GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report Combined: Phase 1 + Phase 2

GERMANY

OECD

Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Germany 2011

COMBINED: PHASE 1 + PHASE 2

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as at October 2010)

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Table of Contents

About the Global Forum 5

Executive Summary 7

Introduction 11

Information and methodology used for the peer review of Germany 11
Recent developments 18

Compliance with the Standards 19

A. Availability of Information 19

Overview 19
A.1. Ownership and identity information 21
A.2. Accounting records 45
A.3. Banking information 49

B. Access to Information 53

Overview 53
B.1. Competent Authority's ability to obtain and provide information 54
B.2. Notification requirements and rights and safeguards. 59

C. Exchanging Information 63

Overview 63
C.1. Exchange-of-information mechanisms 65
C.2. Exchange-of-information mechanisms with all relevant partners 72
C.3. Confidentiality 75
C.4. Rights and safeguards of taxpayers and third parties. 76
C.5. Timeliness of responses to requests for information 77

Summary of Determinations and Factors Underlying Recommendations. . . . 83

Annex 1: Jurisdiction's Response to the Review Report 87
Annex 2: List of All Exchange-of-Information Mechanisms in Force 88
Annex 3: List of all Laws, Regulations and Other Material Received 93
Annex 4: People Interviewed During On-Site Visit 95

About the Global Forum

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 90 jurisdictions, which participate in the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the international standards of transparency and exchange of information for tax purposes. These standards are primarily reflected in the 2002 OECD *Model Agreement on Exchange of Information on Tax Matters* and its commentary, and in Article 26 of the OECD *Model Tax Convention on Income and on Capital* and its commentary as updated in 2004. The standards have also been incorporated into the UN *Model Tax Convention*.

The standards provide for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest.

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, are being reviewed. This process is undertaken in two phases. Phase 1 reviews assess the quality of a jurisdiction's legal and regulatory framework for the exchange of information, while Phase 2 reviews look at the practical implementation of that framework. Some Global Forum members are undergoing combined – Phase 1 and Phase 2 – reviews. The ultimate goal is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

All review reports are published once adopted by the Global Forum.

For more information on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and for copies of the published review reports, please refer to *www.oecd.org/tax/transparency.*

Executive Summary

1. This report summarises the legal and regulatory framework for transparency and exchange of information of Germany. The international standard which is set out in the Global Forum's Terms of Reference to Monitor and Review progress Towards Transparency and Exchange of Information, is concerned with the availability of relevant information within a jurisdiction, the competent authority's ability to gain timely access to that information, and in turn, whether that information can be effectively exchanged with its exchange of information partners.

2. As a major world economy, Germany has a long history in negotiations of tax treaties leading to a broad treaty network covering more than 100 jurisdictions, 89 of them being covered by a double tax convention and 17 by a tax information exchange agreement. This network includes all Germany main economic and diplomatic partners as well as financial centres. Germany is also able to exchange information with other EU member States[1] under the *EU Council Directive 77/799/EEC* of 19 December 1977[2] concerning mutual

1. The current EU members, covered by this Council Directive, are: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. Regarding Cyprus – note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue". Note by all the European Union Member States of the OECD and the European Commission: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.
2. This Directive came into force on 23 December 1977 and all EU members were required to transpose it into national legislation by 1 January 1979. It has been

assistance by the competent authorities of the member States in the field of direct taxation and taxation of insurance premiums**.**

3. The German legal environment usually ensures that the necessary information concerning ownership and financial activities is maintained for all relevant companies, partnerships, foundations and other entities and arrangements. This is in particular thanks to the registration requirements for companies and partnerships, the anti-money laundering legislation requiring a range of service providers to conduct customer due diligence and requirements to report information to the Federal Central Tax Office for tax purposes. Nevertheless, further action should be taken to ensure the availability to government authorities of information on bearer share holders. The German legislation contains provisions requiring accounting information and underlying documentation to be kept for a minimum of six years for all relevant entities and arrangements. There are no restrictions in Germany regarding the availability of bank information to government authorities.

