

Asset Protection – How to structure assets in an anonymous way, while meeting the international transparency requirements.

Commission(s) in charge of the Session/Workshop:

Private Clients Commission
Tax Law Commission

Munich, 2016

National Report of Germany

Inga Zillmer

Inga Zillmer | Tax Law
Bahnhofstrasse 29,
71638 Ludwigsburg / Germany
+49 7141 2395945, zillmer@zillmer-steuerrecht.de

General Reporters:

<p>Cosima von Rechteren Bär & Karrer AG Brandschenkestrasse 90 CH – Zurich 8027 Phone: +41 58 261 56 01 E-mail: cosima.vonrechteren@baerkarrer.ch</p>	<p>Roos Jongeneel Taxand Netherlands Piet Heinkade 133 Amsterdam, The Netherlands Phone: +31 20 435 64 09 E-mail: Roos.Jongeneel@taxand.nl</p>
--	--

31 January 2016

INTRODUCTION

1. Private Clients

As the world becomes increasingly globalised, it is becoming easier for everyone to hold assets through structures and to make and manage investments through financial institutions outside of its own country of residence. International organisations such as the OECD and the FATF, institutions such as the EU and of course the USA are at the forefront when it comes to combatting tax evasion, money-laundering and terrorist financing. Due to this development, the last several years have brought a new wave of greater financial transparency.

With more than 90 countries already committed to the OECD's Common Reporting Standard (Standard for Automatic Exchange of Financial Account Information), the first stage amongst the early adopters will come into effect on 1 January 2016. The EU recently introduced its new anti-money laundering (AML) rules, namely the Fourth EU Anti-Money Laundering Directive ("4AMLD"). The main novelty of the new Directive is the introduction of a central UBO-register, a public register which identifies the ultimate beneficial owners (UBOs) of companies and trusts. EU Member States have until June 26, 2017 to transpose the requirements of the 4AMLD into national law. Then of course financial institutions are faced with the long arm of the US-legislation in the form of the Foreign Account Tax Compliance Act, known as FATCA.

At the same time, the world is becoming more and more dangerous to any wealthy individual. Unjustified law suits, invented claims, bankruptcy of whole countries, asset seizure, increasing liability risks or the risk of kidnapping, whatever the reason may be, the need for anonymous asset protection structures is bigger than ever.

When planning their individual asset protection structure, international families, high net worth individuals and their advisers are confronted with these changes in new tax and asset reporting regimes and reporting rules. Especially where anonymity is sought, these rules can have far reaching consequences. For the unwary, these new regulations are a potential minefield. Advisers are looking for ways how to lessen the impact of these rules.

Now, how are these issues dealt with in your country? In this section, we would like to find out what kind asset protection structuring possibilities your country offers and how these are affected by the recent international and national compliance and filing requirements.

2. Tax

Simultaneously with the introduction of more transparency regarding the structuring of privately held assets, the international developments also strive to more transparency regarding the income and tax planning. Multinationals but also privately owned companies held by the same international families and high net worth individuals who are subject to the transparency requirements as described above, are also faced with increasing transparency

and compliance requirements regarding their tax position and exchange of information between states.

On 5 October the OECD published the final reports regarding the Action Plan Against Base Erosion and Profit Shifting (“BEPS”). The BEPS Action Plan is aimed to equip governments with domestic and international instruments to address tax avoidance and ensure that profits are taxed where economic activities generating the profits are performed and where value is created. The background furthermore lies in three key pillars identified by the OECD: introducing coherence in domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty. The proposed actions by the OECD regard inter alia Country-by-Country reporting, mandatory disclosure of tax schemes and international exchange of information between states.

On 6 October 2015 unanimous agreement was reached between the EU Member States on the automatic exchange of information on cross-border tax rulings. According to the European Commission, the lack of transparency on tax rulings can be exploited by certain companies in order to artificially reduce their tax contribution. Where currently Member States have the discretion to decide whether information such as a tax ruling should be exchanged with another Member State, the proposed amendment to Directive 2011/16/EU will require Member States to automatically exchange information on their tax rulings. The deadline for implementation of the amendment is the end of 2016 as the Directive will come into effect on 1 January 2017.

Although the transparency requirements on tax planning aim to tackle tax avoidance and aggressive tax planning, all tax payers, “aggressive tax planners” or not, will be faced with an increased administrative burden. Their advisors operate in an ongoing changing environment and are challenged by the international developments when advising their clients on the best tax strategy and e.g. on whether it is still beneficial to obtain a tax ruling. Perhaps it can be questioned whether the key pillar of certainty is still supported.

Now, how are these issues dealt with in your country? In this section, we would like to find out in what way your country is introducing the transparency requirements proposed by the OECD and the European Commission besides the requirements that already exist and how these developments may affect the future tax strategy of your clients.

Please find here some useful information for drafting your report. Following these basic rules will ensure consistency among all our reports as well as a convenient experience for our readers.

STYLES

- There are two different levels of headings you may use. See example below.
- Your body text needs to be Garamond, Size 12.
- If you need to display a list, you may use bullet points or letters in lowercase.
- For the use of footnote, you can use the style available here¹.

