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German Tax and Legal News

MOF publishes final decree on application of DAC 6 rules

Only minor changes made to 2020 draft decree.

The German Ministry of Finance (MOF) published the final decree regarding the application of the mandatory disclosure rules relating to certain cross-border tax arrangements on 29 March 2021. Germany implemented [Council Directive \(EU\) 2018/822](#) (commonly referred to as “DAC 6”) into its domestic law on 21 December 2019, and reporting requirements for affected structures that were implemented after 24 June 2018 apply as from 1 July 2020 (see [GTLN dated 10/02/2019](#)). Compared to the draft decree that was published on 2 March 2020, the final decree reflects only minor amendments, and its publication provides increased certainty to taxpayers and intermediaries regarding the reporting requirements. The MOF provides detailed guidance in the final decree regarding the application of the rules, the interpretation of the hallmarks of a reportable arrangement, and the reporting process, among other things; the final decree is 69 pages long and there are two appendices.

Despite several requests from taxpayers and advisers, the “white-list” in one appendix to the decree listing arrangements that generally are not reportable arrangements has not been broadened and includes only a limited number of arrangements.

The final decree clarifies that the relevant domestic tax provisions and tax provisions of other affected EU member states that have to be reported in relation to an arrangement are not the provisions regarding the imposition of the reporting obligation (e.g., sections 138d and following of the German General Tax Code); instead, they are the provisions relating to the tax consequences of the specific arrangement. In addition, provisions whose application would be prevented by the arrangement have to be included in the report. As indicated by various officials, this clarification is a direct response to taxpayers providing insufficient detail when filing DAC 6 reports in Germany.

The second appendix to the final decree was published separately on the federal tax office's homepage on 30 March 2021 and consists of a list of preferential tax regimes and non-cooperative third countries. This list (which will be updated as needed) can be used in determining whether a reportable cross-border arrangement fulfills the conditions of hallmark C1 (a specific hallmark relating to certain cross-border transactions). Not surprisingly, the list of preferential tax regimes includes the US foreign derived intangible income (FDII) regime that is still under OECD review (which also was included on an MOF list for purposes of the royalty barrier rule that was published on 20 February 2020; see [GTLN dated 02/25/2020](#)). The list as provided by the MOF, however, is not final and determinative and should be merely advisory in character.

The final MOF decree provides useful guidance for dealing with the reporting obligations under the German DAC 6 rules. Although taxpayers and advisers may have hoped for some additional guidance and clarifications compared to the draft version of the decree, the final decree is valuable as a representation of the coordinated view of the federal and state authorities on the reporting obligations. Based on information provided by the tax authorities, the federal tax office has received approximately 8,000 reports on arrangements so far, which is far less than originally expected. Another surprising observation from the first filings is that most of the reports were submitted by “users” of arrangements, while a smaller number of reports were submitted by intermediaries. EU tax authorities are working closely together not only to exchange information, but also to further develop the rules and to provide a coordinated approach to their application.

Taxpayers and intermediaries must deal with complex technical and administrative issues when determining whether a reportable cross-border arrangement exists; the general 30-day reporting deadline is extremely short. Taxpayers and intermediaries are recommended to set up a proper reporting process and to assess whether a potential DAC 6 reporting

obligation exists for each cross-border arrangement.

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