Implementation of DAC6 in Italy

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In this article, the authors examine Italy's implementation of the EU's directive requiring intermediaries and taxpayers to report specific types of cross-border tax planning arrangements and requiring Italy to share the information with interested member states and, in some cases, third countries.

With the publication in the Italian Official Journal of Legislative Decree No. 100 of July 30, 2020 (the decree), which entered into force on August 26, 2020,[1] Italy has transposed[2] Council Directive (EU) 2018/822 of May 25, 2018 (directive on administrative cooperation, or DAC6), into its domestic law. The decree establishes rules and procedures for the mandatory automatic exchange of information on aggressive cross-border tax planning arrangements (reportable cross-border arrangements, or RCBAs) between the Italian Revenue Agency (Agenzia delle Entrate) and the competent tax administrations of other EU member states and between Italy and third countries in accordance with relevant agreements.

This article examines the new regulatory and operating structures arising from the DAC6 in Italy.

[1] Official Journal No. 200 of Aug. 11, 2020.

[2] Law No. 117 of Oct. 4, 2019, empowered the Italian government to transpose the European directives and implement other EU acts into domestic law.

The Transposition of DAC6 in Italy

Procedure

In addition to the decree, Italy took several other steps to ensure the effective implementation of DAC6, a move that has already attracted quite a bit of attention.[3]

On November 20, 2020, the Italian Ministry of Economy and Finance published the Ministerial Decree of November 17, 2020 (the DAC6 ministerial decree), which contains a definition of the technical rules and procedures concerning the mandatory exchange of information on RCBAs. On November 26, 2020, the Italian Revenue Agency published Revenue Agency Director Enactment No. 364425 (the DAC6 enactment)

[3] Associazione fra le società italiane per azioni (ASSONIME), "Risposta alla procedura di consultazione pubblica indetta dal MEF — Dipartimento delle Finanze, in data 30 luglio 2018, riguardante lo schema di decreto legislativo recante attuazione della direttiva 2018/822/UE del Consiglio del 25 maggio 2018, relativa ai meccanismi transfrontalieri soggetti all'obbligo di comunicazione (DAC 6)," Consultation No. 9/2018 (Sept. 28, 2018); proceedings of the PARADIGMA congress on DAC6 held in Milan on Sept. 15, 2020; Daniele Majorana, "Evoluzione dello Scambio di informazioni: primo inquadramento sistematico alla luce del decreto attuativo della Direttiva 822 del 25 maggio 2018 del Consiglio europeo (c.d. 'DAC 6')," 49 *Rivista Strumenti Finanziari e Fiscalità* 59 (2020); Marco Piazza and Chiara Resnati, "Scambio internazionale di informazioni: definizioni e sanzioni nel decreto attuativo della DAC 6," 2 *Norme e Tributi Mese* 26 (Feb. 5, 2019); Luigi Garavaglia, Piazza, and Roberto Torre, "L'attuazione della direttiva sulla comunicazione dei meccanismi transfrontalieri da parte degli intermediari finanziari," Diritto Bancario, Mar. 17, 2020; Piergiorgio Valente, "Cooperazione fiscale internazionale: gli sviluppi in tema di scambio di informazioni," 2 *La gestione straordinaria delle imprese* 925 (2018); Giovanni Barbagelata, "Mandatory Disclosure Rules: definizione di intermediario e relativi obblighi," 5 *Novità Fiscali* 239 (May 2019); Alessandro Galimberti, "Schemi elusivi, in arrivo la stretta sugli intermediari," Il Sole 24 Ore: Norme e Tributi Plus, July 23, 2020; Giacomo Albano, "Mandatory Disclosure Rules dell'OCSE e proposta di direttiva UE: cambia il ruolo dei consulenti fiscali," 2 *La gestione straordinaria delle imprese* 87 (2018); Luca Bosco and Davide Bleve, "Dalla 'collaborazione spontanea' alle nuove regole della 'Mandatory Disclosure' in ambito europeo," 4 *La gestione straordinaria delle imprese* 75 (2018); Federico Pacelli and Pamela Palazzi, "DAC 6: ennesimo obbligo di trasparenza o nuova spinta alla 'compliance' preventiva?" 8-9 *Corriere Tributario* 755 (Aug.-Sept. 2020); Giovanni Carpenzano and Massimo Antonini, "Implementazione della DAC6 in Italia: criticità e prospettive di applicazione," Diritto Bancario, Aug. 17, 2020; and Antonio Tomassini and Alberto Sandalo, "Dac6, riflessioni sulla strada del recepimento," 7 *Norme e Tributi Mese* 14 (July 7, 2020).

