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URL: http://mobile.deloitte-tax-news.de/german-tax-legal-news/government-publishes-first-draft-of-law-to-implement-eu-mandatory-disclosure-rules.html

02.10.2019

German Tax and Legal News

Government publishes first draft of law to implement EU mandatory disclosure rules

Published draft no longer includes disclosure rules for domestic tax planning arrangements.

The German federal government issued the first official draft of the "Law for the introduction of an obligation to report cross-border tax arrangements" on 26 September 2019, which would implement Council Directive (EU) 2018/822 (commonly referred to as DAC 6) into Germany's domestic law effective as from 1 July 2020. Contrary to an unofficial draft that was circulated in January 2019, the officially published draft no longer includes reporting obligations for purely domestic tax planning arrangements. It is expected that the draft law will be formally introduced into the legislative process soon.

DAC 6, dated 25 May 2018, imposes an obligation on EU intermediaries (as described below) to disclose certain reportable cross-border tax arrangements. EU member states are required to implement the directive into their national law by 31 December 2019. The EU mandatory disclosure rules in DAC 6 are closely linked to the 2015 final report under action 12 of the OECD/G20 BEPS project; however, compared to the OECD rules, the scope of arrangements covered by DAC 6 is much broader. The goal of the implementation of DAC 6 is to provide the tax authorities of the EU member states with information to enable them to promptly respond to harmful tax practices and to close loopholes by enacting legislation or by undertaking adequate risk assessments and carrying out tax audits.

An unofficial first draft of a law to implement DAC 6 into German domestic legislation was published on 29 January 2019. The official draft law published on 26 September 2019 contains no surprises and mainly is based on the unofficial draft from January and the requirements described in the EU directive. The reporting requirements for purely domestic tax planning arrangements from the unofficial draft no longer are included in the official draft law. Even though the reporting requirements under DAC 6 apply only to cross-border arrangements, the government originally was planning to go beyond the requirements of the EU directive and to introduce even more extensive reporting obligations for taxpayers. It seems that these plans have been abandoned.

Based on the official draft law, reporting obligations would apply only for purposes of taxes that are covered by the EU administrative assistance law ("EU Amtshilfegesetz"); therefore, they would not apply for VAT purposes. The description of reportable transactions in a new section of the General Tax Code (section 138e) would follow the description of reportable transactions provided in DAC 6, with some minor amendments for clarification/technical purposes.

The draft law would follow the same approach as provided in DAC 6: the reporting obligation would apply to cross-border tax arrangements that have one or more specified characteristics ("hallmarks"). Some of these hallmarks would result in reportable transactions only if the "main benefit test" is satisfied. The test would be satisfied if it can be established that the main benefit, or one of the main benefits, that a person may reasonably expect to derive from an arrangement is obtaining a tax advantage, based on all relevant facts and circumstances. The term "tax advantage" would be defined in a new section of the General Tax Code (section 138d (3)) and specifically would include non-German tax advantages.

Hallmarks that would result in reportable transactions only if the main benefit test is satisfied would be described in a new section of the General Tax Code (section 138e (1)) and would include the following:

- Qualified confidentiality clause;
- Contingent fee arrangement;
- Substantially standardized documentation;
- Loss trafficking arrangement;
- Conversion of income into capital, gifts or other categories of revenue that are taxed

at a lower level or are exempt from tax;
- Circular transactions;
- Certain cross-border payments to related parties that are resident in low tax/no tax jurisdictions; and
- Certain cross-border payments to related parties that either are tax exempt or are subject to a preferential tax regime.

In addition, there are hallmarks that would result in reportable transactions regardless of whether the main benefit test is satisfied. Arrangements that fulfill the conditions of a specific hallmark in this category would have to be reported irrespective of whether a tax advantage is achieved. These hallmarks would be described in a new section of the General Tax Code (section 138e (2)):

- Certain cross-border payments to related parties that are not a tax resident of any jurisdiction or that are resident in a jurisdiction that is either blacklisted by the EU or is treated as non-cooperative by the OECD;
- Assets that are subject to depreciation in more than one jurisdiction;
- Relief from double taxation that is claimed more than once for certain income, resulting in the income not being taxed;
- Assets that are transferred in a cross-border arrangement taking advantage of significantly different valuations from the perspective of the jurisdictions involved;
- Certain arrangements that circumvent EU legislation (e.g. DAC) or agreements on the automatic exchange of information, and that have the effect of avoiding the reporting of income to the state of tax residence of the taxpayer;
- Certain arrangements that aim to conceal beneficial owners; and
- Specific transfer pricing arrangements:
  - Arrangements involving the use of unilateral safe harbor rules;
  - Arrangements involving the transfer of hard-to-value intangibles; or
  - Arrangements involving an intragroup cross-border transfer of functions, risks and/or assets, if the projected earnings of the transferor(s) before interest and taxes (EBIT) during the three-year period after the transfer are less than 50% of the projected annual EBIT of such transferor(s) if the transfer had not been made.

The primary obligation to disclose information to the tax authorities in the cases described above would rest with the "intermediary." Based on the proposed section 138d (1) of the General Tax Code, an intermediary would be defined as "any person that promotes, designs for a third party, organizes, makes available for implementation or manages the implementation of a reportable cross-border arrangement." To be considered an intermediary, a person would have to:

- Be resident in the EU;
- Provide its services through a branch within the EU;
- Be registered in an EU public register; or
- Be registered as a member of an EU professional legal, tax advisory or other professional services organization.

In the case of a reportable transaction, the intermediary would have to electronically report the relevant information (e.g. applicable hallmark, summary of the arrangement, date of its implementation, applicable tax provisions) to the federal tax office within a 30-day timeframe. The report also would have to include certain information regarding the intermediary itself.

In a case where the intermediary is bound by a legal professional privilege from reporting further information regarding the relevant taxpayer, the intermediary would have to inform the relevant taxpayer of the possibility of waiving the privilege. The intermediary would be required to report the information only if the relevant taxpayer grants the waiver. If the relevant taxpayer does not grant the waiver, the responsibility for reporting the information about the taxpayer would shift to the relevant taxpayer and the intermediary would have to inform the taxpayer of its reporting obligation within one week. The relevant taxpayer would have to report the required information by using the registration number for the specific reportable transaction that was received by the intermediary from the federal tax office (and passed on to the relevant taxpayer). A reportable transaction also would have to be included in the tax return of the relevant taxpayer by referring to the registration number for the relevant arrangement. Penalties for noncompliance with the reporting obligations could be as high as EUR 25,000.

The reporting obligations would apply starting from 1 July 2020 for all reportable arrangements that were implemented after 24 June 2018. For reportable arrangements that were implemented in the period from 25 June 2018 to 30 June 2020, the report would have to be filed with the federal tax office by 31 August 2020; there would be no penalties for such reportable arrangements. For reportable arrangements that are implemented or made available after 30 June 2020, the report would have to be filed within the general 30-day period.

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