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The implementation of DAC6 in Italy

Expert's opinion

DAC6 and disclosure obligations for financial intermediaries

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Focus on...

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Among the hallmarks indicated in Annex 1 to Legislative Decree n. 100, i.e. among the indicators of a possible tax avoidance intent, those listed under letter E are relevant to transfer pricing. For the purposes of the regulation under analysis, these hallmarks are relevant only when enacted without complying with the arm's length principle; they are not subject to the main benefit test i.e. to the assessment of whether a tax advantage is the main benefit expected from the arrangement. The existence of transactions...

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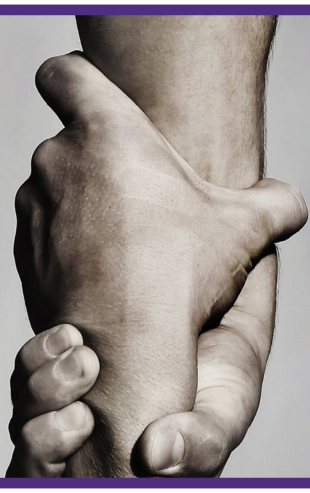

Overview

The mandatory automatic exchange in the tax area

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Over recent years, increasingly more initiatives concerning the automatic exchange of information have been implemented in order to react to aggressive tax planning phenomena. In the EU, many directives have progressively extended the perimeter of the automatic exchange of information, allowing the Tax Authorities of Member states to receive increasingly more data in an increasingly shorter time.

To further strengthen means available to Tax Authorities to prevent and discourage aggressive tax planning, Directive (EU) 2018/822 (hereinafter the «Directive»), which includes further adjustments to directive no. 2011/16/EU, introduced the mandatory automatic exchange of information in relation to the so-called "cross-border arrangements". Specifically, the Directive obliges intermediaries and, in some cases, taxpayers, to inform Tax Authorities on certain schemes, agreements, etc. that could imply the presence of an aggressive tax planning.

The Directive has been implemented in Italy through legislation decree dated 30 July 2020 no. 100 (hereinafter, the «Decree»), which establishes the rules and procedures relevant to the mandatory automatic exchange of information on cross-border arrangements, reportable to the Revenue office, with the competent authorities of EU Member states and of other foreign jurisdictions due to arrangements in force.

The Decree has been recently integrated by the Decree of the Ministry of Economy and Finance dated 17 November 2020, containing the "definition of technical rules and procedures relevant to the mandatory exchange of information on cross-border arrangements, reportable to the Revenue Office" (hereinafter "DM"), thus completing the reference domestic regulatory framework on this matter.

Given the complexity of the regulation, this article provides a brief and introductory description of the key elements characterizing this new fulfilment, the relevant terms and applicable penalties in case of omitted or partial compliance.

1. Concerned subjects

The new mandatory reporting of "*cross-border arrangements*" concerns the following categories:

- financial intermediaries (e.g. banks, centralised financial instruments management companies, stock brokerage companies (SIM), asset management companies (SGR), insurance companies, etc.);
- tax advisors, lawyers, and chartered accountants, who design, promote or provide assistance with reference to specific cross-border arrangements (i.e., so-called «Promoters» and so-called «Service Providers»);
- taxpayers (companies), in case (i) there is no intermediary, or (ii) a non-EU intermediary is involved, or when the intermediary is exempt.

The concerned subjects represent one of the most relevant updates of the Directive, which, in fact, extends the mandatory automatic exchange of information to all economic operators being potentially involved in aggressive tax planning structures, while it was previously addressed only to some categories of intermediaries (for example, reference is made to the Common Reporting Standard or CRS).

It must be specified that taxpayers must comply with the obligation at issue only if, substantially, no financial intermediary or advisor being subject to the reporting obligation intervened in the potentially relevant operation.

2. Potentially reportable operations: "cross-border arrangements"

As previously mentioned, so-called "*cross-border arrangements*" must be reported. The Decree defines a cross-border arrangement as "*a scheme, agreement or project concerning Italy and one or more foreign jurisdictions*", which meets the following requirements:

- it must include at least one of the "hallmarks" provided under the regulation (please refer to point 2.1. below);
- it must be available to involved parties starting from 25 June 2018 (effective date of the Directive).

