



Implementation of DAC 6 in Italy

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Introduction

Our latest Tax & Legal Alert gives an overview of recent developments in the implementation of DAC 6 in Italy, following the publication in November of a new ministerial decree and new Revenue Agency reporting guidelines for intermediaries and taxpayers.

What has been published and when

On 17 November 2020 the Italian Ministry of Economy and Finance passed a decree which was published on 30 November 2020⁽¹⁾ (the 'Ministerial Decree'). The Ministerial Decree implements Directive EU 2018/822 on the mandatory exchange of information (DAC 6), brought into Italian law by Legislative Decree no. 100 of 30 July 2020 (the 'Legislative Decree')⁽²⁾.

The Ministerial Decree was followed, on 26 November 2020, by the publication of guidance on the reporting of cross-border arrangements, issued by the Director of the Italian Revenue Agency for the benefit of intermediaries and taxpayers.

1. The Ministerial Decree

The Ministerial Decree establishes the rules on the technical application of DAC 6. It also gives further details about some of the hallmarks of cross-border arrangements and the criteria to be followed when assessing whether such arrangements are tax-driven.

1.1 Definitions

The Ministerial Decree starts by giving a series of definitions, extra to those already given in the Legislative Decree⁽³⁾. Some of these are listed in the next page.

(1) In Official Gazette no. 297 of 30 November 2020 (daily *Serie generale* edition).

(2) See our previous update - [Lettera informativa n. 17/2020](#).

(3) See article 2 of the Legislative Decree.

1. **Hard-to value intangible assets:** these are intangible assets or intangible asset rights:
 - for which there are no reliable comparable transactions at the time of their transfer between related companies;
 - whose ultimate overall profitability is difficult to predict at the time of the agreement governing their transfer, because the projected future cash flow or income from the intangible assets, or the assumptions used in valuing them, are extremely uncertain.
2. **Non-tax advantage:** this means any quantifiable economic benefit, other than a tax one, deriving from the cross-border arrangement.
3. **Safe harbor:** this means a system that, for specific categories of transactions, pre-establishes certain rules and minimum standards that, if adhered to, protect businesses from having to provide the further evidence required by transfer pricing rules or practices.
4. **Opaque offshore structure:** this means a passive offshore structure whose ownership is organized in such a way as to prevent the beneficial owner from being properly identified or to make it appear that a party is not the beneficial owner. It may also be a passive offshore vehicle marketed as a way of achieving these effects.
5. **Passive offshore vehicle:** this means an entity that does not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises and that is set up, resident, managed, controlled or established outside the jurisdiction in which at least one of the beneficial owners of the assets held by the entity is resident.

1.2 Value of the arrangement

The Ministerial Decree establishes the criteria for determining the value of cross-border arrangements for reporting purposes⁽⁴⁾.

In the case of Hallmarks A, B, C and E, the value is the tax advantage deriving from the cross-border arrangement. This tax advantage is the difference between the taxes to be paid under one or more cross-border arrangements and those that would have been due without the arrangement/s.

In the case of Hallmark D, the reportable value is that of the financial accounts, the calculation of which is based on the CRS implementation decree.⁽⁵⁾⁽⁶⁾

(4) See article 6(1)(f) of the Legislative Decree.

(5) See article 3(1) of the Ministry of Economy and Finance Decree of 28 December 2015.

(6) With regard to Hallmark D.2, in the case of non-financial assets and income the reportable value of the cross-border arrangement corresponds to the tax advantage.

1.3 Reportable details and reporting deadline

The Ministerial Decree gives the following additional details about the reporting deadline.

The taxpayer must send the information indicated in the Legislative Decree⁽⁷⁾ to the Revenue Agency within 30 days of the date following that on which the reported cross-border arrangement has been made available to the taxpayer for implementation or on which implementation has begun.

If an intermediary is exempted from reporting because this could result in self-incrimination or violate professional privilege, that intermediary must inform the other intermediaries and the taxpayer within 30 days of:

- the date following that on which the reported cross-border arrangement has been made available for implementation or on which implementation has begun;
- the date following that on which they have supplied, directly or through other persons, assistance or advice connected with the implementation of the reportable cross-border arrangement.

1.4 Level of knowledge

Intermediaries may have a dual role, as both promoters and service providers⁽⁸⁾. The latter must report a cross-border arrangement when, having regard to the information available and the expertise and understanding required to provide such services, they know or have reasonable grounds for believing that the arrangement is reportable under DAC 6⁽⁹⁾. The Ministerial Decree⁽¹⁰⁾ has clarified that service providers have this level of knowledge if they:

- have actual knowledge of the cross-border arrangement, based on information readily available as a result of the assistance or advice provided to their client; and
- have the level of expertise necessary to provide the assistance or advice, as well as the level of experience normally required for work of that kind.

With regard to the level of knowledge of financial intermediaries, the Ministerial Decree clarifies an important point: unless there is proof to the contrary, this level of knowledge is not demonstrated in the case of routine banking and financial transactions.