setting out the manner of and deadline for reporting the required information and establishing the manner by which the Italian tax authorities will submit RCBAs to the competent tax administrations of other jurisdictions. Finally, on February 10, 2021, the Italian Revenue Agency published Circular No. 2 (the DAC6 circular), containing some preliminary clarifications about RCBAs.

History of the DAC

Before the publication of DAC6, the following directives, which are commonly referred to by acronym and number, were issued successively:

- Directive 2011/16/EU (DAC1), which extended the scope of application of Directive 77/799/EEC;
- Directive 2014/107/EU (DAC2), which introduced the common reporting standard for member states;
- Directive 2015/2376/EU (DAC3), which introduced an obligation for the automatic exchange of information on advance pricing agreements;
- Directive 2016/881/EU (DAC4), which introduced an obligation for the automatic exchange of information on country-by-country reporting; and
- Directive 2016/2258/EU (DAC5), which required member states to allow tax authorities access to the customer due diligence procedures adopted by financial institutions in accordance with the fourth anti-money-laundering (AML) directive (Directive 2015/849/EU).

Also, Directive (EU) 2021/514 (DAC7), which was published in the Official Journal of the European Union on March 25, has imposed new reporting obligations on the managers of digital platforms with effect from January 1, 2023. Managers that carry out commercial activities within the EU, are not residents for tax purposes, and do not have a permanent establishment in a member state must disclose the revenue realized by any natural persons or bodies corporate that carry on business using their platforms.

Finally, the European Commission has opened a public consultation on DAC8 to gather data and evidence with a view toward assessing the need for new rules on the exchange of tax information regarding electronic currency and cryptoassets.

Subjective Scope of Application

Taxpayers and Intermediaries

The decree lays down the rules and procedures for the mandatory automatic exchange of information on RCBAs. Article 3, "Reporting Obligations and Exemptions," provides that the taxpayer and the intermediaries are the parties required to report the cross-border arrangement to the Italian Revenue Agency, with the exceptions stated in articles 3 and 4 of the decree.[4]

The decree defines a taxpayer as "anyone who implements a cross-border arrangement or to whom a cross-border arrangement is made available for implementation." If there is more than one taxpayer, the obligation falls on the taxpayer who agreed to enter into the RCBA with the intermediary or, if there is no intermediary, on the taxpayer who managed its implementation.

Broadly, intermediaries include Italian financial institutions and professionals subject to AML obligations. For the purposes of the decree, however, the definition of intermediary is strictly limited to the role of:

- *promoter*: a person that designs, markets, organizes, or makes the RCBA available for implementation by another person or autonomously manages the entire implementation of an RCBA; or
- *service provider*: a person that directly or through other persons provides assistance or advice regarding the management, design, marketing, or making available for implementation of an RCBA if, given the available information and having the expertise necessary to perform those activities, the person knows or has fair reasons to conclude that the arrangement falls within the scope of the rules.

The following exemptions from the reporting obligation apply in accordance with article 3. The

[4] Unless otherwise indicated, all translations are the work of the authors.

taxpayer has no obligation to report the cross-border arrangement if:

- the information reported could trigger criminal liability for the taxpayer; or
- the taxpayer can prove that the information has been reported by another taxpayer, wherever resident, to the Italian Revenue Agency or to the competent tax administration of a member state or of other foreign jurisdictions with which an exchange of information agreement is in place.