The Decree specifies that the involvement of one or more foreign jurisdictions occurs when at least one of the following conditions is met:

- one or more involved parties are resident for tax purposes outside the territory of the Italian State;
- one or more involved parties have a double tax residence;
- one or more involved parties have a permanent establishment in another jurisdiction and the scheme concerns this permanent establishment;
- one or more involved parties carry out their activity in another jurisdiction (without any permanent establishment).

Therefore, taxpayers must not necessarily be part of a multinational group to imply the application of the reporting obligation; in fact, it is sufficient that such taxpayer is involved in transactions with other tax jurisdictions.

2.1 Hallmarks

The so-called "hallmarks" that must be integrated in order for the scheme, agreement, or project to be reportable are structured to identify a high number of aggressive tax planning cases.

In fact, these are proper tax evasion or avoidance risk indicators and are designed to identify the following schemes, agreements, or projects:

- those aimed at obtaining a tax advantage for one or more parties involved;
- those than can alter the correct application of the procedures concerning the automatic exchange of information (provided under CRS or FACTA) or concerning the identification of the beneficial owner.

As it can be understood, the cases considered by the hallmarks are numerous and in fact, the Directive – and, subsequently, the Decree – provides for five hallmarks categories, which are, in turn, divided into further sub-categories, for total fifteen different hallmarks.

Below is an outline of hallmarks:

Generic hallmarks linked to the main benefit test

1. commitment to comply with a condition of confidentiality which may imply the non-disclosure of how the arrangement could secure a tax advantage;

2. remuneration fixed by reference to the amount of the tax advantage derived from the arrangement (so-called success fee);
3. application of a substantially standardised arrangement and/or structure that can bring a tax advantage.

Specific hallmarks linked to the main benefit test

1. use of shell companies;
2. conversion of income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax;
3. round-tripping.

Specific hallmarks related to cross-border transactions

1. deductible cross-border payments made between two or more associated enterprises where the recipient benefits from a concessional taxation or an exemption from taxation (providing different cases);
2. deductions for the same depreciation on the asset in more than one jurisdiction;
3. relief from double taxation in respect of the same item of income or capital in more than one jurisdiction;
4. transfers of assets between different jurisdictions and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

Specific hallmarks concerning automatic exchange of information and beneficial ownership

1. arrangements which may have the effect of undermining the reporting obligation under the laws on the automatic exchange of Financial Account information (CRS or FACTA);
2. arrangements involving a non-transparent legal or beneficial ownership.

Specific hallmarks concerning transfer pricing

1. use of unilateral safe harbour rules;
2. transfer of hard-to-value intangibles;
3. intragroup restructuring, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, are less than 50 % of the projected annual EBIT if the transfer had not been made.

2.2 Main benefit test

Hallmarks under categories A, B, C, and E may only be taken into account where they can determine a reduction in taxation (Ministerial Decree, article 6).

Pursuant to article 7 of Ministerial Decree, hallmarks A, B, and C [point 1, letter b), sub 1), letter c), and letter d)] are considered integrated if the tax advantage deriving from the cross-border arrangement is higher than 50% of the sum of the tax advantage and non-tax advantages (so-called "Main Benefit").

The tax advantage is calculated as the difference between tax payables by adopting the cross-border arrangement and tax that would be payable without such arrangement, while the non-tax advantage is defined as any quantifiable economic (non-tax) advantage.

In fact, besides hallmarks under category D, aimed at identifying the application of potentially opaque structures, only those concerning transfer prices are relevant regardless of the prevailing tax advantage.

3. Terms

With the coming into force of the Council Directive (EU) 2020/876 of 24 June 2020, which modified Directive 2011/16/EU, European countries were authorized to postpone (due to the Covid-19 pandemic) the terms concerning the communication of reportable cross-border arrangements to the Revenue Office to up to six months.

