

# Mandatory Disclosure Rules

## DAC6 transposition in Italy – draft Legislative Decree issued by Government, but not yet approved by Parliament

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

### Status

On January 29, 2020, the Italian Government approved the draft text of a Legislative Decree to transpose Directive (EU) 2018/822 on mandatory disclosure rules (hereinafter “DAC6” or “the Directive”) into Italian domestic law.

The decree had to be approved by the competent Committees of the Italian Parliament by March 11, 2020. However, given the COVID-19 emergency, an opinion from the one of the Parliament’s Committee (“*V Commissione – Commissione Bilancio*”) is still missing.

The decree, once it has been approved by all the competent Committees, will be subject to the final approval by the Italian Council of Ministers before it can be enacted into law by the President of the Italian Republic. This was expected in early May 2020. However, in the context of the COVID-19 pandemic and related government response, the Italian Council of Ministers approved a draft-law that extends by three months the deadlines to adopt any legislative decree with a deadline that would otherwise fall between February 1, 2020 and August 31, 2020. Therefore, if the draft-law becomes effective, the deadline to implement DAC6 will be postponed to early August 2020. Nonetheless the implementation of DAC6 should be dealt with as a matter of priority.

A decree (Implementation Decree) is also expected to be issued by the Italian Finance Minister and will clarify the Italian interpretation of certain key aspects of the Directive (e.g. the application of the main benefit test).

Please note that this summary is based on information available as at April 17, 2020 and the comments made are based on both the draft Legislative Decree and on the draft text of the Implementation Decree, still unofficial.

### 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 draft legislation 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 draft legislation includes the following clarifications:

### Intermediary

The definition of intermediary mirrors the definition presented in the Directive. To qualify as an intermediary, a service provider must also have a sufficient level of knowledge of the arrangement.

Based on the draft 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.

### Intermediary (cont.)

It has been also 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.

A report accompanying the draft Implementation Decree also clarified that actual knowledge is based on readily available information, implying that the intermediary does not have to (i) fulfil any further due diligence requirements other than those ordinarily imposed by law or other purposes (e.g. anti-money laundering), or (ii) acquire information additional to that already available for business reasons.

### Hallmarks & Main Benefit Test

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

The draft Implementation Decree provides additional clarity on the application of the hallmarks and main benefit test. Note, however, that these are proposed measures, which may change as the draft moves through the legislative process.

### Reduction in amount of tax due

The draft Implementation Decree specifies that, with the exception of the specific category D hallmarks – concerning the automatic exchange of information (AEOI) and beneficial ownership – Italian MDRs will apply only in cases where there is a reduction in the amount of tax due by a taxpayer that is resident for tax purposes in an EU Member State or in another foreign jurisdiction with which there is a special agreement on the exchange of information.

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).

### Main benefit test

The draft Implementation Decree clarifies that the main benefit test would be satisfied in Italy when the tax advantage that could be obtained by one or more taxpayers 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.

In this regard, the 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.

### Reporting - Intermediaries

Under article 2(1)(c) of the draft Legislative Decree, an intermediary will only have a reporting obligation in Italy if it meets one of the following conditions:

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

According to article 3(3-5) of draft Legislative Decree, an intermediary will not be required to report if:

- a) the intermediary has evidence that it reported the relevant information in another Member State; or
- b) there is evidence that the same information has been reported by another intermediary;
- c) the reporting obligation would breach the legal professional privilege;
- d) the reporting obligation would trigger a criminal liability.

In the case of c) and d), according to article 3(6) of the draft Legislative Decree, the intermediary is required to notify any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations.

Neither the draft Legislative Decree, nor the Implementation Decree have yet clarified what evidence is deemed sufficient to convincingly demonstrate that reporting was completed by another intermediary.

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.

Article 7(4) of the draft Legislative Decree states that the Italian Revenue Agency will issue a standard form, to be filed electronically.

### **Reporting – Relevant Taxpayer**

Reporting timelines for relevant taxpayers and the information that is required to be disclosed mirror the requirements of DAC6. Relevant taxpayers should also report on the use of reported arrangements each year.

Under article 2(1)(d) of the draft Legislative Decree, a relevant taxpayer will be obliged to report arrangements in Italy if it meets one of the following conditions:

- 1) is liable to tax in Italy by virtue of tax residency, PE, registered office or place of business;
- 2) operates in Italy through a PE, which benefits from the arrangement;
- 3) receives income or profits in Italy; or
- 4) pursues an activity in Italy.

Under article 3(7) of the draft Legislative Decree, a taxpayer will be required to report in the following cases:

- there is no reporting intermediary;
- 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 article 3(8) of the draft Legislative Decree, where multiple taxpayers are involved, the relevant taxpayer that is to file information will be the one that features first in the following list :

1. The taxpayer that agreed the arrangement with the intermediary; or
2. The taxpayer that is managing the implementation of the arrangement.

Finally, under article 3(9-10) of the draft Legislative Decree, the relevant taxpayer will not be required to report if:

- the reporting obligation would trigger a criminal liability;
- the taxpayer has evidence that another taxpayer has reported the same information to the competent Tax Authorities.

### **Exchange of information**

Under article 9(4) of the draft Legislative Decree, the Italian tax authorities do not intend to automatically exchange certain categories of sensitive information (e.g. intellectual or industrial property rights) automatically with other EU tax authorities.

### **Penalties**

According to article 12 of draft 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.

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

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