- **Headings**

Heading 1, Font: Garamond, Size 14, Bold

Heading 2, Font: Garamond, Size 12, Bold

- **Body text**

Read here your body text in Garamond, Size 12.

- **Lists**

A list can be displayed with letters in lowercase:

- a. Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore
- b. et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat.
- c. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.

or with bullet points:

- Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore
- et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat.

¹ This is a footnote.

- Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.

You can also use indentation to add extra levels to your lists.

- Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore
 1. et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat.
 2. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.

BIBLIOGRAPHY

If you add a bibliography at the end of your report, please use the style below.

- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

NAMING YOUR FILE

When saving your report, please name the document using the following format: "National Report (country).doc". The General Reporter in charge of your session will take care adding the Working session/Workshop reference once this is available.

Example: National Report (France).doc

General Reporters, National Reporters and Speakers contributing to the AIJA Annual Congress 2015 accept the terms here below in relation to the copyright on the material they will kindly produce and present. If you do not accept these terms, please let us know:

General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2015.

AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.

1. Private Clients

1.1. Asset Protection – structuring possibilities and other means of asset protection²

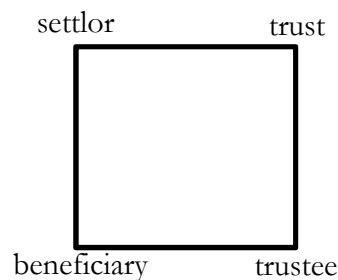
1.1.1. Does your jurisdiction recognize domestic or foreign trusts? If yes, what types of domestic trusts are there and what type of trusts is usually used for asset protection purposes? Are there any restrictions in your jurisdiction as to the possibility of the settlor to be a beneficiary at the same time?

Germany is a civil law jurisdiction that does not know trusts – there is no trust according to German law. From a German perspective, it is hard to understand that ownership in strict law and ownership in equity can be split. However, German civil law may recognize that (foreign) assets can be assigned to a trust.

The taxation of trusts does not necessarily follow the civil law ownership. It is quite complicated because there are so many varieties of trusts (depending on the governing jurisdiction, the statutes, by-laws ...) and Germany tries to fight tax evasion by special clauses for trusts and other asset protection vehicles.

So there is no general rule how a trust is treated under German law. The parties have to take all facts and circumstances into consideration.

How can we fit a trust into the domestic civil law and tax system?



By answering these questions:

- To whom does the law attribute the assets for civil law purposes?
- To whom does the law attribute the assets for tax law purposes? Does civil law ownership or economic ownership prevail?

² *Wassermeyer* The taxation of family foundations and trust from a German perspective, FR 2015, 149; *Troll/Gebel/Jülicher* on Gift and Inheritance Tax; *Fürwentsches* The (non) recognition of trusts in Germany

- To whom does the law attribute the income derived from the assets for tax law purposes?
- Which anti-avoidance rules apply that assign the assets and/or income to another party?

When German residents are involved – either as settlor or beneficiary – the parties would rather use a foundation than a trust. However, if a trust is the preferred vehicle, it should be an opaque EU/EEA trust. It can be an *inter vivos* trust or a *testamentary* trust (the latter is admitted since the European Succession Regulation came into force).

There is no general restriction that prevents a settlor from being a beneficiary. However, the civil law and tax consequences can be unpleasant depending on the details of the case:

- The settlor can be deemed owner of the assets when he is still in control – the trust is disregarded for civil law purposes.³ The same can be true for tax purposes because the settlor can be considered to be the economic owner of the assets (Sec. 39 Par. 2 GTC). This structure can be described as **transparent trust**.
- If the trust is recognized (**opaque trust**), the attribution of assets is subject to Gift and Inheritance Tax (**GIT**)⁴. When the assets are transferred back to the settlor, the transfer is again subject to GIT⁵. Both cases are subject to Tax Bracket III with a tax rate of 30% (asset value up to € 6.000.000) or 50% (asset value higher than € 6.000.000).⁶ The taxes add up - there is not tax credit!

1.1.2. Does your country recognize private foundations (domestic or foreign) which are suitable for asset protection purposes (such as family foundations or similar)? If yes, what are the main characteristics of such domestic private foundation and are there any restrictions in your jurisdiction as to the possibility of the founder/donor to be a beneficiary at the same time?

Yes, Germany does recognize domestic and foreign foundations.

³ Higher Regional Court of Stuttgart (*OLG Stuttgart*) judgment dated 29th June 2009, 5 U 40/09, ZEV 2010, 265.

⁴ Sec. 7 Par. 1 no. 9 GITA.

⁵ Sec. 7 Par. 1 no. 9 GITA.

⁶ *BFH* 21st July 1992, II B 49/14, BStBl. II 1993, 328; *Kapp/Ebeling* GIT Sec. 15 no. 66 f.; *F/J/P/W* GIT Sec. 15 no. 62.

Under domestic law, there are two types of foundations, i.e. foundations with or without legal capacity. Both types are subject to government supervision. This report will focus on foundations with legal capacity.

There is no special civil law regulation for family foundations. However, family foundations are commonly defined as foundation whose beneficiaries are (close) relatives of the settlor.

