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KPMG

Mandatory Disclosure Rules

Germany enacts DAC6 transposition bill and publishes guidance

This article provides a summary of the German transposition of mandatory disclosure rules under DAC6 into domestic law.

Status

On December 12, 2019, the German Parliament (Bundestag) approved a bill to transpose DAC6 into German domestic law. The bill was approved by the German Federal Council (Bundesrat) on December 20, 2019 and published in the Official Gazette on December 30, 2019.

On March 29, 2021, the German Ministry of Finance published guidance providing information on the application of all relevant domestic implementation rules concerning DAC6. The guidance provides, inter alia, information on the scope and application of the hallmarks and contains examples in this respect.

Please note that the summary is based on information available as at April 29, 2021.

Scope

The scope of the German mandatory disclosure rules (MDRs) mirrors the text of DAC6 – an intermediary is required to report cross-border arrangements that contain specific hallmarks (i.e. the law does not address domestic arrangements). An obligation to report domestic German arrangements may be implemented through a separate legislative act, however timing and scope remain unclear.

The legislation covers the types of taxes set out in the Directive on Administrative Cooperation. In this regard, guidance to the bill confirms that the following taxes would be in scope: income tax, corporation tax, trade tax, inheritance and gift tax, air traffic tax, vehicle tax, non-harmonized excise tax, real estate transfer tax, insurance tax. In line with the Directive, excluded taxes are VAT, harmonized excise duties and import and export duties which fall under the Customs Code of the EU.

Definitions

The law is closely aligned with the Directive with regard to the definitions of the terms "associated enterprise", "marketable arrangement" and "cross-border arrangement".

In addition, the German legislation includes the following definitions and clarifications:

1) Intermediary

The definition of intermediary includes any person that markets, designs, organizes or makes available for use a cross-border arrangement for, or to a third party, or manages their implementation by a third party.
This definition appears to be narrower than that foreseen in the Directive, which also extends to parties that provide aid, assistance or advice with respect to a reportable cross-border arrangement (so-called "secondary intermediaries" or "supporters").

EU rules do not allow for the scope of Directives to be narrowed upon transposition into local law. Should the German authorities indeed interpret the definition to exclude secondary intermediaries, this might prove to be a point of contention between Germany and the European Commission.

Under German legislation, an intermediary is not considered to be a participant in a tax arrangement. This interpretation limits the scope of application as the qualification of a tax arrangement as "cross-border" only depends on the countries of residence and activity of the user (or users) and other affiliated or non-affiliated participants.

Guidance also clarifies that a group company can qualify as an intermediary when organizing reportable arrangements for other group companies.

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2) User

The legislation replaces the DAC6 term "relevant taxpayer" with "user", which is similarly defined. The guidance clarifies that a user is generally a person impacted by the arrangement, while a "participant" is a person that has an active involvement in the arrangement. The guidance further notes that partnerships may be viewed as users, but their partners are generally not deemed to be considered as participants in the arrangement.

3) Arrangement

According to the guidance, the term "arrangement" means a creative process in which a certain structure, process or situation is consciously and actively created or changed by the user or for the user, and which acquires a fiscal significance that would not otherwise occur.

An example of an arrangement is where income streams or income sources are created or acquired by a legal entity or allocated or transferred to a legal entity. The term also refers to the establishment or acquisition of a legal entity that generates such income.

In contrast, guidance notes that the term "arrangement" does not cover situations in which a taxpayer merely waits for a certain deadline to expire or a certain time period to end before carrying out a transaction in order to benefit from a tax exemption or contractual adjustments to comply with arm's length requirements.

4) Tax Advantage

The legislation contains a definition of the term "tax advantage" for the purposes of the main benefit test. A tax advantage should be considered to arise if, through the arrangement, taxes are to be refunded, tax rebates granted or increased, tax claims waived or reduced or the arising of tax claims is prevented or shifted to other tax periods or tax dates. In this regard, the guidance notes that the relevant tax advantage should not be limited to domestic German tax advantages, i.e. tax advantages in another EU Member State or in a third-country could also be relevant.

5) Made available for implementation

According to the guidance, cross-border arrangements are made available for implementation if the intermediary has handed over to the user the information or (contractual) documents that are required for the implementation of the reportable arrangement. The actual implementation of the arrangement is not required for this reporting trigger.

Hallmarks & Main Benefit Test

The hallmarks listed in the German transposition law are in line with those laid down in DAC6.

The main benefit test should apply to the same hallmarks as those in the Directive (i.e. category A and B hallmarks and paragraphs (1)(b)(i), (c) and (d) of the category C hallmarks).

The legislation does not introduce a policy filter whereby the main benefit test would be deemed not to be met if the outcome of an arrangement is in line with the intent of the legislator. Nonetheless, a so-called "white list" of arrangements, where a tax advantage will not be deemed to arise, was issued by the German Ministry of Finance.