Italy, as most part of Member states (with the significant exclusion of Germany) opted for the postponement of original deadlines, thus implying that first deadlines for the new fulfilments are the following:

- by 31 January 2021: communication relevant to the period from 1 July 2020 to 31 December 2020;
- by 28 February 2021: communication relevant to the period from 25 June 2018 to 30 June 2020.

These are two one-off communications relevant to the first application period of the regulation.

Starting from 1 January 2021, intermediaries must report information to the Revenue Office within thirty days (generally, these start from the day following that on which the cross-border arrangement is made available for its execution or the day in which its execution starts).

On the contrary, taxpayers report information on cross-border arrangements within thirty days starting from the day following that on which they were informed by the exempt intermediary on the existence of the reporting obligation

4. Penalties

In case of omitted communication, a fine from 3,000 to 31,500 Euro applies.

In case of incomplete or incorrect communication, penalty is reduced to one third, i.e. it can be from 1,000 to 10,500 Euro.

Expert's opinion

DAC6 and disclosure obligations for financial intermediaries

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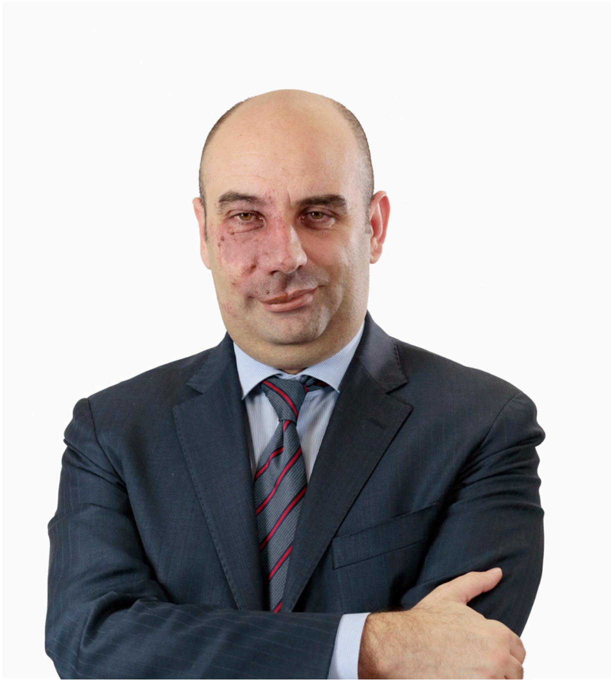


With Directive 2018/822/EU (hereinafter, the "Directive" or "DAC6") of 25 May 2018, which modified previous Directive 2011/16/EU, the Council of the European Union introduced specific provisions on the automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (i.e. those arrangements involving more Member states or one Member state and a third country, which present one or more potential tax evasion risk indicators (so-called hallmarks).

It must be specified that the regulation on the matter falls within the scope of the initiatives introduced following the recommendations of action 12 of BEPS, which is focussed on the strengthening of instruments for fighting tax avoidance and tax evasion. In fact, action 12 "*[…] provides recommendations for the design of rules to require taxpayers and advisors to disclose aggressive tax planning arrangements. These recommendations seek a balance between the need for early information on aggressive tax planning schemes with a requirement that disclosure is appropriately targeted, enforceable and avoids placing undue compliance burden on taxpayers*".

The abovementioned Directive has been implemented in Italy through Legislative Decree no. 100 dated 30 July 2020 (hereinafter the "Decree"), followed by a proper Decree by the Ministry of Economy and Finance on 17 November 2020 (hereinafter "DM"), including the definition of technical rules and procedures relevant to the mandatory automatic exchange of information on reportable cross-border arrangements.

As for the concerned subjects, the Decree established that the reporting obligation to the Tax Authorities of cross-border arrangements that present one or more hallmarks is on "intermediaries" and, secondarily and only upon meeting certain conditions, on "taxpayers", i.e. those subjects that could potentially benefit (or benefitted, starting from 25 June 2018, when the Directive came into force) of the effects of cross-border arrangements.

