

## German Ministry of Finance publishes draft MDR guidance

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### Executive summary

On 4 March 2020, the German Ministry of Finance (MoF) published a draft decree containing guidance on the final German Mandatory Disclosure Rules (MDR) legislation which was published in the German Federal Gazette on 30 December 2019.<sup>1</sup> The newly issued draft decree provides further clarity on the MoF's interpretation of the scope, hallmarks and reporting procedure and confirms that the German MDR legislation is broadly aligned with the requirements of the Directive. The draft decree also contains a so-called "white list" of arrangements that are in principle not reportable. This "white list" is however shorter than expected and the arrangements included do not appear to be commonly implemented transactions. Due to delays with the establishment of the reporting interface connection at the responsible German Federal Central Tax Office (BZSt), a one-time extension shall be granted until 30 September 2020 for the submission of the first reports.

The draft decree has been released for public consultation, and it is expected that the final decree will be published by the end of June 2020 at the latest.

The key highlights of the draft decree are summarized below.

## Key highlights

The draft decree comprises a total of 56 pages and its text is partially based on the explanatory notes which were published by the German Government during the legislative process. As such, it contains detailed explanations and practical examples on various terms and rules introduced with the legislation. In certain areas, the draft decree goes beyond the explanatory notes and provides additional guidance on how the MoF and tax authorities will interpret certain terms and rules.

## Scope of application

The draft decree includes for the first time a definition of the term “other participants of an arrangement” (*andere an der Gestaltung Beteiligte*), which involves the user and its business or contractual partners (i.e., buyer or seller of an asset, lessor or lessee, borrower or lender). It is important to determine all participants of the arrangement, to assess whether the arrangement meets the definition of a reportable cross-border arrangement.

In addition, the draft decree further defines the term “intermediary” and clarifies that an intermediary must have an active function directly connected to a cross-border arrangement. According to the legislation, this includes marketing, designing, organizing, making available or implementing an arrangement to a (potential) user. For the hallmarks which are subject to the main benefit test, a person does not qualify as an intermediary according to the guidance, if the person neither knows nor could objectively recognize that the main benefit of a transaction for a (potential) user is the achievement of a tax advantage. This must be assessed based on all relevant facts and circumstances as well as the expertise and understanding required to provide such services. It also clarifies that a person will not qualify as an intermediary if that person is only involved in specific, separate steps of a transaction. As an example, the draft decree mentions a bank providing a loan which is part of a cross-border transaction in which the bank is not further involved. The mere granting of the loan should in principle not suffice for the bank to qualify as an “intermediary,” but rather as an “other participant.”

Further, the draft decree clarifies that in-house tax teams of legally independent entities can qualify as an intermediary, user or other participant of an arrangement independently of each other, e.g., if a reportable arrangement was designed and implemented by an in-house tax department for other

group companies. The same is the case for investment funds or special investment funds which can also qualify as intermediary, user or other participant of an arrangement.

## Interpretation of hallmarks and main benefit test (MBT)

The appendix of the draft decree contains a so-called “white list” which names certain types of arrangements that are in principle not reportable. The German MDR legislation provides that the German tax authorities may define such a white list of arrangements, specifically, if such arrangements only result in a tax advantage in Germany, and this advantage is intended by German law. Hence, the publication of such a list was generally anticipated, however the “white list” published in the appendix to the draft decree is shorter than expected and, so far, lists only eight specific cases concerning inheritance tax/gift tax, income tax/retirement provision and the *Research Allowance Act*.

In addition, there is a further “white list” concerning hallmark A.3 (standardized documentation or structure), in which certain standard contracts are in principle excluded from the notification requirement. This applies, for example, to standard contracts used for the establishment of companies, the granting of loans or licenses, the secondment of employees, the agreement of services or standard arrangements typical for banks such as the acquisition of publicly listed financial instruments. A reporting obligation might still be triggered, if the contracts are structured in an untypical manner or additional steps are added to achieve a tax advantage.

## Two-stage notification procedure

According to the MoF, the information to be disclosed on reportable arrangements can only be submitted in German. However, some information may also be submitted in English. In line with the German MDR legislation, the draft decree also reiterates that there is an obligation to list reportable arrangements in the annual tax return for the assessment period in which a tax advantage was first obtained or shall be obtained.

Generally, the German law requires reports to be filed by 31 August 2020 for reportable arrangements where the first step is implemented between 25 June 2018 and 30 June 2020. However, for technical reasons, there will be no objection if reports for the transitional period are submitted by 30 September 2020, since the reporting

interface connection for electronic submission to the BZSt will likely only be made available as of 1 August 2020. This extension to the deadline for the submission of reports also applies to arrangements that are made available for implementation, that are ready for implementation or where the first step is implemented in July 2020. Thus, the first notifications would have to be submitted by 30 September 2020.

## Next Steps

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Taxpayers and intermediaries who have operations in Germany should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting these obligations.

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## Endnote

1. For further details on the German MDR legislation see EY Global Tax Alerts: [Germany publishes draft Mandatory Disclosure Rules](#), dated 20 March 2019, [German Ministry of Finance amends draft Mandatory Disclosure Rules](#), dated 30 September 2019 and [German Government issues update on draft Mandatory Disclosure Rules](#), dated 10 October 2019.

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