

Italy is about to implement DAC 6

After having failed the deadline set on 31st December 2019, the Italian Government is speeding up the process of implementation of DAC 6. The implementing decree will establish reporting obligations on intermediaries and taxpayers concerning cross-border arrangements meeting a list of dedicated hallmarks. The framework is quite complex and reference is made to a further ministerial decree that should provide for more detailed specification of the hallmarks and the technical operating rules. DAC 6 implementation could have a disruptive effect in the consultancy industry and bear a huge impact on the activity of financial institutions.

EU Council Directive 2018/822 of 25 May 2018 (“DAC 6”) sets out the conditions under which intermediaries and taxpayers shall report to the competent tax authorities of EU Member States information regarding the relevant cross-border arrangements concluded with the aim to

pursue a tax advantage, and how such information are exchanged between EU Member States

and non-EU States

The ultimate deadline to implement DAC 6 was set on 31 December 2019. Italy failed to meet the deadline, although on 30 July 2018 a draft implementing decree was issued for the purpose

of a public consultation opened until Fall 2018.

DAC 6 Implementation: Decree Proposal released by the Italian Government

The Italian Government is currently working on an updated draft version of the implementing decree that seems to take into account some of the observations raised in the course of the 2018 public consultation.

The Decree Proposal will be subject to opinion by the competent parliamentary committees and should be finally approved by the Council of Ministers – further amendments may therefore take place.

What to report

Definition of relevant cross-border arrangement

A “cross-border arrangement” is broadly defined as a “scheme, arrangement or plan” that concerns Italy and one or more other countries and where at least one of the following conditions is met:

- at least one of the participants to the arrangement (either taxpayers or intermediaries) is not tax-resident in Italy or is dual-resident in Italy and in another country;
- if all participants are tax-resident in Italy, there is at least one who carries on business activity through a permanent establishment located abroad and the arrangement concerns (even partly) the PE activity;
- if all participants are tax-resident in Italy and no one has a PE abroad, at least one carries on an activity abroad;
- the arrangement can potentially undermine the automatic exchange of information under the CRS framework or the identification of beneficial ownership.

The cross-border arrangement is subject to reporting obligation only if it meets at least one of

the hallmarks outlined in the annex to the Decree Proposal (essentially mirroring Annex IV to

DAC 6).

Hallmarks

Hallmarks are divided into five categories. The first and the second one would apply to the extent the cross-border arrangement is mainly aimed at obtaining a tax advantage (so-called main benefit test).

1) the first category lists generic hallmarks linked to the main benefit test;

By way of example, this category includes arrangements where the intermediary is entitled to receive a fee by reference to the amount of the tax advantage derived from the arrangement

2) the second category lists specific hallmarks linked to the main benefit test;

By way of example, this category includes arrangements that have the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower rate or are tax-exempt.

3) the third category lists specific hallmarks linked to the cross-border transactions;

By way of example, this category includes arrangements that involve double deduction or deduction-and-non-inclusion situations or transactions with entities located in tax heavens.

4) the fourth category lists specific hallmarks that outlines arrangements capable of undermining the exchange of information under the CRS framework or involving a nontransparent

legal or beneficial ownership chain.

5) the fifth category lists specific hallmarks linked to transfer pricing.

By way of example, this category includes the transfer of hard-to-value intangibles.

The Decree Proposal establishes that a further to-be-issued Decree from the Ministry of Economy and Finance will set out the technical operating rules, including further specifications about the hallmarks and the criteria under which the main tax benefit test

should

be run.

Information to be reported

The following information concerning a relevant cross-border arrangement should be reported:

- identification data of the intermediaries and taxpayers involved (included associated enterprises) – this information should be reported by intermediaries to the extent it is in their knowledge, possession or control;
- hallmarks met by the reported arrangement;
- a summary of the reported arrangement;
- the value of the reported arrangement;
- the starting date of the reported arrangement;
- identification of the tax-residence jurisdictions of the taxpayers involved;
- identification of any other subject potentially involved.

Who shall report

Reporting obligation to the Italian Revenue Agency (Agenzia delle Entrate) would cover the participants to a relevant cross-border arrangement, who can be both taxpayers and intermediaries.

