are no other intermediaries).
- When the intermediary has not provided the relevant taxpayer with the documentation proving that the information has been reported to the competent tax authorities.

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:

- the reporting obligation would trigger their criminal liability;
- the taxpayer has evidence that another taxpayer has reported the same information to the competent tax authorities.

Reporting deadlines

The intermediary must fulfill the reporting obligation within 30 days. That 30-day period begins:

- on the day after the reportable cross-border arrangement is made available for implementation or

the reportable cross-border arrangement has been implemented, if the intermediary qualifies as a promoter; or

- on 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 service provider.

In the case of marketable cross-border arrangements, intermediaries must file a quarterly report to submit any information received after their submission of the first report or the latest quarterly report.

Instead, the relevant taxpayer must report the information about the arrangement within 30 days of the day after that on which they have received notification from an exempted intermediary.

Furthermore, because Italy has opted for the six-month deferral, intermediaries and taxpayers are required to report:

- cross-border arrangements the first step of which was implemented between 25 June 2018 and 30 June 2020 (so-called 'historical arrangements'), by 28 February 2021 (instead of 31 August 2020);
- cross-border arrangements for which the reporting trigger occurs between 1 July 2020 and 31 December 2020, within 30 days of 1 January 2021.

Additional obligations

Intermediaries and taxpayers must keep evidence of the implementation of the cross-border arrangements until:

- 31 December of the fifth year following that in which the arrangements are reported;
- 31 December of the seventh year following that in which the arrangements should have been reported, in the event of failure to report.

Penalties

The administrative penalties for failing to comply with the reporting obligations vary according to the type of infringement, as follows.

- Failure to report: EUR 3,000 to EUR 31,500.
- Incorrect or incomplete reporting: EUR 1,000 to EUR 10,500.

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