Guidance on the interpretation of the main benefit test notes that it is not enough to provide evidence of the non-tax benefits relating to the arrangement - it must be demonstrated that a "tax advantage" is not a major advantage of the arrangement. The user should be able to show (e.g. using economic data) that the tax advantage fades into the background when viewed against the arrangement as a whole.

Furthermore, an arrangement should not be subject to the reporting requirement where it only has an effect domestically and if it is, under consideration of all circumstances of the tax arrangement, legally provided for in German domestic law.

Hallmarks linked to the main benefit test

- Hallmark A(1) (confidentiality clauses): guidance notes that it is not intended that legal and professional confidentiality clauses would fall in scope. It is also noted that it should be possible to safeguard trade secrets through confidentiality clauses but that where the tax authorities are specifically included in such a clause, a disclosure requirement may arise.
- Hallmark A(2) (performance-based remuneration of the intermediary): guidance notes that reporting is not required where an increase in professional fees in accordance with legal requirements on compensation is solely based on the value of the subject matter that reflects an expected tax advantage.

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Hallmarks & Main Benefit Test (cont.)

- Hallmark A(3) (standardized documentation and/or structure): the guidance notes that substantial customization of the arrangement (i.e. as opposed to standardization) should be considered to arise where changes to the content or concept of the structure are required. In contrast, only minor adjustments (e.g. changes to the amount, names, etc.) for the individual needs of different users are insufficient to qualify as customization.
- Hallmark B(1) (acquiring loss-making companies): guidance states that the acquisition of companies whose operations had already ceased at the time of acquisition or which are now generating profits should not be covered by the hallmark.
- Hallmark B(2) (conversion of income resulting in taxation at a lower level or tax exemption): guidance includes the example where an interest-bearing receivable is transferred to a subsidiary, resulting in future tax-exempt dividends at the level of the shareholder. Should this reduce the overall group tax burden, it can be generally assumed that the structure is reportable due to a relevant tax advantage.
- Hallmark B(3) (circular transactions that have an offsetting or cancelling effect): guidance notes that it is sufficient that assets are transferred only for a legal (fictitious) second. It is also essential that the round-tripping process is a systematic process, unless stemming from legal requirements (e.g. clearing arrangements in forward transactions).
- Hallmark C(1)(b)(i) (deductible cross-border payments subject to a corporate tax rate of zero or almost zero): the guidance notes that "almost zero" should mean less than or equal to 4%.
- Hallmark C(1)(c) (deductible cross-border payments subject to full tax exemption): according to the guidance, a full exemption from tax is assumed in case the payments are not included in the tax base of the taxing state due to exemptions (provided for in domestic and treaty law), tax allowances, tax loss reliefs or tax credits. Moreover, this hallmark should also address subjective exemptions, i.e. should also apply to a payment received by a recipient that is a tax-exempt person because of its status.
- Hallmark C(1)(d) (deductible cross-border payments subject to preferential regimes): guidance notes that, in order for a tax regime to be assessed as preferential, reference should be made to the work of the OECD's Forum on Harmful Tax Practices (FHTP), irrespective of the outcome of the assessment, i.e. whether the regime was deemed as harmful. A non-conclusive list of preferential tax regimes is included as annex to the guidance.

Hallmarks not linked to the main benefit test

- Hallmark C(1)(a) (no tax residence in any tax jurisdiction): guidance to the bill provides examples of stateless payees who deliberately avoid being tax resident anywhere. An example is provided of a state that bases tax residency on the concept of management and control and a second state that bases the determination of tax residency on a company's jurisdiction of incorporation.
- Hallmark C(1)(b)(ii) (non cooperative jurisdictions): the guidance states that non-cooperative jurisdictions are those included in the EU list (Annex I) and jurisdictions that have been assessed as non-compliant with exchange of information (EOI) standards as per the OECD's secretariat most recent report to the G20. An overview of these countries is included as annex to the guidance.
- Hallmark C(2) (depreciation of the same asset in more than one jurisdiction): guidance provides the example of an aircraft leasing transaction, in which both the aircraft leasing company and the lessee claim depreciation on the value of the aircraft in their respective jurisdictions on the basis of their respective domestic legislation – unless the credit method applies.
- Hallmark C(3) (relief from double taxation in more than one jurisdiction): guidance notes that this hallmark applies in case of, i.a., situations involving three jurisdictions, where exemption from double taxation is applied in two different jurisdictions due to qualification or allocation conflicts. Moreover, the guidance clarifies that hallmark C(3) should not be triggered in case of dividend payments that, on the one hand, benefit from a withholding tax exemption (either fully or partially) in Germany and, on the other hand, are tax exempt in the hands of

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Hallmarks & Main Benefit Test (cont.)