4. Access to information is ensured by strong information gathering powers granted by the German *fiscal code* as well as a strong compliance culture. These powers, and the penalties for non-compliance, are strong enough to ensure the Federal Central Tax Office has the information it needs to respond to international requests for information. There is however a co-ordination issue as EOI for tax purposes is conducted by the German competent authority situated in Bonn while, due to the German federal organisation, the actual collection of information is the responsibility of the authorities at the state (*Länder*) level, and this contributes to some delays in provision of responses. Additional contributing factors are the need to translate requests into German and the lack of monitoring of the status of requests. Indeed, Germany is only able in 12% of cases to provide responses to international requests for information within three months.

5. Before providing information to the requesting party, Germany must inform the taxpayer that it will do so. In practice, even though the German legislation foresees exceptions to this notification procedure, the taxpayer is always notified. Nevertheless, the prior notification process has to date limited impact on the effectiveness of exchange of information as the sending of information abroad is rarely challenged by taxpayers.

6. Considering its involvement in developing a very comprehensive network of tax agreements, its status as a founder of the European Union and its key position in international trade, Germany is a very active country in the field of exchange of information (EOI) on request, receiving between 1 000 and 2 000 requests a year. This volume of requests and the will of the German

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amended since that time. A new Mutual Assistance Directive was adopted by the EU Council on 7 December 2010 and will enter into force on 1 January 2013.

authorities to provide comprehensive answers to their partners show the deep involvement of Germany in exchanging information for tax purposes.

7. Germany's competent authority, located in the Federal Central Tax Office in Bonn under the supervision of the Federal Ministry of Finance, is sufficiently resourced to ensure its mission being exercised in a good way, even considering the very large number of EOI matters it manages. However, while being very active in exchanging information with its partners and keen to provide answers, input received from its international counterparts showed some weakness in Germany's capacity to respond quickly to incoming requests.

8. Notwithstanding the need to strengthen some areas of the German system, comments received on the experience of a number of Global Forum members with Germany indicate that Germany is fully committed to the international standards of transparency and exchange of information for tax purposes. Germany is an important and robust partner, actively exchanging information for international tax matters with a large network of jurisdictions across the globe.

Introduction

Information and methodology used for the peer review of Germany

9. The assessment of the legal and regulatory framework of Germany and the practical implementation and effectiveness of this framework was based on the international standards for transparency and exchange of information as described in the Global Forum's Terms of Reference, and was prepared using the Global Forum's Methodology for Peer Reviews and Non-Member Reviews. The assessment was based on the laws, regulations, and exchange of information mechanisms in force or effect as at October 2010, other information, explanations and materials supplied by Germany during the on-site visit that took place on 21-24 June 2010, and information supplied by 23 partner jurisdictions. During the on-site visit, the assessment team met with officials and representatives of the relevant German government agencies, including the Ministry of Finance, the Federal Central Tax Office (the German competent authority), registration and anti-money-laundering authorities and local authorities (see Annex 4).

10. The Terms of Reference break down the standards of transparency and exchange of information into 10 essential elements and 31 enumerated aspects under three broad categories: (A) availability of information; (B) access to information; and (C) exchanging information. This combined review assesses Germany's legal and regulatory framework and the implementation and effectiveness of this framework against these elements and each of the enumerated aspects. In respect of each essential element a determination is made regarding Germany's legal and regulatory framework that either; (i) the element is in place, (ii) the element is in place but certain aspects of the legal implementation of the element need improvement, or (iii) the element is not in place. These determinations are accompanied by recommendations for improvement where relevant. In addition, to reflect the Phase 2 component, recommendations are also made concerning Germany's practical application of each of the essential elements. As outlined in the Note on Assessment Criteria, following a jurisdiction's Phase 2 review, a "rating" will be applied to each of the essential elements to reflect the overall position

of a jurisdiction. However this rating will only be published "at such time as a representative subset of Phase 2 reviews is completed". This report therefore includes recommendations in respect of Germany's legal and regulatory framework and the actual implementation of the essential elements, as well as a determination on the legal and regulatory framework, but it does not include a rating of the elements.

11. The assessment was conducted by a team which consisted of three assessors and a representative of the Global Forum Secretariat: Mr Richard Thomas, Attorney Advisor, Office of Associate Chief Counsel, Internal Revenue Service of the United States; Mr Raul Pertierra, Revenue Service Representative, Internal Revenue Service of the United States; Mr Jeong-Real Park Deputy Director, International Investigation Division, National Tax Service of Korea; and Mr Rémi Verneau from the Secretariat to the Global Forum.