As concerns information on cross-border arrangements that needs to be reported to the Revenue Office, according to art. 6 of the Decree it includes:

- the identification of concerned intermediaries and taxpayers, including their name, date and place of birth or company name, address, residence for tax purpose, tax identification number, and associated companies of such taxpayers;
- hallmarks that characterize the cross-border arrangement (and that, therefore, make it reportable);
- a summary of the content of the reportable cross-border arrangement;
- the starting date of the cross-border arrangement;
- the domestic regulations that establish the reporting obligation of the cross-border arrangement;
- the value of the reportable cross-border arrangement;
- the identification of the tax residence jurisdictions of concerned taxpayers, as well as any other jurisdictions potentially concerned by the reportable cross-border arrangement;
- the identification of any other subject being potentially concerned by the cross-border arrangement and of any jurisdictions which such subject is referred to.

Considered such regulatory framework, a circular letter is awaited, that could explain and better define some of the issues that are still unclear.

Financial intermediaries

For the purposes concerned by this analysis, it is pointed out that financial intermediaries that are subject to the reporting obligation of information relevant pursuant to the regulation on the Common Reporting Standard automatic exchange of information under art. 1, para. 1, letter n) of Ministerial Decree no. 28/12/2015 (such as banks, centralised financial instruments management companies, stock brokerage companies (SIM), asset management companies (SGR), insurance companies, undertakings for collective investments in transferable securities (UCITS), fiduciary companies, trusts, permanent establishments of foreign financial institutions that carry out the same activities as the financial institutions subject to the reporting obligation) be included, in their quality as intermediaries, among the entities being subject to the new reporting obligation of cross-border arrangements and, more specifically, of those presenting hallmarks regarding the automatic exchange of information and the beneficial ownership listed under category D of Annex I of the Decree (i.e. those hallmarks (i) having the effect of undermining the reporting obligation under the laws on the automatic exchange of Financial Account information (CRS or FACTA), and (ii) involving a non-transparent legal or beneficial ownership).

Hallmarks

Interesting interpretations of the abovementioned cross-border arrangements are included in the "Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures" issued by OECD on 9 March 2018. More specifically, this document includes some first considerations on (i) those schemes aimed at undermining the exchange of information, for example, the use of instruments similar to financial accounts but that, in fact, are not financial accounts, the transfer of financial assets in jurisdictions that are not bound to the exchange of information, the reclassification of income and capital into products or payments that are not subject to the automatic exchange (so-called "CRS avoidance arrangements"), or (ii) those schemes that use people, legal frameworks or legal persons that do not have an actual economic activity and characterized by an opaque structure aimed at hindering the identification of the beneficial owner (so-called "Opaque offshore structures").

Given the above, it must be pointed out that the primary legislator's objective was the timely identification of arrangements capable of compromising the correct fulfilment of the reporting obligations for the automatic exchange of information on financial accounts (in other words, the identification of transactions aimed at avoiding the rules provided by the Common Reporting Standard, which regulate the procedures for the collection of information relevant to the availability of a financial asset at a certain date).

Subsequently, unlike what is provided by the Common Reporting Standard, intermediaries will need to acquire proper instruments and procedures to map and assess those transactions being subject to the reporting obligation.

Some first reflections

A critical interpretation of the regulation allows observing that domestic forecasts are somehow halfway between a further transparency obligation towards the Tax Authorities and the Tax Authorities' trend to carry out – on taxpayers and operators that act transnationally – an increasing and more pervasive preventive compliance activity.

However, the retroactive effect of the Directive implies the assessment of such compliance also with regard to the last two years, thus generating an obligation and, presumably, considerable costs for intermediaries, which add to the obligations provided under the Common Reporting Standard.

Therefore, it is crucial for involved subjects to outline, in the following weeks, an action plan aimed at identifying, first of all, the current perimeter of fulfilments provided under the abovementioned Common Reporting Standard and assess their validity for the purposes of the Decree, as concerns both their ability to identify suspicious situations and the need to standardize an objective approach to the issue.

Then, it will be important to identify and analyse what is not relevant (or what has not been considered) for the purposes of the Common Reporting Standard, in order to evaluate their possible relevance for DAC6 purposes.