The intermediary has no obligation to report the cross-border arrangement:

- based on information received from its client or information it receives concerning its client while examining the latter's legal position or while carrying out a defense or representing the client in proceedings before a judicial authority or in relation to those proceedings, including information obtained while providing advice on how to initiate or avoid those proceedings, if the information was received or obtained before, during, or after the proceedings;[5] or
- if the information reported could trigger criminal liability for the intermediary.[6]

In these cases, the intermediary has an obligation to inform any other intermediary of which it is aware — or, if there is none, the taxpayer concerned — about that entity's obligation to report the cross-border arrangement to the revenue agency.

When an intermediary or a taxpayer is required to report the same cross-border arrangement to more than one member state, then the intermediary or the taxpayer is exempted from the obligation to report to the Italian Revenue Agency if it can prove that the same information was reported, as prescribed by the law, to the competent tax administration of another member state.

Standard of Knowledge

In order for the service provider to be characterized as an intermediary, with the associated reporting obligations under DAC6 rules, it must meet the standard of knowledge — that is, it must be shown that the provider is aware or can be reasonably presumed to be aware of the cross-border arrangement in light of relevant facts and circumstances and based on the available information and the skills required to provide the services.

The standard of knowledge is closely linked to the definition of routine banking and financial transactions. The rule, contained in the explanatory report and confirmed in the DAC6 circular, does not impose due diligence obligations on the service provider beyond those usually required for regulatory or commercial purposes.[7] It does not require the use of a higher level of expertise than that required to provide the service on the assumption that the potential service provider does not have an obligation to conduct verifications other than those ordinarily required to provide the service. A person that, directly or through other parties, provides assistance or consulting services in connection with the processing, marketing, organizing, making available, or managing the implementation of an RCBA will not be characterized as a service provider for the purposes of the legislation if that person has no reasonable knowledge of the facts or circumstances that make it possible to identify the RCBA as such, or if the person does not have a suitable level of technical skill to perceive the potentially abusive implications of the RCBA.

Likewise, article 4 of the DAC6 ministerial decree provides that in order to be characterized as intermediaries, service providers must meet the standard of knowledge. The standard of knowledge is determined with reference to the

[5] Article 3(4) of the decree provides that communications made for the purposes of the decree that are made for the reasons set out in the decree and in good faith do not constitute a violation of any restrictions on the disclosure of information required by contract, laws, regulations, or administrative rules and do not give rise to liability.

[6] As specified in the explanatory report to the DAC6 ministerial decree, "the exemption applies if there is an interest worthy of legal protection as it reflects the principle '*nemo tenetur se detegere*,' that is, the right against self-incrimination."

[7] Specifically, the implementing rules in article 2(2) of the DAC6 ministerial decree state that "for the purpose of gathering the information to be reported" to the Italian Revenue Agency, the service provider "is not required to adopt additional customer due diligence obligations besides those imposed by current legislation."

intermediary's actual knowledge of the cross-border arrangement, based on information promptly available in relation to the assistance or consulting services provided to clients, and the level of skills and experience required to provide the assistance or consulting services.

Unless contrary proof is provided, article 4(3) of the DAC6 ministerial decree indicates that the standard of knowledge is deemed not to be met for routine banking and financial transactions, which are defined as "transactions characterized by minimum decision-making authority and by frequently executed standardized procedures."[8] The DAC6 circular provides a list of examples of transactions falling within this definition including:

- cash desk operations or online banking operations involving wire transfers, collections, or standard payments;
- banking operations characterized by standard procedures, such as purchase, sale, and placement of financial instruments listed on Italian and foreign regulated markets, and related ancillary transactions, such as discretionary and non-discretionary administration of those financial instruments, as well as the collection and execution of the relevant orders;
- the mere placement of units of collective investment undertakings, unless they consist of financial instruments specially created for a single class of investors;
- life assurance policies and asset management contracts, if the intermediary merely places, but does not manage, the individual financial instruments;
- loans to support clients' regular business requirements, such as short-term loans for liquidity purposes, factoring transactions, advances on invoices, bank credit, import or export funding, portfolio discounts, promissory notes, letters of credit, bonds (such as advance bonds, bid bonds, and performance bonds), warehouse warrants (*fedi di deposito* or *note di pegno*); and
- consumer credit transactions and conclusion of agreements for the automatic debiting of one-fifth of an individual's salary.