Some families use charity foundations because they are partly exempt from Income Tax and the attribution of assets is tax free. Part of the income may still be distributed to the family. A combination of family and charity foundation can be very efficient – tax wise and for asset protection purposes. There are no general restrictions for the settlor to be beneficiary.

- 1.1.3. Are there any other asset protection vehicles which are commonly used in your jurisdiction? What are their specific characteristics?

There are no special purpose vehicles.

Please note that the prospective donor may attribute private assets (e.g. cash, shares) to his or her company so that the assets qualify as business assets. Under certain conditions, these assets are subject to an 85% or 100% exemption from GIT.⁷ The GITA is subject to review. The legislator will introduce a new regulation for the exemption of business assets until 30th June 2016.

- 1.1.4. Is your jurisdiction asset protection-friendly? E.g. does your jurisdiction typically respect asset protection structures or does it recognize principles such as "sham" or "piercing the corporate veil"? If yes, what are the prerequisites for a court/other administrative body to apply such principles? What is the right balance between settlor control and asset protection?

The domestic jurisdiction is not particularly asset protection – friendly, neither for family law nor for tax law purposes.

- a. Family law

The domestic family law provides for a strict forced heirship regime. A prospective decedent cannot escape from that regime by attributing his or her

⁷ Sec 13 a 13 b GITA.

assets to an asset-protection vehicle. A 10 year grace period applies. Only after 10 years have elapsed, the heirs lose their forced heirship rights on the respective assets. A prospective decedent may choose a different governing law according to the EU Succession Regulation.⁸

The domestic matrimonial property law provides for a monetary equalization of assets between the spouses upon divorce. The general rule is that the spouses are entitled to each 50% of the combined wealth that the spouses acquired during marriage. The spouse who has acquired less has an equalization claim against the other spouse. The transfer of assets to an asset protection vehicle does not reduce the equalization claim. Exemption: The 10 year grace period between attribution and divorce has elapsed or the other spouse agrees that the attributed assets shall not be part of the equalization claim.

A trust or a foundation can be considered sham for civil law purposes if the settlor has a right to revoke the assignment of assets.⁹ The „piercing the corporate veil“ principle is recognized. When applying the principle, you have to bear in mind the questions presented in 1.1.1. The crucial question is: Who controls the assets, their distribution, investments etc. according to the governing law, the statutes, by-laws etc. There is not the one right balance between control and asset protection. Structures that are favorable for succession planning can be very unfavorable for tax purposes. So it is important to find the right balance for every single case.

b. Tax Law

Please see 1.1.7.

- 1.1.5. Are there any other characteristics in your jurisdiction that make it particularly asset protection friendly, e.g. political stability, banking or other secrecy rules, favorable civil procedural rules (e.g. in relation to the (non-)recognition of foreign judgments) and have there been any changes to these principles recently?

Germany is politically and economically stable. There is a bank and a tax secret. However, Germany participates in various programs on the (automatic)

⁸ REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

⁹ OLG Stuttgart, 26.09.2009, 5 U 40/09, ZEV 2010, 265; Linn/Schmidt DStR 2014, 2541, Wassermeyer, FR 2015, 149.

exchange of information for tax purposes (see 2.2.). Germany does recognize foreign judgments unless they violate the public order.

- 1.1.6. Has there been any recent case law particularly relevant with regard to asset protection structures and what was it about?

There is only little case law with regard to asset protection structures. For the recent ruling on the taxation of trust distributions, please see 1.1.7.

There are two older precedents that should be taken into consideration, too:

a. Federal Fiscal Court on Liechtenstein Foundations¹⁰

The Federal Fiscal Court (*Bundesfinanzhof* – **BFH**) had to decide whether the attribution of assets to a Liechtenstein *Anstalt* was subject to GIT. The settlor had mandated a lawyer to establish a Liechtenstein *Anstalt*. According to the statutes and the contract of mandate, the lawyer acted as trustee under his own name. However, the lawyer was bound to the settlor's instructions.

The attribution of assets to a foundation is subject to GIT (i) upon the establishment of the foundation (endowment of the initial capital, Sec. 7 Par. 1 Nr. 8 GITA) and (ii) any additional contributions (Sec. 7 Par. 1 Nr. 1 GITA). *Attribution* means that the foundation has the assets as its own disposal while the settlor is not entitled to give instructions or dispose of the assets. The settlor has no right to demand the assets. The rights of the foundation must be clearly stated in the governing civil law, the statutes, the by-laws, and any other applicable regulation.

In the aforementioned case, the settlor had the assets still at his disposal because he could decide what the *Anstalt* had to do with the assets. The transfer of assets to the *Anstalt* was not an attribution for GIT purposes and therefore not taxable. The judgment shows how a settlor can avoid GIT. On the other hand, this structure does not seem to make sense for asset protection purposes because the settlor remains owner of the assets.

b. Higher Regional Court of Stuttgart on Foundations¹¹

The *Court* held that a fiduciary foundation (*Treuhandstiftung*) may be disregarded for civil law purposes. Upon the decease of the settlor, it was unclear whether the assets that the settlor had attributed to the fiduciary foundation were still part of his estate. The *Court* decided that the assets did not belong to the fiduciary foundation because the attribution had been a sham transaction

¹⁰ Federal Fiscal Court, judgment dated 28th June 2007, II R 21/05, BStBl II 2007, p. 669.