As an example, we could mention the case in which some investment is used, which do not fall within the definition of financial account (or which do not appear as financial accounts, though having similar characteristics), or the transfer of financial accounts or assets to jurisdictions that are not bound to the Common Reporting Standard.

Moreover, the different terms required under the two regulations (i.e. annual fulfilments, as required under the Common Reporting Standard, against fulfilments within 30 days from the occurrence of the conditions giving rise to the reporting obligation, as required under DAC 6) will inevitably lead operators to acquire mapping and analysis instruments that could work simultaneously and that can identify junctions of the regulations, as well as their specific differences.

It will therefore be crucial, in the following weeks, to identify an operating action plan that, starting from rules available to financial intermediaries for the purposes of the Common Reporting Standard, could test transactions implemented or concluded starting from 25 June 2018, evaluate the possible application for DAC6 purposes (also based on the "reasonably be expected to know" concept) and, once a sufficient number of similar transactions is identified, reach a clustering that allows a correct and timely management of the new reporting obligations, considering the need to blend the operating efficiency (an update of the IT systems will subsequently be necessary) and a qualitative evaluation of each specific case, which cannot be referred – also due to clear responsibility issues – to a mere automated procedure.

Focus on...

DAC6 and transfer pricing: distinctive features

Paolo Besio
Partner Bernoni Grant Thornton

Introduction

Among the hallmarks indicated in Annex 1 to Legislative Decree n. 100, i.e. among the indicators of a possible tax avoidance intent, those listed under letter E are relevant to transfer pricing. For the purposes of the regulation under analysis, these hallmarks are relevant only when enacted without complying with the arm's length principle; they are not subject to the main benefit test i.e. to the assessment of whether a tax advantage is the main benefit expected from the arrangement.

The existence of transactions under letter E of the Annex implies an integration of reporting obligations, if the prerequisites set forth by the regulation are met, including time requirements.

There are various hallmarks relevant to arrangements implemented or implementable among associated enterprises . Of course, these arrangements also need to be analysed to assess whether the conditions agreed upon comply or not with the arm's length principle, though they are relevant under other aspects. Therefore, shared methodologies, both on a domestic and international level, need to be applied.

Below we will focus only on those hallmarks listed under letter E, i.e. safe harbour, hard to value intangibles and business restructuring.

These topics have been the focus of OECD studies for years, have been analysed in depth within the BEPS project and are extensively analysed in the latest version of the OECD Transfer Pricing Guidelines.

Preliminary remarks

Before analysing these three hallmarks in detail, I wish to make two preliminary points, the first concerning the definition of associated enterprise. It is easy to notice that the definition contained in art. 2, para. 1, letter e) of Legislative Decree n. 100 is wider than the one provided under Ministerial Decree dated 14 May 2018 as well as under the Guidelines, for the purposes of determining the arm's length price. The definition is further extended by Ministerial Decree dated 17 November 2020 with reference also to hard to value intangibles.

The decision made by the EU legislator and thus also by the domestic one, is objectionable since it causes transaction to be subject to transfer pricing regulations, which will not - neither for the past nor for the present - be subject to said regulation in most States. Therefore, mapping these transactions through the analysis of the transfer pricing documentation is partial and risks not to identify all arrangements potentially subject to the reporting obligation.

Moreover, the further extension introduced by the Ministerial Decree by explicitly recalling both the definition of associated enterprise and letters C, point 1 and E, point 2 of Annex 1 is not self-explanatory. The reference to the definition of associated enterprise contained in the Legislative Decree automatically implied its application to all cases to which reference was made - in the same Legislative Decree - to associated enterprises.

The further reference to two specific letters of Annex 1 is not clear: in particular, it would be helpful to understand whether such reference is just a superfluous specification, as already included in the definition, or whether the aim is that of identifying two difference subjective perimeters of analysis, the first relevant to safe harbours and business restructuring and the second one relevant to hard to value intangibles only. I deem the first hypothesis to be the correct one, also in the light of what contained in the Commission working party IV, direct taxation, according to which the term "intercompany" under letter E, point 3 refers to associated enterprises.