(7) See article 3(1) of the Legislative Decree.

(8) According to article 2(1)(c) of the Legislative Decree.

(9) See article 2(1)(c) of the Legislative Decree.

(10) See article 4 of the Ministerial Decree of 17 November 2020.

1.5 Applicability of the hallmarks and the main benefit test

The Ministerial Decree clarifies⁽¹¹⁾ that Hallmarks A, B, C and E apply for DAC 6 purposes only if liable to reduce the amount of taxes (excluding VAT, customs duty, excise duty and social security contributions) due by a taxpayer in an EU Member State or other jurisdiction with which there is a specific agreement to exchange information.

With regard to the main benefit test, used to determine whether certain hallmarks are applicable⁽¹²⁾, the Ministerial Decree states that this test is satisfied only if the tax advantage is higher than 50 percent of the sum of that tax advantage and the non-tax advantages. It also specifies that this tax advantage is the difference between the taxes to be paid under one or more cross-border arrangements and those that would have been due without the arrangement/s.

1.6 Clarifications about certain hallmarks

The Ministerial Decree has provided clarifications about certain hallmarks⁽¹³⁾.

- A cross-border arrangement will not exhibit Hallmark A.3 if it is made in order to benefit from a single form of tax relief offered by the state and satisfies the necessary conditions for that relief.
- With regard to the concept of a related company⁽¹⁴⁾, it is necessary to consider the following points.
 - i. If more than one company has a share in the management, control, capital or profits of the same company, all the companies involved are deemed to be related companies.
 - ii. If the same companies have a share in the management, control, capital or profits of more than one company, all the companies involved are considered to be related companies.
 - iii. A company that, with another company, conducts a transaction involving voting rights or capital held in a third entity is considered to hold all the voting rights or all the capital held by the second company in that entity.

(11) In article 6.

(12) The main benefit test applies only to Hallmarks A, B and C.1(b)(1)(c) and (d) indicated in Appendix 1 to the Legislative Decree.

(13) See article 8(1) of the Ministerial Decree of 17 November 2020.

(14) See article 2(1)(e) of Legislative Decree no. 100 of 30 July 2020. Moreover, the concept of a related business is relevant for the purposes of Hallmarks C.1 and E.2.

- For the purposes of Hallmark C.1(b)(1)⁽¹⁵⁾, companies receiving cross-border payments are not considered to be excluded from corporation tax or to be subject to zero or close-to-zero tax if they (i) fall within the scope of the tax transparency regime governed by articles 5, 115 and 116 of the Italian Income Tax Code or (ii) are foreign tax residents and are subject to equivalent tax transparency regimes in the jurisdiction where they are resident, established or effectively managed (e.g. partnerships).
- For the purposes of Hallmark C.4, the material difference in the amount being treated as payable in consideration for the assets in the jurisdictions involved is the difference between the amount being treated as payable and the fair market value of the assets⁽¹⁶⁾.

Appendix A of the Ministerial Decree gives various examples of cases that might exhibit Hallmark D and therefore have to be reported. See article 8(1) of the Ministerial Decree of 17 November 2020.

1.7 Reference number

When a cross-border arrangement is reported, the Italian Revenue Agency will issue a reference number, unless the report already includes a reference number issued by that agency or by other EU tax authorities. This reference number must be indicated by the participants in any other subsequent report on the same arrangement and in the periodic reports that intermediaries must submit to the Italian Revenue Agency in the case of marketable arrangements⁽¹⁷⁾. It must also be indicated in the returns of the taxpayers who implement the arrangement (in the return for each fiscal year in which the cross-border arrangement is used).

(15) This hallmark is exhibited by an arrangement in which deductible cross-border payments are made between two or more related companies and in which the jurisdiction where the payee is resident for tax purposes does not impose any corporation tax or imposes a zero-rate corporation tax or a rate close to zero.

(16) The fair market value must be determined by reference to the conditions and prices that would have been agreed between unrelated parties operating on arm's length conditions and in comparable circumstances, taking into account, in the case of a business or part of a business, the value of the goodwill, calculated on the basis of the functions and risks transferred.

(17) See article 7(2) of Legislative Decree no. 100 of 30 July 2020.

2. Italian Revenue Agency guidance

The guidance issued by the Director of the Italian Revenue Agency on 26 November 2020 (ref. no. 364425), by explaining how reports should be submitted through Entratel or Fisconline, completes the framework enabling reporting of cross-border transactions to begin on time.

Two points in particular are worth noting:

- It is possible to delegate reporting to a group company or to an intermediary.⁽¹⁸⁾
- Reports rejected by the Revenue Agency's systems will be treated as not having been submitted. However, the party that is notified of the rejected report can resubmit it within the calendar-year quarter in which the original submission deadline falls.

(18) See article 7(2) of Legislative Decree no. 100 of 30 July 2020.

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