Overview of Germany

General information

12. The Federal Republic of Germany (hereafter referred to as Germany) is located in central Europe. It is bordered to the north by the North Sea, Denmark and the Baltic Sea; to the east by Poland and the Czech Republic; to the south by Austria and Switzerland; and to the West by France, Luxembourg, Belgium, and the Netherlands. Germany covers 357 000 square kilometres and has a population of about 81.8 million people, making it the most populous nation in Europe. Germany has a federal system of government and is divided into 16 *Länder* which are further divided into 439 districts and cities. German is the official and predominant spoken language in Germany.

13. Germany is the largest national economy in Europe and the fourth-largest in the world with a GDP of EUR 2 400 billion. The service sector (mainly commerce and transports) contributes around 70% of the total GDP, industry 29%, and agriculture 1%. Germany is the world's second largest exporter with EUR 1 000 billion exported in 2009 with exports accounting for more than one-third of national output (main goods exported: automobiles, machinery, chemical products). Germany's main trading partners are The Netherlands, France, China, the US and Italy as for imports and France, the US, the UK, the Netherlands and Italy as for exports.[3]

14. According to Transparency International's Corruption Perception Index, Germany is the 14th least corrupt country in the world.[4] With regard to the United

3. According to the German Federal Statistic Office (*Statistiches Bundesamt*). See *www.destatis.de*.
4. *www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table*.

Nations Development Programme's Human Development Index, Germany ranked 22 out of 182 in 2009.[5]

15. Germany is very active in the international arena, a founding member of the European Union (EU) and member of the Euro zone, the Schengen area, the United Nations since 1973 and its affiliate organisations, the Council of Europe, the North Atlantic Treaty Organization (NATO), and the Organisation for Economic Co-operation and Development (OECD). Germany is also a member of other international organisations, including the International Monetary Fund (IMF), the Financial Action Task Force (FATF), International Bank for Reconstruction and Development (World Bank) and the World Trade Organization (WTO).

Legal system

16. On 23 May 1949, Germany was established as a federal democratic republic under the *Grundgesetz* (or "Basic Law"). The *Grundgesetz* lays out the structure of the federal system and contains articles concerning human dignity, the separation of powers, and the rule of law.

17. Under the *Grundgesetz*, the *Bundestag* (Parliament) and the *Bundesrat* (States Chamber) are established. There are 622 members in the *Bundestag* and members serve for four years. The *Bundesrat* is a legislative body comprised of 69 members who represent the 16 *Länder* (federal states) of Germany. Together the two bodies form a legislative system unique to Germany which is classified as neither unicameral nor bicameral. Legislative power is divided between the *Länder* and the federal government. However, the *Grundgesetz* designates all legislative powers to the *Länder* unless otherwise specified.

18. The *Länder* are not mere provinces but rather federal states which are endowed with their own powers and budgets. The distribution of power between the federal government and the *Länder* is an essential element of the power-sharing element of the government, which is provided for in the Basic Law.

19. The executive branch in Germany is comprised of the Chancellor and the President. The Chancellor is head of government and holds all the executive power. The President is head of State and primarily serves a ceremonial role. Germany has a civil law legal system which is based in a Roman law and Germanic legal tradition. Major sources of law in Germany are the codes, acts and regulations. As a member of the EU, a growing proportion of legislation operative in Germany originates from the EU, though not legislation concerning direct taxation. Some of these laws apply directly, while others must be implemented in German legislation before they can take effect.

5. *http://hdr.undp.org/en/statistics/.*

20. Although income tax, corporate income tax, and value-added taxes are legislated at the federal level, power over and administration of all taxes – excluding customs, excise duties, and the taxes on motor vehicles and insurance premiums – are assigned to the *Länder.* All fiscal legislation (passed at the federal level) requires the approval of the *Bundesrat*. Pursuant to section 2 of the *Fiscal Code*, "Agreements on taxation concluded with other countries within the meaning of Article 59(2), first sentence, of the Basic Law takes precedence over tax legislation insofar as they have become directly applicable domestic law". To this extent, treaties are implemented by way of a federal act.