RCBAs

Defining Reportability

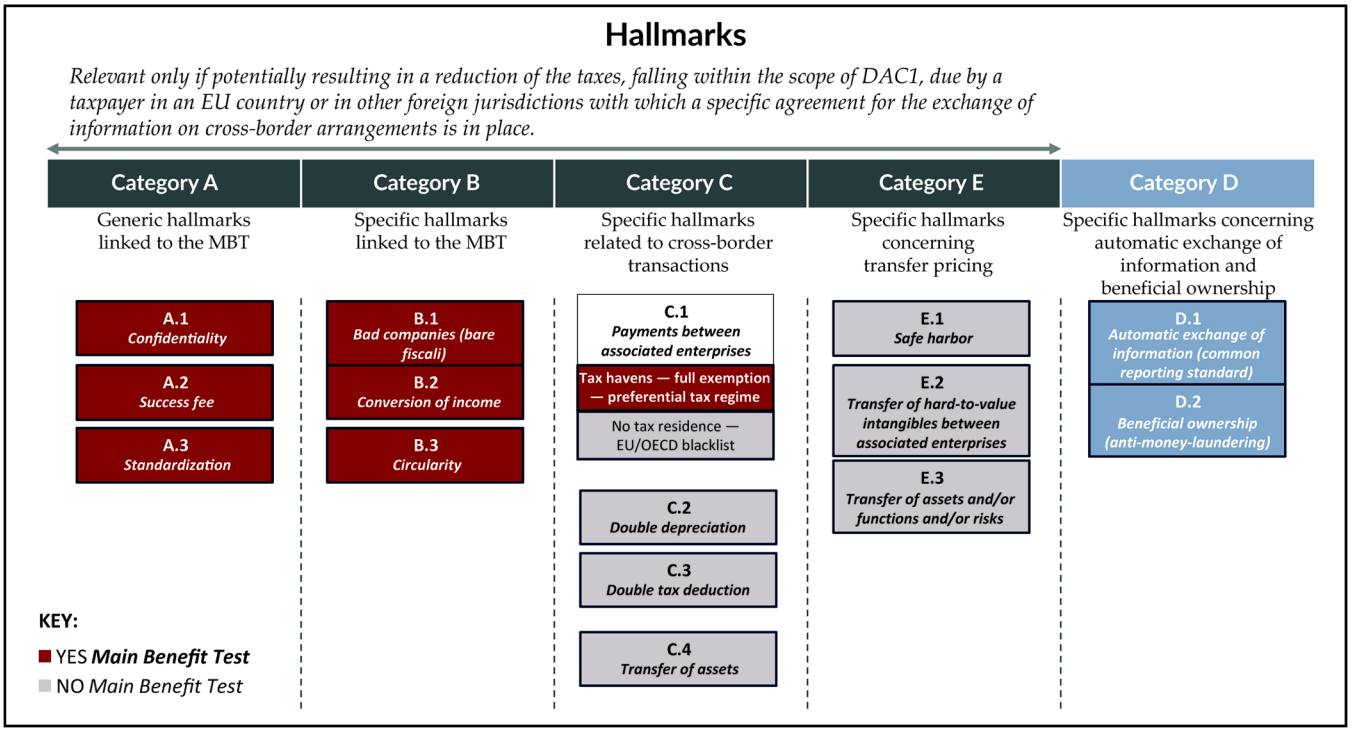
According to article 2 of the decree, a cross-border arrangement is an agreement, project, or scheme involving Italy and one or more foreign jurisdictions in which at least one of the following conditions is met:

- not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;
- one or more of the participants in the arrangement are resident for tax purposes in more than one jurisdiction;
- one or more of the participants in the arrangement carry on a business in a jurisdiction other than its residence state through a PE situated in that jurisdiction, and the arrangement forms part or all of the business of that PE;
- one or more of the participants in the arrangement carry on activity in another jurisdiction without being resident for tax purposes or creating a PE in that jurisdiction; or
- the agreement, project, or scheme may alter the proper application of the procedures on the automatic exchange of information or the identification of beneficial ownership.

