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The implementation of DAC 6 and transfer pricing

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(E) Specific hallmarks concerning transfer pricing

1. An arrangement which involves the use of unilateral safe harbour rules.
2. An arrangement involving the transfer of hard-to-value intangibles.
3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 % of the projected annual EBIT of such transferor or transferors if the transfer had not been made.

The transfer pricing hallmarks apply independently from any benefit test.

Hard To Value Intangibles (HTVI)

The term “hard-to-value intangibles” covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:

a) no reliable comparables exist; and

b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.

HTVI in the OECD Transfer Pricing Guidelines (TPG)

- Part of the final documents on the 15 Action Items of the BEPS project, published in 2015; then formalized within the 2017 version of the TPG.
- Rationale: information asymmetry between taxpayers and tax administration, exacerbating the difficulty for tax administrations to verify the arm's length basis on which pricing was determined.
- Consequence: the tax administration can consider ex post outcomes as presumptive evidence about the appropriateness of the ex-ante pricing arrangements.
- The tax administrations cannot apply it based on hindsight (taking ex-post results for tax assessment without considering whether the information could have been known and considered at the time of the transaction).

OECD TPG Chapter VI – HTVI exceptions

The approach will not apply when at least one of the following exemptions applies:

i. The taxpayer provides:
   1. Details of the ex-ante projections used at the time of the transfer to determine the pricing arrangements (…); and
   2. Reliable evidence that any significant difference (…) is due to: a) unforeseeable developments or events (…); or b) the playing out of probability of occurrence of foreseeable outcomes, and that these probabilities were not significantly overestimated or underestimated at the time of the transaction.

ii. The transfer of the HTVI is covered by a bilateral or multilateral advance pricing arrangement (…)

iii. Any significant difference between the financial projections and actual outcomes mentioned in i.2 above does not have the effect of reducing or increasing the compensation for the HTVI by more than 20% of the compensation determined at the time of the transaction.

iv. A commercialisation period of five years has passed following the year in which the HTVI first generated unrelated party revenues for the transferee and in which commercialisation period any significant difference between the financial projections and actual outcomes mentioned in i.2 above was not greater than 20% of the projections for that period.

OECD – HTVI other documents

- Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles, published in June 2018.
- Status of implementation of the HTVI approach, published in December 2020; information submitted by 40 jurisdictions, in the form of answers to a questionnaire:
  - 18 Countries haven't adopted/implemented the approach.
  - 16 Countries consider it automatically adopted as they generally follow the latest version of the OECD TPG.
  - 6 Countries have adopted specific legislation:
    - Japan, Korea, Netherlands, Poland, UK and USA.
  - No information published about Italy.