



LEGALINK

INTERNATIONAL BUT PERSONAL

DAC6
THE EU DIRECTIVE
ON CROSS-BORDER
TAX ARRANGEMENTS

INTRODUCTION

On 25 May 2018 the Council of the European Union adopted Directive 2018/822/EU as the sixth amendment to the Directive on Administrative Cooperation 2011/16/EU, commonly referred to as "DAC 6", which imposes extensive reporting requirements with respect to cross-border tax planning arrangements affecting at least one EU member state. DAC 6 is part of the continuing efforts of the EU Commission to clamp down on tax avoidance and evasion in the internal market by creating transparency regarding potentially aggressive cross-border tax planning schemes.

The reporting obligations under DAC 6 are very broad and do not just apply to tax lawyers and therefore create a new set of compliance issues for the legal profession, in particular for lawyers involved in cross-border M&A transactions. Since DAC 6 only provides a general framework and gives the member states significant discretion regarding the transformation into national laws, it is useful for any practitioner who can be a potential "intermediary" to have an overview over the various laws and regulations in the EU member states.

ITALY

Cocuzza & Associati

1. When was DAC 6 implemented into the National Tax Law of Italy?

DAC 6 was implemented in Italy by means of Legislative Decree n. 100/2020, entered into force on 26 August 2020, followed by a Decree issued by the Ministry of Economics and Finance dated 17 November 2020.

- Have the tax authorities in your jurisdiction issued guidelines for the application and enforcement of the obligations under DAC 6?

Yes. The Agenzia delle Entrate (Italian Revenue Agency) issued circular n. 2 on 10 February 2021 setting forth guidelines for the application and enforcement of DAC 6.

2. What constitutes a reportable cross-border tax arrangement under the laws and regulations of your jurisdiction?

- What constitutes a "cross-border" arrangement? To what extent are national structures also covered?

A cross-border arrangement consists in a scheme, an agreement or a project that concerns Italy and one or more foreign jurisdictions, in presence of one of the following conditions:

- a) not all the participants in the arrangement are resident for tax purposes in Italy;
- b) one or more participants are simultaneously resident for tax purposes in Italy and in one or more foreign jurisdictions;
- c) one or more participants carry on their business in a foreign jurisdiction through a permanent establishment located there, and the arrangement concerns at least a part of the business of the permanent establishment;
- d) one or more participants, without being resident for tax purposes or having a permanent establishment in a foreign jurisdiction, carry on their business in such jurisdiction;
- e) the arrangement can alter the correct application of the procedures on the automatic exchange of information or on the identification of beneficial ownership.

- How are the hallmarks and the "main benefits" test in Annex IV to DAC 6 defined and interpreted in your jurisdiction?

Hallmarks are defined as indexes of risk of tax avoidance or evasion.

Main benefits are the result of the difference between taxes that arise from the implementation of the cross-border arrangement and taxes that would have been due in its absence. If the former are lower than the latter, a main benefit occurs, represented by a potential tax reduction (circular n. 2/2020 of Agenzia delle Entrate and art. 7 Decree of the Ministry of Economics and Finance).

- What constitutes a "tax benefit" under the legislation in your jurisdiction?

Art. 2, par. 1, lett. (i) of Legislative Decree n. 100/2020 defines the tax benefit as one of the main benefits of a fiscal nature that are reasonably expected from the cross-border arrangement, taking into consideration facts and circumstances.

- Is it required that the achievement of the "tax benefit" is the sole or the main purpose of the structure?

Yes, the tax benefit is one of the main benefits that are expected from the cross-border arrangement. It must be main or prevailing in comparison with benefits that are not of a fiscal nature (art. 7.2 Ministry of Economics and Finance Decree).

- Do the laws and regulations of your jurisdiction require a connection to a potential abuse of tax structures?

Yes.

- Did your jurisdiction adopt a whitelist of non-reportable "standard" tax arrangements?

No.

3. Who is subject to the reporting obligation (taxpayer, intermediary, other)? Art. 3 of Legislative Decree n. 100/2020 sets forth that reporting obligations concern intermediaries and taxpayers.

- Do the laws and regulations of your jurisdiction address the issue of potential legal conflicts of intermediaries with professional confidentiality obligations?

Yes. Art. 3, par. 4 of Legislative Decree n. 100/2020 sets forth that an intermediary is exempted from the reporting obligation if he obtains information from or about his client due to his legal position or while carrying out activities of defence or representation of the same in a judicial proceeding.

4. What information must be included in a report on cross-border tax arrangements under DAC 6 in your jurisdiction and is there a specific format to be used?

The information that must be included in a report is the following (art. 6 of Legislative Decree n. 100/2020):

- identification of the intermediaries, taxpayers and associated companies of such taxpayers;
- hallmarks present in the cross-border arrangement that make it reportable;
- overview of the content of the reportable cross-border arrangement;
- start date of implementation of the cross-border arrangement;
- national provisions that establish the obligation to report the cross-border arrangement;
- value of the reportable cross-border arrangement that is the object of the reporting obligation;
- identification of the jurisdictions of fiscal residence of the taxpayers, as well as of other jurisdictions that are potentially affected by the cross-border arrangement that is the object of the reporting obligation, if any;
- identification of any other subject who is potentially affected by the cross-border arrangement, as well as of the jurisdictions to which the subject is attributable.

As regards formalities, there is a specific format that must be filled with required information and forwarded electronically to the Agenzia delle Entrate.

5. Is there an obligation to report tax arrangements which were already implemented in the past? If yes, what is the cut-off date?

Yes, art. 7, par. 4 of Legislative Decree n. 100/2020 sets forth that information regarding the time period between 1 July 2020 and 31 December 2020 had to be reported within 30 days from 1 January 2021, and art. 8, par. 1 of the same Decree sets forth that reports regarding cross-border arrangements the first phase of which was implemented between 25 June 2018 and 30 June 2020 had to be made no later than 28 February 2021.

6. Who is the competent authority for filing a report under DAC 6 in your jurisdiction?

The competent authority in Italy is the Agenzia delle Entrate (the Revenue Agency).

7. What is the deadline for filing a report?

The deadline is 30 days from:

- the day that follows the day when the reportable cross-border agreement is available for implementation or the day when the implementation has been started;
- the day that follows the day when assistance or consultancy has been provided, directly or by means of other people, for the purposes of the implementation of the reportable cross-border arrangement.

– Has there been an extension of deadlines due to the COVID-19 pandemic?

Yes. Deadlines indicated in point 5 above are the results of such extension.

8. What are the penalties and/or other legal consequences for failing to submit a DAC 6 report within the applicable deadline?

The penalty is an administrative fine of €3,000 to €31,500, reduced by half if the report is submitted within 15 days from the deadline, as set forth by art. 12 of Legislative Decree n. 100/2020.

9. Has your firm implemented specific processes regarding DAC 6 compliance? If yes, please describe.

We are currently reviewing and updating our internal procedures. There is a clear intersection between DAC 6 and anti-money-laundering protocols, so we are studying the interplay, even though it is clear that these are two different reporting obligations.

10. Contact details

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