Definition of intermediary

An intermediary is defined as any person who:

- designs, markets, organises or makes available for implementation or autonomously manages

the implementation of a reportable cross-border arrangement (so-called “promoter”), or

- directly or by means of other persons, provides aid, assistance or advice with respect to the activities outlined above (so-called “service provider”), when – having regard to the relevant facts and circumstances including the expertise required to provide such services – such

person

knows or could be reasonably expected to know that the concluded arrangement qualifies as a reportable one.

The reasonably-expected-to-know test will clearly be an issue. The explanatory memorandum (relazione illustrativa) attached to the Decree Proposal suggests that the test should not have the effect to impose additional due diligence requirements on intermediaries.

By way of example – as the explanatory memorandum puts it – a financial institution performing routine functions (like executing bank transfers) should be out of the scope of DAC 6 mandatory reporting, since it will “pass” the reasonably-expected-to-know test.

An intermediary qualifies as such where at least one of the following conditions is met:

- the intermediary is tax-resident in Italy,
- the intermediary is not Italian-tax-resident but it provides the services related to the crossborder arrangement through an Italian permanent establishment,
- the intermediary is incorporated or governed by the laws of Italy,
- the intermediary is registered with a professional association related to legal, taxation or consultancy services in a Member State.

As mentioned by the explanatory memorandum, the definition of intermediary covers

financial

institutions subject to CRS reporting obligations and professionals subject to anti moneylaundering

obligations, including lawyers, tax advisors, and public notaries.

In case more than one intermediary is involved in one relevant cross-border arrangement, the

reporting obligation falls in principle on each intermediary involved. In case one intermediary

can prove that another one has already reported to the Italian Revenue Agency or to the competent authority of another country (either EU or non-EU), the former is discharged from any reporting obligation.

Definition of taxpayer

The relevant taxpayer is defined as any person:

- a) who implements the relevant arrangement or
- b) to whom a reportable arrangement is made available for implementation, provided that:
 - the taxpayer is Italian-tax-resident, or
 - the taxpayer is not Italian-tax-resident, but has an Italian PE that benefits from the arrangement (the explanatory memorandum to the Decree Proposal clarifies that the benefit can also not be related to tax), or
 - the taxpayer receives or produces Italian-sourced income, or
 - the taxpayer carries on an activity in Italy.

The taxpayer is under reporting obligation if:

- there is no intermediary involved or
- the intermediary informs that it benefits from a safe-harbour clause (see below) and there is no other intermediary under reporting obligation or
- the tax taxpayer has not been made aware within the reporting deadline (see below) that the reporting obligation has already been fulfilled by an intermediary or another taxpayer.

In case of multiple taxpayers, the obligation falls on the one(s) who concluded the arrangement

with the intermediary or, in its absence, on the one(s) who managed the implementation of the

arrangement.

Special safe harbours

Legal Privilege

The intermediary is discharged from reporting obligation for any information received from his client or otherwise obtained concerning:

- the examination and assessment of the legal position of the client, including advice on the possibility to bring or to avoid legal proceedings;
- activity of defence and assistance in legal proceedings, including information received or obtained before, during and after the conclusion of the proceedings.

Prevention of self-incrimination

The intermediary and the taxpayer are discharged from reporting obligation in any case where

this could imply the risk of self-incrimination.

In case the legal privilege and self-incrimination safe-harbours apply, the reporting obligation is

shifted to other intermediaries and to other taxpayers (if any).

Reporting deadlines

Intermediary shall fulfil the reporting obligation within thirty days from:

- in case of “promoters”: the day when the arrangement has been made available or when its implementation phase began;
- in case of “service providers”: the day when the aid, assistance or advice services are rendered.

If the taxpayer is informed that the intermediary is discharged from reporting obligation, then the deadline is set to thirty days starting from the day when the information is received.

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The Decree Proposal states that intermediaries and taxpayers shall report within 31 August

2020 the information about relevant cross-border arrangements the first phase of which has been implemented in the period between 25 June 2018 and 1 July 2020.

The information received is exchanged by the Italian Revenue Agency with the competent authorities of other EU and non-EU countries every three months.

Penalties

Failure to report may result in administrative penalties charged in a range between EUR 4,000

and 42,000. Incorrect reporting may result in administrative penalties charged in a range between EUR 1,000 and 10,500.