The cross-border arrangement is subject to the reporting obligation if at least one of the hallmarks listed in Annex 1 to the decree is met. The hallmarks are indicators of a risk of tax avoidance or tax evasion.

As the figure indicates, not all of these hallmarks involve an obligation to report the cross-border arrangement. Article 6 of the DAC6 ministerial decree provides that the hallmarks identified under letters A, B, C, and E of Annex 1 to the decree are relevant for reporting obligations only if they may determine a tax reduction within the scope of DAC1 in a member state or in a third country with which an exchange of information agreement is in place in accordance with article 6(1) of the decree.

[8] Explanatory report to the DAC6 ministerial decree.



At the same time, some of the hallmarks can be taken into account only if they meet the main benefit test (MBT) — in particular, those under letters A, B, C.1(b)(1), C.1(c), and C.1(d).[9] Thus, in accordance with article 2(1)(i) of the decree, these hallmarks can be taken into account only when it can be ascertained that "the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage."

The figure summarizes the hallmarks, stating the characteristics of each of them for the purposes of the reporting obligation.[10]

The DAC6 circular also provides preliminary clarification on the MBT issue. In the Italian Revenue Agency's opinion, the MBT requires that for the purposes of the reporting obligation, one or more taxpayers in Italy (that is, taxpayers who meet at least one of the requirements for nexus with Italy) derive a tax advantage and the tax benefits exceed any nontax benefits.

Also, article 7(2) of the DAC6 ministerial decree establishes a measure of the tax benefit, specifying that the MBT is met when the tax

[9] For hallmark C.1, the relevant arrangements that must necessarily meet the MBT in accordance with Annex 1 to the decree involve:

> deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:
>
> . . .
>
> (b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:
>
> 1) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero;
>
> . . .
>
> (c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;
>
> (d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.

[10] Notably, as a result of Brexit, the United Kingdom has unilaterally decided to circumscribe the DAC6 reporting obligations falling within the scope of hallmark D, namely those concerning arrangements designed to avoid the automatic exchange of financial account information and to conceal beneficial ownership information. This decision — which seems to conflict with the EU-U.K. agreement that binds both parties to refrain from weakening or lowering the level of protection agreed to at the OECD level and includes reference to the exchange of information on cross-border tax planning arrangements — de facto shifts the reporting obligation to the residents of the member states concerned by the cross-border arrangement.

benefit in connection with the relevant taxes[11] deriving to one or more taxpayers from the implementation of one or more cross-border arrangements is higher than 50 percent of the sum of the tax benefits and the nontax benefits.[12]

Article 7(3) of the DAC6 ministerial decree establishes that the tax advantage is the difference between the taxes payable in accordance with one or more cross-border arrangements and those that would be due in the absence of those arrangements.

In light of the information required to establish the relevance of a cross-border arrangement, the characteristics that make a cross-border arrangement reportable are summarized in the table.

Reportable Information

Article 6(1) of the decree, "Information to Be Reported," provides that:

> the information to be reported to the Italian Revenue Agency concerns: a) the identification of intermediaries and relevant taxpayers, including their name, date and place of birth, residence for tax purposes, [taxpayer identification number] and the persons that are associated enterprises to the relevant taxpayer; b) details of the hallmarks set out that make the cross-border arrangement reportable; c) a summary of the content of the reportable cross-border arrangement, in Italian with a brief report in English; d) the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made; e) details of the national provisions that provide for the obligation to report the cross-border arrangement; f) the value of the reportable cross-border arrangement; g) the identification of the jurisdictions where the relevant taxpayers are resident for tax purposes and of any other jurisdictions which are likely to be concerned by the reportable cross-border arrangement; h) the identification of any other person likely to be affected by the reportable cross-border arrangement, and of the jurisdictions to which such person is linked.