The second preliminary remark concerns the legitimacy of the reference to the OECD Guidelines to interpret the transactions under letter E. I believe this is the case, since both the legislator and the Revenue Office have been making reference to the Guidelines for years as a source of inspiration of the regulation and as interpretation aid and because Legislative Decree no. 100 recalls Ministerial Decree dated 14 May 2018 which, in turn, recalls the Guidelines.

Reference to the Guidelines is also made in the document issued by the Commission working party IV, direct taxation. For the sake of completeness, I wish to underline that the use of the Guidelines to interpret the Italian regulation, i.e. the arm's length principle, is considered legit also by judicial decisions concerning the merits and by the case law of supreme courts.

It goes without saying that the whole provision being analysed and the directive which it implements in Italy make explicit reference to action 12 of the BEPS project, i.e. Mandatory Disclosure Rules and to the OECD works.

After making these preliminary remarks, I move on to analyse the three categories of transactions.

Safe harbour

First of all, let's focus on the definition contained in the Ministerial Decree: safe harbour is "*a regime which, with reference to specific categories of transactions, preliminarily establishes certain rules and minimum parameters complying to which enterprises are exempt from providing further evidence required under the transfer pricing regulation or practice*".

Safe harbour is thus a provision or an interpretation practice which, upon assessing given conditions, grants taxpayers the possibility to determine the price applicable to an intercompany transaction as a lump sum, without carrying out a comparability analysis.

The definition contained in the Italian norm is different from the definition provided in the OECD Guidelines: "*A safe harbour in a transfer pricing regime is a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country's general transfer pricing rules*".

The Italian norm actually restricts safe harbours to categories of transactions, whereas the OECD refers to categories of transactions and categories of taxpayers.

Aim of the safe harbours is that of limiting the effort required from taxpayers with reference to transactions which could not justify the administrative burden that the analysis of intercompany transactions normally requires.

The OECD, which in the 1995 version of the Guidelines expressed a negative judgement on safe harbours, reviewed its position in the following years.

The OECD now recognises, on the one hand, that safe harbours can have the legit aim of simplifying and reducing the administrative burden and, on the other hand, that they can be subject to misuses from both the financial authorities and groups, generating double taxation or double non-taxation, respectively.

The OCED considers bilateral or multilateral safe harbours commendable to minimise the risk of misuses and also provides examples of agreements that the financial administrations could conclude with reference to the different categories of conceivable safe harbours.

Letter E, point 1 refers to unilateral safe harbours, i.e. enacted only in one of the States involved in the transaction, without involving the others. This emphasises the margin of discretion which the case being analysed implies which consequently may give rise to abuses.

Regardless of an explicit agreement reached by two or more States, safe harbours recognised as legit by the OECD and which therefore obtained the consent of the other member States, are not to be considered as unilateral and thus they do not fall within the scope of application of this norm. The abovementioned Commission party IV, direct taxation, also follows this direction stating that "The commission Services took the view that national rules on safe harbours should be "unilateral" when they depart from the international consensus, as this is enshrined in the OECD transfer pricing guidelines". This applies also in case only one of the two States involved in the transaction decided to make use of the safe harbour provision.

The easiest example regards low value added services. This type of services was identified and described in the BEPS project, described in action 8-10 and thus integrated in the Guidelines issued further to the project and still in force.

As a final note, the recent order by the Revenue Office Director expressly provides for a reformulation of the structuring of the documentation apt to the disapplication of the administrative sanctions in case of a transfer pricing dispute.

Based on these assumptions and remarks, I deem that no safe harbour exist today in Italy. They existed in the past, further to the introduction of Revenue Office Circular Letter no. 32 of 1980 concerning the consistency of royalties. This had been correctly received as limiting the arm's length principle as it did not reflect what agreed between independent parties in the free market, but it unquestionably identified thresholds which, not requiring specific analyses, could result in advantages in case the intangible asset had no characteristics which would lead to presume that a third party would pay a royalty for its use.