21. Germany has a judicial branch of government which is completely independent of the legislative and executive branches. The *Bundesverfassungsgericht* (the Federal Constitutional Court) is the supreme court of law with the role of judicial review for constitutional matters. For civil and criminal matters, the highest court of appeals is the Federal Court of Justice. Other federal courts in Germany include the Federal Labour Court, the Federal Social Court, the Federal Tax Court, and the Federal Administrative Court. There is also a constitutional court in each of the 16 *Länder*, ruling on issues related to the constitution of the respective *Land*, as well as *Länder* tax courts (ruling on tax issues as court of first instance). At the federal level, tax matters are presided over by the *Bundesfinanzhof* (the Federal Tax Court).

Taxation system

22. The competent authority over taxation at the federal level is the Federal Ministry of Finance and at the *Länder* level are the *Länder* Ministries of Finance. Taxation principles are laid out in the *Grundgesetz*. The *Abgabenordnung – AO* (*Fiscal Code*) contains the general law on taxes, the provisions of which are applicable to all taxes regardless of their nature and whether they are levied at the state or the national level. These provisions mostly concern central concepts such as procedural rules, tax assessments, tax audits, tax offences, and criminal prosecution in tax matters. Tax law in Germany is mainly contained in a combination of tax acts, supranational norms (*e.g.* European Union law) and international agreements such as double taxation conventions (DTCs) and taxation information exchange agreements (TIEAs).

23. Personal income tax, corporate income tax, trade tax, value-added tax, and inheritance and gift taxes in Germany are governed by individual pieces of legislation. Personal income tax is charged on a progressive system, the lowest rate being 16% and the highest being 45% (plus 5.5% solidarity surcharge). Income from investment is subject to a flat rate of 25% (plus the solidarity surcharge) and – when originating from domestic sources – tax is levied by way of withholding. Corporate tax is charged at a flat rate of 15% plus a 5.5% solidarity surcharge calculated on the corporate tax due, making the total corporate tax burden equal to nearly 16%. All resident companies

and permanently established non-resident companies are subject to corporate income tax; resident companies are taxed on their worldwide income while non-resident companies are taxed only on German-source income. Companies, business partnerships and sole proprietorships are subject to trade tax. While the trade tax base is determined based on federal law, the tax accrues to municipalities and also the municipalities decide on the rate to be applied. The average rate is about 14 %.

24. In addition to income tax, Germany levies value-added, capital gains, property, inheritance and gift taxes as well as social security contributions. According to the *Grundgesetz*, the revenue from income and value-added taxes is jointly assigned to the *Länder* and the federal government. Distribution of revenue from taxes is determined by law.

25. On a total amount of EUR 538.2 billion in 2007, direct taxes including corporation tax and income tax accounted for 40.3% of total tax revenues, VAT for 31.5% and local taxes 10%.

Commercial sector

26. The *Handelsgesetzbuch* (Commercial Code) is the most important law in Germany concerning commercial activities. The *Handelregister* (Commercial Register) holds information on companies, commercial partnerships and sole proprietorships. Commencement of any business activity must also be notified to the *Gewerbeamt* (local trade office).

27. German commercial legislation allows for the establishment of *Gesellschaft mit beschränkter Haftung* (*GmbH*) (limited liability company), *Aktiengesellschaft* (*AG*) (joint stock company), *Kommanditgesellschaft auf Aktien* (*KGaA*) (partnership limited by shares), *Kommanditgesellschaft* (*KG*) (limited partnership) and *Offene Handelsgesellschaft* (*oHG*) (general partnership). The broader commercial landscape also includes *Genossenschaften* (co-operatives).

Overview of the financial sector and relevant professions

28. The German financial system has traditionally been a bank-based system, *i.e.* banks have been the key source of financing. According to the information provided by the German authorities, in mid-2009, around 2 169 independent banks with around 39 565 branches have operated in Germany. The banking sector comprises three types of banks offering the full range of banking business and financial services (“three-pillar system”), namely private commercial banks (*private Geschäftsbanken*), co-operative banks (*Genossenschaftsbanken*) and savings banks (*Sparkassen*). The savings banks are retail banks commonly owned by administrative districts and municipalities. There are also state banks (*Landesbanken*) which are mainly owned by

the savings banks as well as by the states (*Länder*). The co-operative banks comprising in particular "*Volksbanken*" and "*Raiffeisenbanken*" are owned by their members. In addition to these universal banks, the banking sector comprises specialised banks such as covered bond banks (*Pfandbriefbanken*) and building societies (*Bausparkassen*).