The DAC6 enactment also requires notification of: (i) the Italian fiscal code, if available, of the individuals or entities to which the above information refers; and (ii) the reference number of the cross-border arrangement preliminarily reported to the Italian Revenue Agency or to the competent authority of another member state when a subsequent notification is submitted.

Timelines for Submissions

Initial and Continuing Duties

In accordance with article 7 of the decree, the information on cross-border arrangements must be reported to the Italian Revenue Agency within 30 days.[13] This period begins at different times for different reporters as follows:

- *promoters*: the day after the arrangement was made available to the customer for implementation or implementation of the arrangement started (that is, the taxpayer took the first legally binding step or carried

[11] The DAC6 circular establishes the scope of application of the rules. VAT, customs duties, excise tax, and social security contributions do not fall within the scope of the Italian DAC6 rules. The taxes covered are the personal income tax (Imposta sui Redditi delle Persone Fisiche, or IRPEF), the corporate income tax (Imposta sul Reddito delle Società, or IRES) and relevant surcharges, the regional tax on productive activities (Imposta Regionale sulle Attività Produttive, or IRAP), withholding taxes as final liability, substitute taxes in lieu of income taxes, local taxes, and other indirect taxes (such as registration tax, stamp duty, mortgage and cadastral tax, and inheritance and gift tax). For other states, the covered taxes are those deemed equivalent to the listed Italian taxes.

[12] Article 1(1)(c) of the DAC6 ministerial decree defines nontax benefits as any nontax economic benefit deriving from the cross-border arrangement.

[13] We call attention to the contact points between the reporting obligations under DAC6 and the confidentiality principle under Italian AML legislation, specifically when there is a reporting obligation under DAC6 and there are also grounds for filing a suspicious transaction report (Segnalazione di Operazione Sospetta) with the Italian Financial Intelligence Unit (Unità di Informazione Finanziaria). The DAC6 circular specifies that the strong relationship between DAC6 and the AML regulations is not sufficient to exempt the intermediary from complying with both sets of rules at the same time to avoid applicable penalties. While at first glance the Italian Revenue Agency reporting obligation may seem to conflict with article 39 of Legislative Decree No. 231 of November 21, 2007 ("Prohibition to File Suspicious Transaction Reports") and article 329 of the Italian Code of Criminal Procedure ("Secrecy Obligation") — a key aspect of the latter is the anonymity of the party making the disclosure — the DAC6 circular clarifies that:

> the presence of constraints imposed by the rules on the reporting of suspicious transactions pursuant to the combined provisions of articles 39(1), 41(3) and 55(4) of Legislative Decree No. 231 of 2007 does not constitute grounds for exemption from the obligation.

Reportability of Arrangements

	Criteria		
Categories of hallmarks (Annex 1 to Legislative Decree No. 100/2020)	Cross-border nature	Tax reduction	Main benefit
A. Generic hallmarks linked to the MBT	Yes	Yes	Yes
B. Specific hallmarks linked to the MBT	Yes	Yes	Yes
C. Specific hallmarks related to cross-border transactions	Yes	Yes	Yes, for arrangements under letter C.1(b)(1), C.1(c), and C.1(d)
D. Specific hallmarks concerning automatic exchange of information and beneficial ownership	Yes	No	No
E. Specific hallmarks concerning transfer pricing	Yes	Yes	No

out the first transaction for the purposes of implementation);

- *service providers*: the day after the provider, directly or through other persons, provided advice or assistance for the implementation of the RCBA; and
- *taxpayers*: the day after they were informed by the intermediary that it was exempt from the reporting obligation and that the taxpayers were in charge of reporting.

For marketable arrangements — that is, cross-border arrangements that can be made available to a plurality of taxpayers without substantial amendments — DAC6 intermediaries must submit a periodic report to the revenue agency every three months, including any relevant information that became available since the last report.

