

Italy publishes ministerial guidance on Mandatory Disclosure Rules

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Executive summary

On 30 November 2020, Ministerial Decree of 17 November 2020 (the Decree) was published in the *Official Gazette* of the Italian Republic, a few days after the issuance of Ruling 364425 of 26 November 2020 by the Director of the Italian Tax Authorities (the Ruling). Both the Decree and the Ruling provide guidance for the introduction in Italy of mandatory disclosure rules set by EU Directive 2018/822 ("DAC6") and implemented in Italy by Legislative Decree 30 July 2020 no. 100 (the Law). The last component to be issued is an interpretative tool represented by a Circular Letter to be released by the Italian Tax Authorities in the weeks to come.

This Alert summarizes the key provisions of the ministerial guidance that appear to be most impactful for an immediate and effective application of the rules.

Detailed discussion

Relevance of the hallmarks

One of the most significant clarifications contained in the Decree, relates to the relevance of the hallmarks for a cross-border arrangement to be reportable. Articles (Art.) 6 and 7 considered together clarify that:

- a) Hallmarks A, B, C and E are relevant only if they are able to give rise to a decrease in taxes due by a taxpayer in a European Union (EU) Member State, or in a third country with which there is an agreement for the exchange of information, **AND**
- b) Hallmarks A, B, C.1(b)(1), C.1(c) and C.1(d) are relevant only if the "tax advantage" deriving from the arrangement is higher than 50% of the total advantages, i.e., the sum of tax and non-tax advantages (so called "main benefit test"). The "tax advantage" is to be calculated as the difference between the taxes to be paid based on one or more cross-border arrangements and the same taxes which would be paid in the absence of such arrangements.

Looking holistically at the two requisites described above, it is immediately clear that defining a cross-border arrangement as reportable entails being able to understand and calculate taxes not only in EU Member States but also in third countries. Furthermore, hallmarks stated in point b) above require the ability to calculate not only tax advantages but also non-tax advantages deriving from a cross-border arrangement.

It is also worth highlighting that the Decree specifies (what had been missed by the Law, i.e.) that both the tax decrease and the tax advantage relate to the taxes which are considered by the Directive, therefore excluding value added tax (VAT), custom duties and excise duties (as per Art. 2.2 of Directive 2011/16/EU).

The obligation for service providers

DAC6 and the Law provide for an obligation to file information on reportable cross-border arrangements in certain situations for both taxpayers and "intermediaries," the latter being defined as either "promoters" or "service providers."

Art. 4 of the Decree states that in order for a service provider to qualify as an "intermediary," a "knowledge standard" (as defined in the decree) must be met (i.e., the so called "reasonably expected to know" test). If the requirement is not met, the service provider is not subject to the obligation to file a report.

The knowledge standard is determined by reference to:

- a) The actual knowledge of the cross-border arrangement that the service provider has, on the basis of the information immediately available to him by virtue of his assistance or consultancy activity performed for the client, and

- b) The degree of expertise necessary to provide the assistance or consultancy service as well as the level of experience ordinarily required for the supply of such a service.

It is worth highlighting here that both conditions must be present, i.e., both the first element relating to the type or scope of consultancy provided and the second element relating to the level of experience of the consultant. Hence, the advisor might not be reasonably expected to know that the arrangement causes a tax reduction in Country A if he is only providing advice on manufacturing in Country B, or if he is a young professional assisting with tax compliance in Country C.

It is also stated that the knowledge standard is not met for routing banking and financial transactions, unless proven otherwise.

The content of the filing

Art. 2 of the Decree specifies that the description of the cross-border arrangement is to be prepared in Italian, but it must be accompanied by a brief report in English. This makes sense when considering that the information shall be exchanged with other countries' tax authorities.

It is worth highlighting that the filing must include the value of the tax advantage deriving from the arrangement when it contains hallmarks A, B, C and/or E. This is in addition to information regarding the involved taxpayers and intermediaries, law provisions, hallmarks, jurisdictions where the involved taxpayers are tax resident, and date of the first step, etc. When hallmark D is met, the value of the cross-border arrangement is the value determined under the Common Reporting Standard (CRS) rules for the financial accounts. Interestingly, Art. 2.3 of the Decree states that, for service providers, information to be collected is only that information that is immediately available by virtue of their relationship with the client.

Timing for the filing

The Law (Art. 7) states that intermediaries are required to file the information within 30 days beginning:

- a) On the day after the reportable cross-border arrangement is made available for implementation or the implementation has started.
- b) On the day after they provided directly or by means of other persons assistance or advice for the purposes of the implementation of the cross-border arrangement.

The Decree does not provide additional information with respect to the timing of the filing of the report, but, with respect to the content of the information to be filed, it clarifies that the "date of the first step" of the cross-border arrangement is defined as "the moment when the taxpayer undertakes the first act having legal effects or the first financial transaction for the implementation of the arrangement."

The Ruling (Art. 4.1.b) provides further information regarding the timing by reproducing the Law. It is worth highlighting that - for letter b) above - the thirty days begin on the day after the service providers have given the advice "for the purposes of the implementation." On the other hand, the definition of service providers makes reference to the "activity of assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of the cross-border arrangement." Hence, one might wonder whether advice with respect to the sole design of a cross-border arrangement does not start the clock for the obligation to file.

It is perhaps worth noting that (see Art. 4 of the Ruling) reportable arrangements related to the period between 1 July 2020 and 31 December 2020 have to be reported within 30 days starting from 1 January 2021, while those arrangements, the first step of which has been implemented between 25 June 2018 and 30 June 2020 must be reported by 28 February 2021.

Clarifications regarding hallmarks

Art. 8 of the Decree has provided some clarifications regarding the hallmarks, which can be summarized as follows:

- ▶ An arrangement does not fall within hallmark A3 if it is aimed at benefitting from a specific tax incentive provided by the State and when the conditions for the incentive are met.
- ▶ For the purposes of hallmark C.1(b)(1), a recipient which is considered as "tax transparent" shall not to be considered a recipient resident for tax purposes in a jurisdiction that does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero.
- ▶ For the purposes of hallmark C.4, the difference in the amount deriving from the assets' transfer is to be meant as the difference between the amount due as consideration in the jurisdictions involved and the fair market value of the transferred assets.
- ▶ The definition of "associated enterprise" includes also the provisions of paragraph 2, 3, 4 and 5 of point 23 of article 3 of the Directive 2011/16 as amended by DAC6 (which had not been included in the definitions provided by the Law).

A list of examples is also provided for cases to be considered as falling within category D of the hallmarks.

Implications

The publication of the Decree and the Ruling is an important step in the implementation of DAC6 in Italy. Taxpayers and intermediaries who have operations in Italy should review these provisions as soon as possible to ensure that they are fully prepared to meet their reporting obligations.

In fact, the first cross-border arrangements will start being reported in a few weeks, and Art. 7.3 of the Ruling states that the first exchange of information by the Italian tax authorities with other countries' tax authorities shall be filed by 30 April 2021.

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