¹¹ Higher Regional Court of Stuttgart (*OLG Stuttgart*) judgment dated 29th June 2009, 5 U 40/09, ZEV 2010, 265.

(Sec. 117 Civil Code). The settlor had not ultimately transferred the assets and had still the right to revoke the transaction.

This judgment is surprising because German civil law recognizes fiduciary transactions. It is unclear if other courts would follow the opinion. So no one knows exactly where the dividing line between sham and fiduciary arrangements runs.

- 1.1.7. What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed? How is the transfer of assets to trusts/foundation or other asset-holding vehicles taxed in your jurisdiction?

a. Transfer of assets: GIT

The transfer of assets to a domestic foundation, foreign foundation, and a trust is subject to GIT if the settlor is German tax resident and/or the assets are deemed domestic.

The transfer to **foreign foundations and trusts** falls within the highest tax bracket (*Steuerklasse III*) with tax rates of 30% (attribution up to € 6 Mio.) or 50% (attribution of more than € 6 Mio.) (Sec. 15 Par. 1 and 2, Sec. 19 GITA). The settlor cannot reduce the tax rate by making several separate transfers because all transfers within a 10 year period are aggregated (Sec. 14 GITA).

The tax rate for transfers to a **domestic foundation** can be significantly lower. The tax bracket depends on the relationship of the settlor and the beneficiaries - the closer the relationship the lower the tax rate. E.g. if all beneficiaries are children of the settlor, Tax Bracket I applies with tax rates between 7% and 30% (the latter for aggregated transfers of more than € 26 Mio.).

Full or partial tax exemption is possible if the settlor transfers business assets (participation in a partnership, a minimum of 25% in a corporation) (Sec. 13a, 13b GITA).

b. Transfer of assets: Income Tax

Assuming that the asset protection vehicle is recognized, the transfer of assets may be deemed a taxable realization.

The transfer to a domestic foundation without consideration is a gift and therefore no taxable realization.

The transfer to a foreign foundation – even without consideration - can be a taxable event if Germany loses the right to tax:

- Transfer of shares in a domestic or foreign corporation (minimum shareholding of 1%).¹² If the foundation resides in the EU/EEA, Germany defers the tax without security. The tax is due when the foundation transfers the assets to a non EU/EEA person or entity.
- Transfer of business assets.¹³

The transfer to a trust is not considered a realization. However, there are no judgments on this issue so far, so the situation is not 100% clear.

c. Taxation of the income of a foundation or trust

A domestic foundation is subject to Corporate Income Tax (*CIT*). DTTs may be applicable.

A foreign foundation is not subject to CIT. However, Germany attributes the assets and income of a **foreign family foundation** to beneficiaries who are subject to unlimited tax liability in accordance with their share – the foundation is deemed transparent for income tax purposes.¹⁴ It is irrelevant whether the foundation distributes the income to the beneficiaries. However, if the income is later distributed and therefore subject to (Corporate) Income Tax in the hand of the beneficiaries, there is a tax credit for the aforementioned tax.¹⁵ These provisions do not apply if a family foundation (i) has its management or its registered office in an EU/EEA State, and (ii) it is proven that the settlor, related individuals, and their descendants have no factual or legal control over the foundation's property, and (iii) Germany and the state in which the family foundation has its registered office provide each other – pursuant to Council Directive 77/799/EEC or a comparable bilateral or multilateral agreement – with the information that is necessary to carry out the taxation.

The same rules apply to an opaque trust.¹⁶

d. Distributions by a domestic foundation

There are two kinds of distributions:

- Distributions in line with the statutes (obligatory distributions)

These distributions are not considered a gift because a gift is voluntary. The distributions are deemed capital income (similar to dividends) and therefore subject to 25% income tax (Sec. 20 Par. 1 Nr. 9 ITA).

¹² Sec. 6 Par. 1 Phrase 2 Nr. 1 Foreign Transaction Tax Act (*FTTA*), Sec. 17 Par. 1 ITA.

¹³ Sec. 4 Par. 1 Phrase 3 ITA. The taxable gain may be

¹⁴ Sec. 15 Par. 1 FTTA.

¹⁵ Sec. 15 Par. 7 FTTA.

¹⁶ Sec. 15 Par. 4 FTTA.

- Distributions not in line with the statutes (voluntary distributions)

These distributions should be rare because domestic foundations are under state supervision. However, if these distributions occur they are probably subject to GIT as well as Income Tax.

e. Distributions by a foreign foundation

There are two kinds of distributions:

- Distributions in line with the statutes (obligatory distributions)

These distributions are not subject to GIT. They are not a gift because they are non-voluntary.

There is a special provision that deems distributions of foreign legal estates a gift (Sec. 7 Par. 1 Nr. 9 GITA). However, the Federal Fiscal Court ruled that foreign foundations do not fall into the scope of the provision.¹⁷ The provision was designed for trusts that the domestic law does not recognize and that need a special treatment. However, foreign foundations that are similar to domestic foundations can be treated like the latter.

The distributions are deemed capital income (similar to dividends) and therefore subject to 25% income tax (Sec. 20 Par. 1 Nr. 9 ITA).