Additional Reporting

Reporting obligations for cross-border arrangements took effect on January 1, and the 30-day term for the reporting of information on RCBAs began on that date. The 30-day term also took effect on January 1 for RCBAs that were made available, became ready for implementation, or for which the first step of implementation took place between July 1, 2020, and December 31, 2020. The same date applies if the intermediaries directly or through other persons provided advice or assistance between July 1, 2020, and December 31, 2020. However, as the Italian Revenue Agency noted in a January 29 release,[14] the DAC6 circular states that "no penalties apply . . . for notices sent by 28 February 2021, even if the ordinary deadline falls due before that date."

In accordance with DAC6, there was also a one-off reporting requirement for intermediaries and taxpayers regarding information about RCBAs that were entered into during the period between June 25, 2018, and June 30, 2020, with the notifications having been due on February 28.

The first periodic report for marketable arrangements had to be filed by April 30.

Also, as provided by article 9 of the decree, the Revenue Agency must transmit the information on RCBAs to the competent authorities of the foreign countries within one month from the end of the quarter during which it received the information from intermediaries and taxpayers. However, the information will not be transmitted when it could reveal a commercial, industrial, or professional secret or commercial process or if its disclosure conflicts with public order.

[14] Italian Revenue Agency release on mandatory reporting regime (Jan. 29, 2021).

Penalties

Paragraph 15 of DAC6 states:

> In order to improve the prospects for the effectiveness of this Directive, Member States should lay down penalties against the violation of national rules that implement this Directive. Such penalties should be effective, proportionate and dissuasive.

Article 12 of the decree established the following penalties:

- failure to report information[15]: the administrative pecuniary penalty under article 10(1) of Legislative Decree No. 471/1997 is increased by half (that is, penalties of between €3,000 and €31,500); and
- reporting incomplete or incorrect information: the administrative pecuniary penalty under article 10(1) of Legislative Decree No. 471/1997 is reduced by half (that is, between €1,000 and €10,500).

Moreover, as clarified by paragraph 7 of the DAC6 circular and the reference made to article 10(1) of Legislative Decree No. 471/1997 in article 12 of the decree, "when the report is filed with a delay not exceeding fifteen days, the applicable penalty is halved."

The violations in question may be remedied by voluntary assessment.

Should a tax audit be conducted and multiple violations identified, the principle of *cumulo giuridico* should apply in accordance with article 12(1) of Legislative Decree No. 472/1997, which provides that "anyone who commits multiple violations of the same provision, [shall be] subject to the penalty applicable to the most serious violation increased by one fifth to two times."[16]

Areas of Concern

Having analyzed the main aspects of the legislation and pointed out some issues concerning its applicability that deserve further consideration, we note that the decree, the DAC6 ministerial decree, the DAC6 enactment, and the DAC6 circular — which provided general indications to identify the "plausible" subjective and objective scope of application of the reporting obligations[17] — require additional clarification from the bodies in charge of their implementation.

In the following subsections, we set out some issues — in order of importance — regarding which official guidance and clarifications would be very helpful.

The Standard of Knowledge

The standard of knowledge is the minimum level of knowledge required by the legislation for service providers to meet the reporting obligations under DAC6. In this regard, a key role is played by professionals, considering the nature of their activity. It is important to note that in the only guidance document issued so far, the Italian Revenue Agency stated that in order for a professional not to be characterized as an intermediary, his activity should not include updating, upgrading, or significantly amending an arrangement.

The clarification in the DAC6 circular that activities consisting of the interpretation of tax rules affected by the arrangement, the recognition of the arrangement at the time of auditing the accounts, the filing of tax returns, and assistance in the pre-litigation or litigation stage were not deemed to be material is helpful. The DAC6 circular further specified that neither a professional who is in charge of assisting a client during an audit or inspection conducted by the Italian tax authorities nor one who issues a memorandum or an opinion to a client about a possible RCBA that has already been implemented by the client falls within the subjective scope of DAC6.

At the same time, there are circumstances in which it would be quite complex to translate the revenue agency's guidance into practical instructions, for example, cases requiring an evaluation of whether the professional's activity

[15] Information is considered not reported if not disclosed by the deadlines established in the implementing rules.

[16] This approach has been confirmed by paragraph 7 of the DAC6 circular.