The existence of a safe harbour needs to be ascertained by all enterprises resident in States applying this norm for all transactions they carry out.

Hard to value intangibles

The definition of hard to value intangibles is contained in the Legislative Decree and reaffirmed in the Ministerial Decree and perfectly mirrors the definition provided in the abovementioned OECD Guidelines.

In particular, hard to value intangibles are "*those intangible assets or rights on intangible assets for which, when transferred among associated enterprises: a) no reliable comparable transactions exist; and b) when defining the relevant agreement, projected future cash flow or income expectations relevant to the transferred intangible are highly uncertain, making it difficult to forecast the transferred intangible's final level of success*".

First of all, it is worth noticing that the norm considers the "transfer of intangible assets"; in the further definition, nonetheless, it refers to "intangible assets or rights on intangible assets". Said norm thus applies both to the transfer of all rights (full ownership) relevant to an intangible asset and to the transfer of some of the relevant rights, i.e. typically to license agreements.

It is also worth reminding that the Guidelines, when dealing with intangible assets, on the one hand confirm the applicability of principles and criteria already indicated for tangible assets and services, whereas, on the other hand, recognise that intangibles often have unique characteristics and therefore the potential to generate revenues and to create future benefits which might differ greatly. If the uniqueness and the forecasting and valuation difficulties concern all intangible assets, this is all the more true and evident for hard to value intangibles, since, from this point of view, they represent a subgroup of intangible assets.

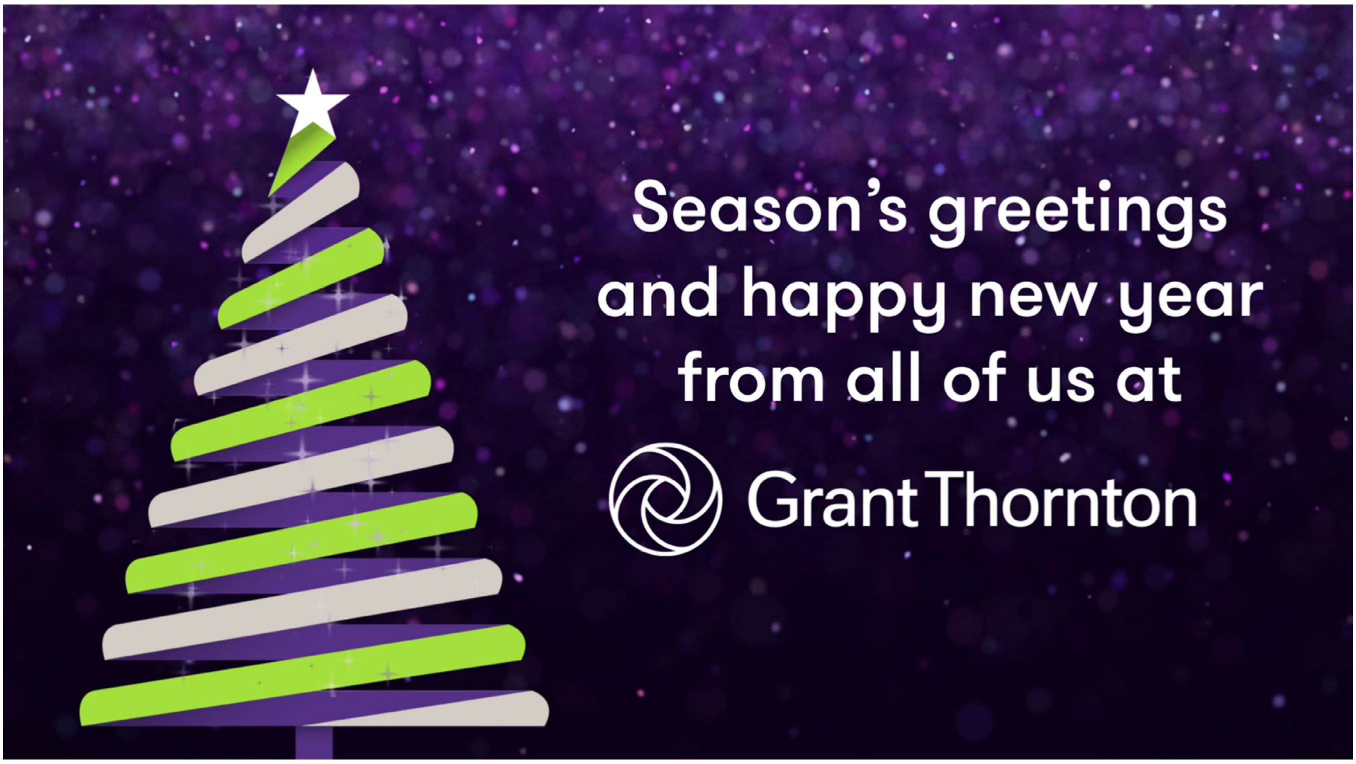
The Legislative Decree, therefore, provides a clear scope of application of letter E, point 2, limited to a specific type of intangible assets, to which the Guidelines dedicate various paragraphs.