29. With premium income of EUR 165 billion (2008), Germany is the fifth largest primary insurance market in the world after the US, Japan, the UK and France. At the beginning of 2009, Germany had 604 insurance companies under federal supervision and 903 under state supervision wrote actively business in Germany. Compared to other industrial nations, the non-life sector is predominant while the market for pensions is smaller, due to the traditional strength of state pensions and unfunded pension benefits by industrial employers in Germany. The market share of foreign insurers is at about 7% in life insurance and 4% in non-life insurance. The sale of insurance through banks has gained in prominence in recent years.

30. Credit institutions, financial service providers, insurance companies, investment funds and investment companies are licensed and supervised by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*). As regards the banking sector, some supervisory tasks are carried out by the *Deutsche Bundesbank*. Insurance companies operating only in a single state (*Land*) are regulated by the respective state authority. Insurance agents are licensed by the local chambers of commerce and industry.

31. The official securities markets of Berlin, Dusseldorf, Frankfurt am Main, Hamburg, Hanover, Munich and Stuttgart, the futures and options exchange Eurex Deutschland and the European Energy Exchange are recognised as regulated markets of the EU[6] and comply with globally accepted regulatory standards. The most important stock exchange in the Federal Republic is the Frankfurt Stock Exchange, operated by *Deutsche Börse AG*. The proper conduct of exchange trading, as well as the correct pricing process is monitored by the Trading Surveillance Office (*Handelsüberwachungsstelle*). The exchange supervisory authorities (*Börsenaufsichtsbehörden*) are responsible at the state level.

Anti-money laundering

32. Anti-money laundering/combating financing of terrorism (hereafter "AML/CFT") in Germany is primarily regulated by the *Geldwäschegesetz* (*Money Laundering Act*) and monitoring of money laundering issues is under the overall control of different ministries such as the Federal Ministry of

6. According to Article 47 of *Directive 2004/39/EC* on Markets in Financial Instruments.

the Interior and the Federal Ministry of Finance. The competent authority for the supervision of money laundering issues with regard to the financial sector is the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*). As a member of the Financial Action Task Force (FATF), Germany undergoes periodic monitoring, with the last evaluation of Germany's AML system taking place in 2009. In August 2008, Germany implemented the Third EU Money Laundering Directive into domestic law through revisions to the *Geldwäschegesetz*, the *Kreditwesengesetz* (Banking Act) and the *Versicheringsaufsichtsgesetz* (Insurance Supervisory Act).

33. Amongst other findings, the outcomes of this evaluation show that information entered into the commercial registers does not necessarily include information on the beneficial ownership of the legal persons and may not provide authorities with direction as to where further information on beneficial owners can be found. These measures do not guarantee that the information that may be obtained is adequate for AML/CFT purposes, accurate, and current. Information on beneficial owners may not be readily available particularly in the case of stock corporations that are not listed and that have issued their shares in bearer form.

34. As regards customer due diligence, while there is generally an adequate framework of preventive measures, the FATF highlighted that the structure of the measures in specific areas is problematic as there are many exemptions to these requirements for low-risk customers, which appear to conflict with some basic monitoring and record-keeping obligations.

Exchange of information

35. As OECD member, Germany is member of the Global Forum and is committed to implementing the international standards of transparency and exchange of information for tax purposes. Germany is Vice-chair of the Global Forum and member of its Steering Group and Peer Review Group.

36. Germany has been active in exchanging information and providing international mutual assistance for more than 50 years. In 1976, a unilateral exchange of information mechanism was introduced (section 117 of the *Fiscal Code*). In 1985, the EU Mutual Assistance Directive was transposed into German domestic law.

37. Considering its key position both in Europe and in international trading, Germany has a wide tax treaty network covering 89 countries. While relationships with its close neighbours have been in place for some time, Germany is still active in expanding this network when it has a diplomatic or economic interest to do so. Thus, since 2008, Germany has concluded 17 TIEAs allowing, when these arrangements will be in force, exchange of information on request with some key financial jurisdictions.

Recent developments

38. Following the FATF report published in early 2010, Germany is working to improve its AML legislation. The bill implementing the second *EU Electronic Money Directive* will amend the *Kreditwesengesetz* (Banking Act), *Versicheringsaufsichtsgesetz* (Insurance Supervisory Act) and the Payment Services Supervisory Act (*Zahlungsdiensteaufsichtsgesetz*). These amendments, which include new comprehensive regulations *inter alia* with regard to internal safeguards and customer due diligence requirements for low-risk customers, will enter in to force before the end of 2010. Further revision of the *Geldwäschegesetz* is planned for 2011 including the implementation of new comprehensive requirements in particular regarding customer due diligence for all persons and entities covered by the requirements of the *Geldwäschegesetz* (Money Laundering Act).