- Distributions not in line with the statutes (voluntary distributions)

The situation is unclear. The distributions are probably subject to GIT and surely subject to income tax.

f. Trust Distributions

Distributions made by a transparent trust are deemed direct distributions from the settlor to the beneficiary. The distributions to German tax residents are subject to GIT with tax rates between 7% and 50%, depending on the relationship of settlor and beneficiary as well as on the value of the distribution.

The distributions of an opaque trust fall into the scope of Income Taxation as well as GIT. The Federal Fiscal Court ruled that **all** distributions (principal and income) are subject to GIT (Sec. 7 Par. 1 Nr. 9 GITA).¹⁸ At the same time, the distributions are deemed income from capital similar to dividends so that income taxation applies (Sec. 20 Par. 1 Nr. 9 ITA). There is no tax credit so that the taxes can add up to 75%. The wording of the law allows the double taxation. The Federal Fiscal Court stated in a preliminary injunction that it is

¹⁷ Federal Fiscal Court, judgment dated 21.07.2014 - II B 40/14, ZEV 2014, 504.

¹⁸ Federal Fiscal Court, judgment dated 27th Sept. 2012, II R 45/10, BStBl II 2013, p. 84.

doubtful whether this double taxation is legally allowed.¹⁹ Unfortunately, the court did not render a final judgment as yet.

1.2. National and international transparency requirements

- 1.2.1. What are the developments in your country with regard to the automatic exchange of information? Will your jurisdiction implement the OECD-CRS and if yes, when and how?

The automatic exchange of information is considered a powerful tool to fight tax evasion. Germany has concluded bilateral and multilateral treaties. For details, please see 2.2.1.

Germany has adopted the OECD-CRS. For details, please see 2.2.2.

- 1.2.2. Has your country entered into a bilateral FATCA agreement? If yes, what are the main features of such agreement?

Yes, Germany concluded a bilateral FATCA agreement.²⁰ The agreement follows the FATCA model treaty. The Federal Ministry of Finance issued a decree on the application of the agreement.²¹

The U.S. recognizes German financial institutions as FATCA compliant. All German financial institutions have reporting duties unless they are mentioned in Appendix II of the Agreement. The list of Non-Reporting German Financial Institutions comprises *inter alia* Governmental Entities, the Central Bank (*Deutsche Bundesbank*), Pension Funds, Small Financial Institutions with Local Client Base, and Certain Collective Investment Vehicles.

The Reporting Institutions have to report information on Financial Accounts such as depots and bank accounts if specified U.S. persons or entities are the owners. The same duties apply to fiduciary accounts.

¹⁹ Federal Fiscal Court, judgment dated 21.07.2014 - II B 40/14, ZEV 2014, 504.

²⁰ Agreement between the Federal Republic of Germany and the United States of America to Improve International Tax Compliance and with respect to the United States Information and Reporting Provisions Commonly Known as the Foreign Account Tax Compliance Act, dated 31st May 2013, BGBl. 2013 II p. 1362. For details see *Eimmermann* IStR 2013, 774.

²¹ FATCA-USA-Umsetzungsverordnung (FATCA-USA-UmsV), dated 23rd July 2014, BGBl. 2014 I, p. 1222.

The Financial Institutions have to identify the owners of the Financial Accounts. However, the Institutions may rely on the self-disclosure of their clients unless they know or have reason to believe that the disclosed data is wrong.

For Accounts that have already existed (**Preexisting Accounts**), there are limited reporting duties. Small accounts with a balance of less than US-\$ 50.000 as of 31st Dec. 2013 do not need to be reported (for insurance contracts, the threshold is US-\$ 250.000). The Financial Institutions have to check accounts worth between US-\$ 50.000 (US-\$ 250.000) and US-\$ 1.000.000, the Institutions have to run an electronic procedure. Further duties apply for accounts worth more than US-\$ 1 Mio.

For **new accounts** that were opened since 1st July 2014, a Reporting Financial Institution has to check *inter alia* if the owner is a specified U.S. person, a FATCA compliant Financial Institution, or an active/passive NFFE. The following details on the account have to be reported *inter alia*: name, address, U.S. TIN of the account holder, account number, interest, dividends, and other income booked on the respective account.

- 1.2.3. FATF (Financial Action Task Force) recommendations and developments: What are the recent developments in your country and what are the specific due diligence obligations in your jurisdiction?

Germany usually follows the FATF recommendations.

The Anti Money Laundering Act (*Geldwäschegesetz GWG – AMLA*) has been amended several times in the last years. Germany has adopted high standards to combat money-laundering and terrorist financing. An obliged party has to report any suspicion of money laundering or terrorist financing to the competent authority.²² Failure to do so can result in a criminal liability and/or administrative fines. It is important to notice that not only the usual suspects such as banks are obliged parties. Lawyers, accountants, fiduciaries, service providers that assist in establishing companies, and estate agents fall into the scope, too.²³ The obliged party has to identify the contractual partner, the motivation of the transaction, the trustor if any. If the obliged party is not able to fulfil these duties, he must not enter into the transaction.