The reason behind this choice is evident: the specific valuation difficulties can be exploited to transfer an intangible from a high-tax jurisdiction into a low-tax one in the initial phases of its lifecycle, when a lower valuation can be obtained basing on more contained development and turnover forecasts.

The above should not be confused with the inherent uncertainty characterising transfer pricing which could imply that, upon inspection, the analyses carried out and the comparables used be disregarded by the inspectors.

This does not mean, in particular, that the asset is a hard to value intangible, but simply that the taxpayer and inspector have a different interpretation of facts and circumstances, as well as of comparability.

It is clear nonetheless that, in such situation, it is particularly important, when carrying out such transactions, to have a documentation allowing to provide evidence of the information available and the valuations performed. Should these transaction be subject to inspection, actually, it could be difficult to retrace all information and data available and thus the defence could be undermined.



Business restructuring

The third type of cross-border arrangement regulated by letter E concerns business restructuring operations. In this case neither the Legislative Decree nor the Ministerial Decree provide a definition of such transactions. The Guidelines indicate that "*In the context of this chapter, business restructuring refers to the cross-border reorganisation of the commercial or the financial relations between associated enterprises, including the termination or substantial renegotiation of existing arrangements*". These transactions normally imply the centralisation of functions, risks and intangible assets.

The typical business restructuring operation frequently concluded in past years were the conversion from fully fledged manufacturer into contract manufacturer or toller, or the conversion from fully fledged distributor into limited risk distributor. Basing on a literal interpretation of the norm and according to the Guidelines' approach, the typical corporate reorganisation operations, such as mergers, demergers and contributions, should not fall within this category. I wish to point out, nonetheless, that according to some administrations, on the contrary, such corporate operations also fall under letter E, point 3.

The legislator's focus on this type of transactions is justified by the fact that, over the years, transaction consisting more in formal rather than substantial conversions have been carried out for tax avoidance reasons.

The legislator does not require that all business restructuring operations be reported, but only those which had a significant impact on the transferor's income statement. The reporting obligation actually applies to operations for which "*the transferor's or transferors' yearly forecasted profits gross of interest and taxes (EBIT), in the three-year period further to the transfer, is lower than 50% of their yearly EBIT forecast without the transfer*".

I believe that particular attention should be paid to this quantitative aspect. Similarly to what mentioned above about hard to value intangibles, also in this case it is crucial to be able to provide evidence, in case of a future inspection, of information and data available when the transaction was carried out. The difficulty to forecast possible trends has increased in the current period due to the effects of pandemic, which can radically change the outcomes reasonably expected.

I point out this aspect to remind that, in normal conditions, a cross-border arrangement is to be reported within 30 days from the day in which it was made available to the taxpayer or its implementation began. The assessment of the existence of reporting conditions should be carried out simultaneously to the operation. The availability of documentary evidence supporting the valuations made in that moment is thus essential.

It should be noted nonetheless that, when in doubt or for the sake of prudence, it is not wise to conclude that it is better to proceed with unjustified reporting rather than omitting them. Of course, in order to address most doubts, a prompt publication of clarifications by the Revenue Office would be welcome.