39. A new Mutual Assistance Directive was adopted by the European Council on 7 December 2010 and is going to be implemented on 1 January 2013.

Compliance with the Standards

A. Availability of Information

Overview

40. Effective exchange of information requires the availability of reliable information. In particular it requires information on the identity of owners and other stakeholders as well as information on the transactions carried out by entities and other organisational structures. Such information may be kept for tax, regulatory, commercial or other reasons. If such information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested. This section of the report describes and assesses Germany's legal and regulatory framework on availability of information. It also assesses the implementation and effectiveness of this framework.

41. The legal and regulatory system for the maintenance of ownership and identity information in Germany is strong, particularly with respect to companies and other legal entities covered by the Commercial Code. However, there are shortcomings regarding the availability of ownership information on persons holding bearer shares. Nevertheless, Germany's exchange of information partners report that responses to requests for ownership information related to a full range of entities have been satisfactorily delivered by the German authorities.

42. The main business structures used in Germany are companies and partnerships with two main type of companies – joint stock corporations (*Aktiengesellschaft*/*AG*) and limited liability companies (*Gesellschaft mit beschränkter Haftung*/*GmbH*) – and two main types of partnerships – general

partnerships (*Offene Handelsgesellschaft*/*oHG*) and limited partnerships (*Kommanditgesellschaft*/*KG*).

43. These legal entities must be registered in the commercial registers managed on a local basis by each court of justice. This information is made available at the Federal level through the "business register" managed by the Federal Ministry of Justice.

44. As part of registration, *GmbH* must indicate their shareholders and subsequent changes should be disclosed to registration authorities. While *AG* are not required to provide ownership information to the local register, *KGaA* must furnish general partners' identity to registration authorities. Both *AG* and *KGaA* must maintain a register of shares issued in a registered form which ensures the availability of this information to the German authorities. Nevertheless, while there are some mechanisms to identify the identity the holder of bearer shares – in particular the obligation to disclose to the revenue authorities each shareholder owning more than 1% of the company's capital – these mechanisms do not allow the owners of such shares to be identified in all circumstances. *OHG* and *KG* are required to provide the identity of their general and limited partners to the registration authorities as well as any subsequent changes.

45. There is no registration requirement for trusts and *Treuhand*.[7] Some mechanisms however, ensure the availability of ownership information, particularly, the information to be provided on request to the revenue authorities, and anti-money laundering obligations applicable to these entities. Additionally, while foundations require registration, there is no legal requirement to disclose a foundations' beneficiaries. The German authorities have mentioned however that this information is available in the required annual report and the records provided by any foundation to the supervisory authorities.

46. Enforcement provisions are in place to ensure all relevant entities maintain information and/or provide it to government authorities as required under the various laws.

47. *AG*, *GmbH* and *KGaA* as well as partnerships (*oHG* and *KG*) and foundations with commercial purposes are required to keep comprehensive accounting records, including underlying documentation, for a minimum of six years. *GbRs*[8] are subject to the accounting obligations applicable to small

7. In a broad sense, the *Treuhand*, or *Treuhandverhältnis,* is a contractual relationship by which one party, the *Treugeber*, requires another, the *Treuhänder*, to manage his or her assets in a certain way.
8. A "*GbR*" is an association of at least two partners (natural or legal persons or partnerships) who are committed to each other through a social contract, to achieve a common purpose. They are often used for the pooling of joint interest in ventures or for passive investments such as interest in real estate.

businesses and must as a consequence keep accounting records a minimum period of six years. Foundations are, in addition, required to send annual accounting information to the supervisory authorities to ensure the use of the foundation's assets is consistent with the purpose of the foundation. Trustees and *Treuhand*, must also keep for six years accounting records to explain all transactions realised and permit the calculation of the taxable income.

48. Finally, there are no restrictions in Germany regarding the availability to government authorities of bank information, in particular thanks to the requirements of the Anti Money Laundering/Combating Financing of Terrorism legislation which establishes customer due diligence and record keeping requirements for financial institutions and some non-financial businesses and professions.