- the foreign recipient in accordance with their local legislation (e.g. participation exemption).
- Hallmark C(4) (cross-border transfers of assets with a material difference in the amount treated as payable): guidance notes that a difference in the amount treated as payable in consideration for the assets transferred is deemed material if it exceeds EUR 500,000, or if it is at least EUR 100,000 and more than 10% of the amount taken as the basis when transferring the asset.
- Hallmark D(1)(f) (exploitation of inadequate or weak anti-money laundering or transparency requirements): guidance notes that the results from the review of the Global Forum on Transparency and Exchange of Information for Tax Purposes of the OECD can be used to assess to what extent weaknesses exist in the respective tax jurisdictions.
- Hallmark E(1) (unilateral safe harbor rules): the guidance notes that safe harbor rules include provisions that exempt eligible taxpayers from certain transfer pricing reporting obligations and where certain flat rate transfer prices (e.g. pre-determined ranges or thresholds for profit mark-ups) are considered arm's length by default. However, guidance states that safe harbor rules accepted by the OECD (e.g. for low value-adding intra-group services) are not considered unilateral safe harbor rules within the meaning of this hallmark.
- Hallmark E(2) (hard-to-value intangibles): guidance notes that the term "hard-to-value intangibles" relates to the definition from the EU Mutual Assistance Directive and OECD transfer pricing guidance.
- Hallmark E(3) (intragroup cross-border transfer of functions, risks and/or assets): in case of a transfer of functions, risks or assets to a permanent establishment (PE), the EBIT of the transferring company is to be calculated without taking into account the PE to which the functions, risks or assets were transferred.

Reporting – Intermediaries

The reporting timelines mirror the requirements of the Directive, i.e. for bespoke arrangements, 30 days as of the relevant reporting trigger.

The information to be disclosed by an "intermediary" largely mirrors the requirements of the Directive. The intermediary shall be required to inform the user what data concerning the user was communicated. It is clarified that the information should be reported in German. However, certain information (e.g. a description of the relevant business activities or arrangements, details of the national provisions that form the basis of the reportable cross-border arrangement) may additionally be disclosed in English.

The intermediary is only obliged to report:

- when resident in Germany (domicile, habitual place of abode, place of management or registered office); or
- in the event of third country intermediaries, when a domestic nexus can be established (domestic permanent establishment, entry in a commercial register/public professional register or registration with a professional association for legal, tax or advisory services).

German law does not outline the priority in which reports should be filed by intermediaries that have a reporting obligation in multiple Member States. However, an intermediary will not be required to report if:

- The intermediary has evidence that it reported the arrangement in another Member State; or
- There is evidence that the required information has been reported by another intermediary.

Legal Professional Privilege

Where intermediaries are protected by legal professional privilege (e.g. auditors, attorneys and tax advisors), the reporting obligation with respect to certain personal data pertaining to the user partly shifts to the latter where:

1) the intermediary has informed the user about the possibility to discharge the intermediary from its client confidentiality obligations, and
2) the user has not discharged the intermediary from the obligation of secrecy, and
3) the intermediary has immediately submitted the data they hold on the arrangement to the user.

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The intermediary is required to provide the user with the above information immediately after the reporting obligation arises. No further clarification on the term "immediately" has been included in the guidance.

Where legal professional privilege applies, the requirement for the intermediary to submit certain information on a "no name" or "abstract" basis will continue to apply, unless the user reports the abstract information on behalf of the intermediary (which is also considered to fulfill the intermediary's obligation to report).

Reporting – User

The reporting timelines for users mirror the requirements of the Directive. In cases where legal professional privilege applies, the taxpayer is required to complete the reporting within 30 days after the intermediary has provided them with the data they hold on the implementation of the arrangement. In cases where there is no qualifying intermediary or where professional privilege applies, the user is only required to report if:

- resident in Germany (domicile, habitual place of abode, place of management or registered office); or
- a domestic nexus can be established for a non-EU user (operating through a domestic PE, earning income or engaging in an economic activity that relates to taxes covered by the EU Mutual Assistance Directive).

German law does not outline the priority in which reports should be filed by users that have a reporting obligation in multiple Member States.

Where multiple users are involved, the user that is required to report for all general (non-user related) information will be the one that features first in the list below:

1) The user that agreed the arrangement with the intermediary; or
2) The user that is managing the implementation of the arrangement.

A user shall be exempt from the reporting obligation only to the extent that:

- There is evidence that the arrangement has been reported by an intermediary; or
- There is evidence that the arrangement has been reported by another taxable person; or
- There is evidence that it reported the arrangement in another Member State.

The user of an arrangement is required to disclose the implementation in their tax return(s). If the Arrangement ID and Disclosure ID is not available at the time of the submission of the German tax return, the user should specify this in the return.

Penalties

A fine of up to EUR 25,000 may be imposed on any person that (intentionally or unintentionally):

- Intermediaries: does not report a cross-border tax arrangement or does not timely report a cross-border tax arrangement or does not forward available information,
- Users: does not report a cross-border tax arrangement (at all / timely / completely / properly), or does not make a reference to the cross-border arrangement in the tax return (at all / timely / completely / properly).

Penalties only apply with respect to cross-border tax arrangements implemented after June 30, 2020.

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For more information, please refer to KPMG's EU Mandatory Disclosure Rules page or contact the following:

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