

Mandatory Disclosure Rules

Germany enacts DAC6 transposition bill

This article provides a summary of the German legislation to transpose 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. The transposition process is therefore complete.

Please note that the summary is based on information available as at January 1, 2020.

Scope

The scope of the legislation mirrors the text of DAC 6 – an intermediary is required to report cross-border tax 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. 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 who markets cross-border arrangements designed for third parties or organizes, provides for the use of 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.

German legislation does not consider an intermediary to be a participant in a tax arrangement. This interpretation significantly 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 its affiliates.

2) User

The legislation replaces the DAC6 term “relevant taxpayer” with “user”, which is similarly defined.

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 given 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 this regard, the guidance provides the example of a newly-established subsidiary that is provided with capital in order to acquire shares from the parent entity.

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.

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.

The legislation further provides that the German Ministry of Finance is authorized to bindingly issue a so-called "white list" of arrangements where a tax advantage will not be deemed to arise.

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. The actual implementation of the arrangement is not required.

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).

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 (particularly 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. The guidance notes that trade secrets should be able to be maintained through confidentiality clauses but that if 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 the service and object value for determining the fee payable to the intermediary increase solely as a result of the expected tax advantage.
- 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 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, if the utilization of the losses is already restricted by law, the acquisition of the loss-making company should not be disclosable. The guidance also provides 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.

Hallmarks & Main Benefit Test (cont.)

- Hallmark B(2) (conversion of income resulting in taxation at a lower level or tax exemption): guidance includes the example where the increase of a shareholding results in the shareholder meeting the requirements of the German participation exemption rules, which should generally not fall in the scope of this hallmark since such tax advantage is explicitly provided for by law and only has an effect domestically. However, guidance further states that it needs to be assessed on a case-to-case basis whether these legal tax advantages comply with the spirit of the legislation.
- Hallmark B(3) (circular transactions that have an offsetting or cancelling effect): guidance provides 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.
- Hallmark C(1)(d) (deductible cross-border payments subject to preferential regimes): guidance notes that a preferential regime is assumed to exist, for example, in cases of license payments being subject to a patent box regime. According to the guidance, this applies even if the patent box regime complies with the modified OECD nexus approach.
- Hallmark C(2) (depreciation of the same asset in more than one jurisdiction): the guidance provides the example of an aircraft leasing transaction, in which 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 in which an exemption from double taxation is applied in two different jurisdictions due to qualification or allocation conflicts.
- Hallmark C(4) (cross-border transfers of assets with a material difference in the amount being treated as payable): the guidance notes that a difference of 10% or less should not be considered material and therefore should not be reportable.
- 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. predetermined ranges or thresholds for profit mark-ups) are considered arm's length by default.

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.

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.

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.

Hallmarks & Main Benefit Test (cont.)

- 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 that is required 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.

The legislation does not clarify in which language the information should be reported.

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 which 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.

According to the guidance, the reference number of the arrangement issued by another Member State is considered sufficient proof.

The German tax authorities will issue a registration number (Arrangement ID) for the cross-border arrangement and a disclosure number (Disclosure ID) for the notification received (i.e. evidence of receipt).

The intermediary is required to immediately provide the registration number and the disclosure number to the user (no further clarification on the term “immediately” has been included in the guidance).

Legal Professional Privilege

For intermediaries that are protected by legal professional privilege – such as auditors, attorneys and tax advisors – the reporting obligation with respect to certain personal data on the user of the cross-border tax arrangement shall partly shift to the user, provided that:

- 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 of the tax arrangement.

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 obliged to report:

- when resident in Germany (domicile, habitual place of abode, place of management or registered office); or
- when a domestic nexus can be established for a non-EU user (by operating through a domestic PE, earning income or engaging in an economic activity that relates to taxes covered by the EU Mutual Assistance Directive).
- 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 registration number (Arrangement ID) should be included in the user's German tax return.

Penalties

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

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

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

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

Where multiple users are involved, the user that is to file 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

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

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