A.1. Ownership and identity information

Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities.

The registers

49. The German registration system is organised on a local basis. Each local court of justice manages its own local commercial register (*Handelsregister*) where all companies are required to be registered. Partnerships are registered in the register of partnerships and co-operatives which is managed on a local basis as well. These registers exist into perpetuity.

50. At the federal level, a business register, maintained by the Federal Minister of Justice, gathers the information contained in these various local registers and ensures then the availability, across the *Länder*, of some information maintained in the local registers. That said, not all information maintained in the local registers can be found in the business register. In particular, this business register is a useful tool to determine whether an entity is registered, but not to directly obtain ownership information.

51. Foundations have their own registers, one separate register being kept in each of the German *Länder* by the foundations supervisory authorities.

Companies (ToR A.1.1)

52. German company law provides for four types of companies:

- **Aktiengesellschaft – AG** (joint-stock company), which is regulated by the *Stock Corporation Act* of 6 September 1965. Articles of

incorporation of an *AG* must take the form of a notarial deed. The *AG*'s capital is at least EUR 50 000 and is divided into shares. Shareholders' liability is limited to the amount of their contribution to the *AG*'s capital. An *AG* may be listed on a stock exchange market. There were 7 700 *AG* in Germany in 2008 of which 1 200 are listed on a stock exchange;

- **European Companies – SE**: European Companies are regulated by *Council Regulation (EEC) No.2157/2001 on Statute for a European Company* and transposed in Germany by law of 22 December 2004 which permits the creation and management of companies with a European dimension, free from the territorial application of national company law. Pursuant to section 10 of the European Regulation, the rules that apply to European companies are the same applicable for public limited companies. In Germany, it means that the all rules that apply to *AG* apply equally to *SE*;
- **Kommanditgesellschaft auf Aktien – KGaA** (partnership limited by shares). A *KGaA* has at least one partner with unlimited liability with regard to the creditors of the company (general partner) and the other shareholders are not personally liable for the obligations of the company (limited shareholders). However, the limited partners' interests are represented by share certificates and, from the limited partners perspective the company is comparable to an ordinary stock corporation. This form of corporate entity is extremely rare (in 2008, 100 German companies took the form of a *KGaA*). Generally the rules on stock corporations apply to *KGaA*;
- **Gesellschaft mit beschränkter Haftung – GmbH** (limited liability company). The *GmbH-Gesetz* (*Limited Liability Company Act*) provides for the law regarding the general framework for the *GmbH.* Otherwise; provisions of the Commercial Code apply. The articles of incorporation of this type of company take the form of a notarial deed. A *GmbH* comprises at least one shareholder and its minimum capital is EUR 25 000. With 465 700 registered entities in 2008, *GmbH* is the most common type of company in Germany.; and
- Additionally, it is possible to set up a **Genossenschaft (co-operative)** which is a member-controlled organisation, especially for the agricultural sector. Articles of incorporation of a co-operative must be adopted in a written form. A co-operative must include at least 3 co-operators. In case of insolvency, the co-operators may be required to make additional contributions (s. 105 (1) of the law on co-operatives). This requirement may be ruled out by the statute (s. 6 (3) of the law on co-operatives). The running of a co-operative is comparable to a company due to its corporate structure. There were 5 200 *Genossenschaften* in 2008 in Germany.

AG and KGaA

Registration requirements

53. Articles of incorporation for *AG* and *KGaA* must be adopted in the form of a notarial deed. According to Article 23 of the *Stock Corporation Act*, these articles must contain information on:

- the founders;
- if more than one class of shares exists, the class of shares subscribed by each founder;
- the company's business name and domicile;
- the purpose of the enterprise, in particular in the case of enterprises engaged in industry and trade, the articles must specify the kind of products and goods to be produced and traded;
- whether shares are to be issued in bearer or registered form; and
- the number of members of the management board or the rules for determining such number.

54. In addition to this information, articles of incorporation of a *KGaA* must also contain:

- the surname, forename and place of residence of each general partner;
- the par value in case of par-value shares;
- the number of shares in case of no-par value shares; and
- the issue price and, if there is more than one class of shares, the class of shares acquired by each party.