[17] *See* Massimo Bellini and Sara Di Trapani, "Operazioni fiscali sospette, il decreto in Gazzetta: comunicazione entro il 28 febbraio 2021 per i meccanismi posti in essere entro il 30 giugno," Il Sole 24 Ore, Aug. 11, 2020; and Barbagelata, *supra* note 3, at 246.

results in an update or upgrade of the arrangement concerned.

Likewise, guidelines are needed to circumscribe joint liability — in terms of subjective relevance for the purposes of the legislation in question — within professional organizations, such as associations of professionals, when a member of the association is involved in a potentially relevant transaction and is potentially an intermediary.

In terms of the standard of knowledge, it is interesting to consider the interrelation with the activities of civil law notaries public, who may be in charge of the reporting obligations in their capacity as service providers, generally providing qualified assistance in one or more steps of transactions characterized by a tax risk. In the performance of their duties, it may be claimed that notaries public may not be expected to adopt standards of knowledge in excess of the ordinary duty of care or to conduct documentary research beyond routine research. As suggested by the Italian National Board of Notaries, to monitor each potentially relevant transaction and avoid potential penalties:

> it may be helpful to complete a self-assessment questionnaire . . . which on the one hand would allow a more effective and orderly management of the tax risk and on the other hand could prove the good faith of a professional who may have been unwittingly involved in an aggressive tax planning arrangement.[18]

The MBT and the Tax Benefit Test

The MBT, which could trigger a reporting obligation for some transactions, requires additional clarifications beyond those contained in the DAC6 circular, especially in terms of how the tax advantage should be determined.

The criteria established for the MBT — namely, that a tax advantage (in terms of a potential tax reduction) for one or more Italian taxpayers exists and that the tax advantage exceeds nontax advantages — do not seem easy to apply, especially in terms of nontax advantages, because they require giving a monetary value to all the advantages deriving from the implementation of the arrangement. We wonder, for example, how the tax authorities would quantify the nontax advantages that may result from the simplification of the organizational structure — something that does not, by its own nature, generate immediate tangible economic results.[19]

Moreover, paragraph 4.3 of the DAC6 circular, "Potential Tax Reduction Test," states:

> The taxes payable must be calculated having regard to all circumstances of the case (for example, also with regard to tax loss carryovers, tax consolidation, tax allowances) which can be objectively estimated at the time the reporting obligation arises.
>
> On the other hand, the paragraph also states:
>
> In determining the tax effects of a cross-border arrangement no account should be taken of any limitations deriving from tax provisions, such as for instance CFC (controlled foreign companies) rules or anti-hybrid provisions, which are not yet in force when the reporting obligation arises. In other words, the reporting obligation also arises when, upon filing the income tax return — usually the subsequent year and thus after the deadline for reporting the arrangement — the taxpayer is expected to wholly or partly remove the tax effects of the arrangement by operation of specific limitation rules.

Experts have noted that this interpretation requires further clarification because it could result in overreporting and thus conflict with the purposes of DAC6.[20] As recital 2 of the preamble

[18] *See* Paolo Puri and Michele Marzano, "Gli obblighi DAC 6 nell'attività notarile," Consiglio Nazionale del Notariato Studio 11-2021T, (Feb. 26, 2021).

[19] *See* Sandalo and Tomassini, "Operazioni sospette: obblighi Dac6 al test del 'vantaggio fiscale,'" Il Sole 24 Ore, Dec. 21, 2020; and Stefano Massarotto, "Il wealth management e l'impatto delle regole della Direttiva DAC 6," 1 *Corriere Tributario* 84 (Jan. 2021).

[20] *See* Luca Rossi and Massarotto, "DAC 6 e meccanismi transfrontalieri: spunti critici sulla Circolare dell'Agenzia delle Entrate," Diritto Bancario, Feb. 25, 2021.

to DAC6 explains, the directive intends to ensure that:

> Member States' tax authorities obtain comprehensive and relevant information about potentially aggressive tax arrangements. Such information would enable those authorities to react promptly against harmful tax practices and to close loopholes by enacting legislation or by undertaking adequate risk assessments and carrying out tax audits. ■