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Mandatory Disclosure Rules

DAC6 transposition in Italy – Legislative Decree published

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

Status

Legislative Decree no. 100 of July 30, 2020, transposing Directive (EU) 2018/822 on mandatory disclosure rules (hereinafter "DAC6" or "the Directive") into Italian domestic law was published in the Italian Official Gazette on August 11, 2020 and enters into force on August 26, 2020.

A second 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).

In the Legislative Decree Italy has opted for a six-month deferral of the reporting deadlines, as allowed under Council Directive (EU) 2020/ 876.

Please note that this summary is based on information available as at August 11, 2020 and the comments made are based on both the Legislative Decree and on the draft text of the Implementation Decree, still unofficial.

Scope

The scope of the Italian mandatory disclosure rules (MDRs) is closely aligned with the Directive, with no extension of scope proposed for VAT, customs duties or excise duties. Italian 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 Legislative Decree includes the following clarifications:

Intermediary

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

As clarified in the explanatory report accompanying the Legislative Decree, the definition of an intermediary includes financial institutions that are 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).

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.

It has been also specified in the draft 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 explanatory report accompanying the Legislative 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 obligations), or (ii) acquire information in addition to that already available for business reasons.

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 should apply to the category A and B hallmarks and paragraphs 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 the 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 Italy has concluded 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 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 the 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 information is received from their clients during the intermediary's analysis of their legal position or while representing their clients before a court;
d) the reporting obligation would trigger a criminal liability.

In the case of c) and d), according to article 3(6) of the 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 Legislative Decree, nor the draft 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 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.

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

1) is tax resident in Italy;
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 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 documentation proving that the relevant information has been reported to the competent Tax Authorities.

According to article 3(8) of the Legislative Decree, where 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.

Finally, under article 3(9-10) of the 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 Legislative Decree it is noted that 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 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 the 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 the Sanctions Decree, decreased by half) will apply.

Deferral of reporting deadlines

Following the adoption of Council Directive 2020/ 876, allowing EU Member States to defer the DAC6 reporting deadlines by up to six months, Italy has 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 on January 1, 2021 (originally July 1, 2020).
- Within 30 days of January 1, 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 – December 31, 2020).
- April 30, 2021 for the first periodic report on marketable arrangements.

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

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