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URL: http://mobile.deloitte-tax-news.de/german-tax-legal-news/mof-publishes-first-draft-of-decree-for-application-of-dac-6-rules.html

13.03.2020

German Tax and Legal News

MOF publishes first draft of decree for application of DAC 6 rules

Detailed guidance from tax authorities on how to apply mandatory disclosure rules.

On 2 March 2020, the German Ministry of Finance (MOF) published the first draft of a decree regarding the application of the mandatory disclosure rules relating to certain cross-border tax arrangements. 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 beginning from 1 July 2020.

DAC 6, dated 25 May 2018, imposes an obligation on EU intermediaries to disclose certain reportable cross-border tax arrangements. EU member states were 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 into domestic tax laws 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.

The purpose of the draft decree is to provide additional guidance and details on the interpretation of the law for taxpayers and intermediaries.

The draft decree is divided into three parts: part one provides additional guidance regarding the scope of the reporting requirements, part two includes details about the hallmarks for reportable transactions, and part three provides further details about the reporting process with the tax authorities.

In the first part of the draft decree, the MOF provides further details about the definition of a tax arrangement, affected taxes, and persons that have an obligation to report. The tax authorities provide their view on persons that qualify as an intermediary, user, or relevant taxpayer, and on other types of parties involved. The conditions for an arrangement to be considered "cross-border" also are described.

In the second part of the draft decree, the MOF provides guidance about the interpretation of the hallmarks that may result in a reportable transaction. Hallmarks that require reporting only if the "main benefits test" is satisfied (MBT) are classified as "qualified hallmarks" *("bedingte Kennzeichen")*, while hallmarks that require reporting regardless of whether the MBT is satisfied are classified as "general hallmarks" (*"unbedingte Kennzeichen"*). The MBT is 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. As specifically authorized in the German DAC 6 implementation law, the decree includes a "white list" of transactions that are not considered by the tax authorities as providing a "tax advantage" for purposes of the MBT. The white list consists of cross-border transactions/structures that result in a tax advantage but do not require mandatory reporting because the tax advantage is specifically permissible and intended under the German tax law.

Qualified hallmarks include circular transactions, certain cross-border payments to related parties that are resident in low-tax or no-tax jurisdictions, and certain cross-border payments to related parties that either are tax exempt or are subject to a preferential tax regime. The draft decree states that, in the MOF's view, cash-pool arrangements and sale-and-leaseback structures generally would qualify as circular transactions under the rules. Low-tax and no-tax jurisdictions would be defined as jurisdictions where either no corporate income tax is levied or where a corporate income tax of 4% or less is levied. The draft decree also includes a more detailed definition of the term "preferential tax regime" and refers to the OECD definition of preferential tax regimes.

The third part of the draft decree focuses on the reporting process itself, and refers to a

future decree that will provide more details on the “DAC 6 XML scheme” for the required data input. As the technical standard for the data transmission is not expected to be available until 1 August 2020, the tax authorities provide for a transition period during which a data transmission for reportable transactions that is made up to 30 September 2020 still will be accepted as being on time (the implementation law provides for a two-month reporting window starting from 30 June 2020 for transactions that took place after 24 June 2018).

In its 56 pages, the decree provides detailed guidance and reflects a broad and comprehensive approach to the mandatory disclosure rules by the tax authorities. It should be noted that there seem to be minor deviations from the explanatory statement for the DAC 6 implementation law, and that several concerns raised by taxpayers and other parties regarding certain details and interpretations of the law have not been addressed.

Interested business associations are invited to provide comments until the beginning of April, and the government currently plans to publish the final decree no later than June 2020.