That means for asset protection structures: A HNWI cannot hide by using a fiduciary. If an obliged party assumes that the contractual partner is not acting on his own behalf but refuses to name the trustor, the obliged party has to refrain from any transactions.

²² Sec. 11 Par. 1 AMLA.

²³ *Griebel* NZM 2012, 481 on estate agents; *Klugmann* NJW 2012, 641 on lawyers; *Ruppert* DSfR 2012, 100 on accountants.

The Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht BaFin – FFSA*) regularly publishes information and recommendations related to FATF documents. The FFSA, the Federal Ministry of Finance, and the umbrella organisation of German Banks have issued an elaborate guideline with due diligence standards.²⁴

1.2.4. Will your country be subject to the Fourth EU Anti-Money Laundering Directive (“4AMLD”) including UBO-register?

Yes.

1.2.5. If not, does your jurisdiction know similar shareholder registers?

n/a

1.2.6. Are there any other transparency requirements in your country that pose a threat on the anonymity of asset protection structures?

There are various duties to disclose cross-border structures for tax purposes. For details, see 2.1.1.

24

https://www.bafin.de/SharedDocs/Downloads/DE/Auslegungsentscheidung/dl_ae_auas_gw.pdf?__blob=publicationFile&v=11 , 95 pages!

2. Tax

2.1. Transparency requirements under national law

- 2.1.1. Does the national law currently include transparency obligations regarding income derived from other states (directly or by subsidiaries) and the tax treatment thereof (including the transfer pricing applied)?

Yes. There is a general transparency clause that is supported by several special obligations for cross-border cases.

The **general rule** is that a taxpayer has to present all facts and circumstances that are relevant for German tax purposes (Sec. 90 Par. 1 General Tax Code *GTC*). Please bear in mind that Germany

- follows the concept of residence and taxation of the world-wide income (for both income and gift and inheritance tax purposes) AND
- has introduced an extensive regulation on cross-border activities in the Foreign Transaction Tax Act (*FTTA*) including transfer pricing regulation and the Investment Tax Act (*ITA*).

Even when looking at the general rule, it is clear that Germany is not in favor of any anonymous schemes.

The transparency rules apply on individuals and companies alike unless otherwise indicated.

These are the most important transparency rules in cross-border cases:

- When a taxpayer is involved in any proceedings that are taking place abroad but can be relevant for German tax purposes, the taxpayer is required to clarify these facts and to obtain the necessary evidence (Sec. 90 Par. 2 phrase 1-2 *GTC*).

Failure to do so may result in an estimate of the taxable income (Sec. 162 Par. 2 *GTC*).

- The situation is even worse when there is **objective evidence** for the assumption that the taxpayer has business relations with **financial institutions** based in a country or territory (i) which has not acceded to an agreement to supply information pursuant to **Art. 26 OECD MTC (2005)**, or (ii) that the country or territory does not supply information to a **comparable extent** or (iii) that the supply

of information is **declined** (Sec. 90 Par. 2 phrase 3). The taxpayer shall be obliged at the request of the tax authorities to provide a declaration in lieu of an oath regarding the accuracy and completeness of the information provided by the taxpayer and to **authorize the tax authorities to assert on the taxpayer's behalf possible rights to obtain information against the credit institutions** named by the tax authorities, both in and out of court.

Failure to do so may result in an estimate of the taxable income (Sec. 162 Par. 2 GC).

- In matters involving dealings with a foreign nexus, the taxpayer is required to document the nature and content of its **business relationships with related parties** → **transfer price documentation**, see below (Sec. 90 Par. 3 GTC). The documentation requirement includes the economic and legal bases for an agreement with the related party on prices and other business conditions in line with the arm's length principle.

Failure to do so will result in a rebuttable presumption that the taxable income is higher than declared (Sec. 160 Par. 3 GTC).

- The taxpayer has to prepare a **transfer price documentation** that describes all dealings with related parties. Permanent establishments are deemed related party for this purpose. The taxpayer has to describe and analyze the risks and functions, the allocation of (intangible) assets, and business opportunities, chose an appropriate transfer pricing method, and give reason for the appropriateness Sec. 1 Par. 3 FTTA).

Failure to do so gives Revenue the right to adjust the transfer prices.

- Transparency rules for investment purposes (Investment Tax Act - **InvTA**): The InvTA deals with domestic and foreign investment funds. The general idea is that an investor pays the same taxes in both settings: investment via an investment fund and direct investment (principle of limited transparency).²⁵ Depending on its structure a fund can be treated as transparent, semi-transparent, or intransparent (opaque). In order to avoid a very unfavorable lump-sum taxation of income derived by the fund, it is necessary to publish an extensive amount of data on the investments (Sec. 5, 6 ITA). That means there is an **indirect obligation** to transparency.

2.1.2. Does the national law in your country currently include regulations to report the world wide transfer pricing policy of the group?

²⁵ Blümich/Wenzel Preliminary notes on Sec. 1 ITA.

No.

However, Germany does support the OECD BEPS Action Plan no. 13.²⁶ Field auditors usually scrutinize the taxpayer's choice of the TP method. An essential part of the choice is the intra-group allocation of (intangible) assets and business opportunities. So field auditors may try to figure out the world-wide strategy and check whether the description of the business relations is consistent.

2.1.3. Does the national law currently include obligations to report tax schemes?

No.

There is no statutory obligation but it can be necessary to disclose cross-border structures in order to receive certain benefits or to avoid disadvantages respectively. The rule of thumb is: Intermediaries that do not carry out sufficient economic activities can be disregarded (look through approach). Auditors can draw conclusions from the structures to discover tax schemes.

Let me give you two examples:

- Claiming reduced withholding tax rates
Germany has an elaborate set of LoB-clauses – unilateral clauses (Sec. 50d ITA) as well as bilateral clauses in DTTs (have look at the two-page-monster of Art. 28 DTT Germany-USA). When a taxpayer claims a lower withholding tax rate e.g. for interest and dividends, Germany wants to make sure that the person who ultimately benefits from the interest / dividends is entitled to the reduced tax rate (look-through approach). So it can be necessary to disclose intermediaries and/or the ultimate shareholder, the economic activities of intermediaries etc.
- Avoiding the application of CFC-regulation
When a German mother wants to avoid the taxation of foreign sourced income deriving from a subsidiary, it can be necessary to prove that the subsidiary carries out a genuine economic activity, has sufficient trained

²⁶ Naumann/Groß (senior officers with the Federal Ministry of Finance) IStR 2014, 792 (793).

staff to perform the activities ... Please bear in mind that the taxpayer has extended reporting duties (Sec. 90 Par. 2 GTC).

2.2. Exchange of information under national law

2.2.1. What are the current regulations regarding international tax assistance and exchange of information on the tax position of companies in your country?

The exchange of information on the tax position of companies - as well as of individuals - is subject to the tax secret (Sec. 30 GTC). Breach of the tax secret is a crime. An exchange of information needs a legal basis, i.e. genuine domestic law, European Law that is directly applicable, or international treaties that the legislator has transformed into domestic. OECD recommendations are not sufficient.

The company must be informed before the tax office discloses the data, unless the exchange of information is subject to the Directive 2011/16/EU or in case of exigent circumstances. The company may file a motion with the fiscal court to prevent the tax authority from disclosing the data.²⁷

There are many statutes that allow the exchange of information:²⁸

- DTTs: Provisions according to Art. 26 OECD-MT
Germany has concluded many DTTs with provisions according to Art. 26 OECD-MT. The exchange of information can be limited to (i) data relevant for the application of the treaty, (ii) data relevant for all kinds of taxes covered by the treaty, (iii) residents of the contracting states.²⁹
- TIAE with 27 states³⁰.
- FATCA agreement with the U.S.A.
- Implementation of the Directive 2011/16/EU and its amendments (see 2.2.2).

²⁷ For details see the Decree issued by the Federal Ministry of Finance dated 23rd Nov. 2015, BStBl. I p. 928 (BMF IV B 6-S 1320/07/10004:007).

²⁸ Comprehensive summary by *Grotherr* IStR 2015, 845; *Czekart* DStR 2015, 2697.

²⁹ *Vogel/Lehner* Art. 26 nr. 58 with a table of all DTTs and the implementation of Art. 26.

³⁰ List of contracting states as of 1st Jan 2016 issued by the Federal Ministry of Finance (http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2016-01-19-stand-DBA-1-januar-2016.pdf?__blob=publicationFile&v=1)

- Council Regulation (EU) No. 904/2019 on the Administrative cooperation in the field of VAT (from 1.1.2012).

- EU Council Directive of Savings Income (2003/48/EU)

Germany implemented the Directive more or less word by word.³¹ The automatic exchange of information is taking place according to the directive.

- Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (**MCAA**)

51 states concluded the MCAA in 2014. The main feature is the automatic exchange of data on financial accounts. The MCAA has been transformed into domestic law in Dec. 2015.³² Germany adopted the OECD standard for the exchange of information on financial accounts (Sec. 1 par. f).

The exchange of information will start in 2017 for the tax year 2016.

- Convention on Mutual Administrative Assistance in Tax Matters

In 1988, member states of the Council of Europe and the OECD concluded the Convention on Mutual Administrative Assistance in Tax Matters. The Convention was amended by the Protocol in 2011. Germany adopted the Convention including the Protocol in 2015.³³

2.2.2. For EU countries, please describe the current implementation in your country of the Directive 2011/16/EU of 15 February 2011 and any developments regarding the automatic exchange of information on tax rulings? Please also describe the current status and any legislative proposals.

The Directive 2011/16/EU (*the Directive*) has been adopted by the EU Administrative Assistance Act.³⁴ The OECD published the Common Reporting Standard (**CRS**) in 2014.³⁵ The EU adopted the CRS by amending the *Directive* in December 2014 (*the amendment*).³⁶

³¹ Sec. 45e ITA; Regulation on the Information on Savings Income dated 26th Jan. 2004, BBl. 2004, 128; Decree on the Application of the aforementioned regulation (BMF 30.1.2008 IV C 1-S 2402-a/0, BStBl. I 2008, 320).

³² Act on the Implementation of the MCAA dated 21st Dec. 2015, BGBl. P. 1630.

³³ Act on the Implementation of the Convention on Mutual Administrative Assistance in Tax Matters dated 16th June 2015, BGBl. 2015, p. 966.

³⁴ EU Administrative Assistance Act of 26th June 2013, BGBl. I 1809. For details, see *Hörhammer/Fehling NWB* 2014, 3402 (3408).

³⁵ http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters_9789264216525-en#page2.

³⁶ EU Directive 2014/107/EU, ABIEU L 359/1 of 16 Dec. 2014.

Germany has transformed the amendment into domestic law by the Act on the Automatic Exchange of Information on Financial Accounts (**FKAustG**) dated 21st Dec. 2015.³⁷ The Federal Central Tax Office (*Bundeszentralamt für Steuern – BZSt*) is the competent authority to collect and distribute the data.³⁸

Exchange of information on tax rulings: The EU amended the Directive by rules on the automatic exchange of tax rulings on 8th Dec. 2015 (2015/2346/EU). There are so far no proposals how to transform the amendment on tax rulings in to domestic law.

- 2.2.3. What are the current developments in your country regarding international tax assistance and exchange of information on the tax position of companies (other than the BEPS and EU action plans)?

Germany has been consumed with implementing all BEPS standards, EU regulations, and other multinational proposals. There are so far no legislative (unilateral) proposals.

However, we may see

- some amendments in DTIs according to Art. 26 OECD-MT as well as provisions in new DTIs (proceedings with 53 countries) and
- new TIEA (currently proceedings with 9 countries).³⁹

2.3. BEPS Action Plan

- 2.3.1. Please describe in what way the BEPS Action Plan no. 5, 12 and 13 will be introduced in the national tax law of your country (e.g. via legislative proposals, inclusion in the policy of the tax authorities or solely used as guidelines) and the current status thereof.

Germany does fully support the BEPS Action plans.

³⁷ FKAustG dated 21st Dec. 2015, BGBl. I p. 2531.

³⁸ For details see *Czakert DSrR* 2015, 2697.

³⁹ List of current negotiations as of 1st Jan. 2016:

http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2016-01-19-stand-DBA-1-januar-2016.pdf?__blob=publicationFile&v=1 .

- BEPS Action Plan no. 5: Harmful Tax Practices

The Federal Ministry of Finance and the British HMRC developed a patent box model in 2014.⁴⁰ The proposal came as a surprise because the domestic income tax system does not provide for preferential regimes (apart from capital income with a preferential tax rate of 25% for individuals). Moreover, Germany evaluated patent boxes in other jurisdictions as rather unfair because they encourage taxpayers to shift taxable income. So the German/UK proposal asks for a nexus between the intangible assets and the jurisdiction, i.e. a “substantial economic activity”.

The patent box regime has not been installed as yet. It is unclear whether the Federal States will give their consent.

- BEPS Action Plan no. 12: Mandatory Disclosure Rules

Mandatory disclosure rules have not been introduced. There is no official document issued by the Federal Ministry of Finance that explains how the disclosure rules could be incorporated into domestic law. There are two main restrictions that the legislator has to take of:

- Who shall be obliged to disclose aggressive tax planning strategies (*atps*)?

The OECD suggests that not only tax payers but also third parties that offer *atps* shall be obliged to disclose the strategies. According to German Professional Law for lawyers and accountants (*Steuerberater, Wirtschaftsprüfer*), these professions are bound by professional secrecy. A breach of the obligation to confidentiality is a serious crime that does lead to criminal procedures and can end in an occupational ban. Even if the client is evading taxes, a lawyer or accountant must not disclose this. On the other hand, lawyers and accountants who assist their clients in tax evasion are committing a crime themselves. The *nemo tenetur* principle is a statutory right and does apply to lawyers and accountants – and of course to any taxpayer. Amendments of the Professional Law and the disclosure duties in the GTC that respect the mutual trust between taxpayers and lawyers/accountant as well as the *nemo tenetur* principle would be necessary.

- What kind of information shall be disclosed?

The Tax Secret (Sec. 30 GTC) bans domestic tax authorities from sharing information with foreign tax authorities or any

⁴⁰ Press release by the Federal Ministry of Finance 11 Nov 2014 (http://www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2014/11/14-11-11-PM47.html?_act=renderPdf&_iDocId=329906).

other third party – **unless** the exchange of information is permitted by law (e.g. EU regulation, implementation of an EU directive, bilateral or multilateral agreements such as DTTs, disclosure rules in the GTC).

A recent court case explains that the exchange of information on business structures (resulting in a favorable tax structure) is not allowed under current law.⁴¹ The OECD BEPS Plan is not a sufficient legal basis. Moreover, the court explains that the information must be *presumably relevant* for the taxation of the group.

The legislator has to introduce rules that provide for prophylactic exchange of information.

- BEPS Action Plan no. 13: Country by Country Reporting

Germany will introduce the Country by Country Reporting in 2016. Companies will have to file the first transfer price documentation in line with the CbCR regulation for the tax year 2016 in 2017.⁴² The FTTA has not been amended as yet so the details are not clear. The amendment could be based on the OECD Implementation Package.

⁴¹ *FG Köln* Beschl. v. 7.9.2015 – 2 V 1375/15, IStR 205, 835.

⁴² *Lappé/Schmidtke* OStR 2015, 693; *Krauß* IStR 2016, 59.