55. Pursuant to Article 36(1) of the *Stock Corporation Act*, all founders and all members of the management board and the supervisory board must apply for registration of the company in the commercial register. There is no legal time limit to go to court for registration. However, the German authorities have mentioned that the purpose of registration in the Commercial Register is to enable a business to be conducted under the name of the company. In addition, without registration the company does not come to life and this has consequences:

- with respect to founders' personal liability;
- and the responsibility of the founders vis-à-vis third parties.

56. The application for registration must be accompanied, amongst other things, by (pursuant to Article 37(3)):

- the articles and the deeds establishing the articles and concerning the subscription to the shares by the founders;
- the documents relating to the appointment of the management board and the supervisory board; and
- a list of members of the supervisory board stating each member's last name, first name, occupation, and place of residence.

57. Pursuant to Article 39, the registration entry of the company must specify, *inter alia*:

- the company's business name and domicile,
- a business address in Germany;
- the purpose of the enterprise;
- the amount of the share capital;
- the date of establishment of the articles and the members of the management board (for *AG*) or general partners (for *KGaA*);
- if a person, who is an authorised recipient of statements and services with legally binding effect on the company, is registered in the commercial register with a German address, such information shall also be stated;
- the authority of the members of the management board to represent the company; and
- if the articles contain any provisions regarding the duration of the company or regarding the authorised capital, such provisions shall also be registered.

58. There is no need to provide information to the commercial register on the identity of an *AG*'s shareholders or of a *KGaA*'s limited partners, and, as a consequence, no need to provide any subsequent changes in shareholding. The identity of a *KGaA*'s general partners is part of the company's statutes and any modification must be mentioned in the statutes and the information available in the register amended accordingly. This means that, other than information pertaining to the general partners in a *KGaA*, no ownership information on *AG* and *KGaA* is available in the German commercial register.

Shares register

59. Pursuant to section 67 of the *Stock Corporation Act*, *AG* and *KGaA* that issue registered shares are required to keep a shareholder register. The company's share register must state for each shareholder his/her:

- name;
- date of birth;
- address; and
- number of shares or share number.

60. If the registered share is transferred to another person, updating of the register occurs upon notification and proof. Credit institutions participating in the transfer or custodianship of registered shares must provide the company with the necessary information to maintain the share register against repayment of the necessary costs. There is no mention of bearer shares in this register.

Legislation on major participations

61. Finally the German legislation requires that information be disclosed to the issuing company and the financial supervisory authority (*BaFin*) on major shareholdings in listed companies *i.e.* any time a shareholding reaches a threshold of 3, 5 10, 15, 20, 25, 30 and 75% of the voting shares (section 21 of the *Securities Trading Act – Wertpapierhandelsgesetz*). Information on such shareholders must then be disclosed in the business register and becomes then publicly available.

Tax requirements

62. *AG* and *KGaA* which have their seat or place of management in Germany are subject to tax on their world income (section 1 *Körperschaftsteuergesetz* – Corporate Income Tax Act).

63. Because the German tax system requires that income must be declared on an annual basis to the German tax authorities, information regarding the shareholding of stock corporations and limited liability companies is provided in the annual tax return. Most notably, the identity of all shareholders owning more than 1% of the capital of a company must be disclosed to the tax authorities.

64. As a result, and even if it is not required to provide ownership information for registration purposes, at least, shareholders owning more than 1% of the company capital are known to the revenue authorities.

Conclusion for *AG* and *KGaA*

65. As a conclusion, for *AG* and *KGaA*:

- ownership information is to be disclosed to the registration authorities on *KGaA's* general partners only;
- each company must keep a register of all the registered shares issued; and
- revenue authorities know the identity of shareholders holding more than 1% of the capital of a *AG* and a *KGaA*;

66. These three requirements ensure the availability of ownership information pertaining to non-listed companies as these companies will mainly issue registered shares and shareholders will commonly own more than 1% of the capital. Regarding the situation of listed companies, the same three rules apply and in addition, major shareholdings in listed companies must also be disclosed to the business register when certain thresholds are reached.

GmbH

Registration requirements

67. The articles of incorporation of a *GmbH* (limited liability company) contain the name or names of all original shareholders. Shareholders may be one or more individuals, corporate entities and other entities.

68. Pursuant to section 15 (5) of the *GmbH Act*, shares of a *GmbH* are transferable but this transfer may be subject to the prior approval of the company. These transfers must take the form of a contract concluded before notary (section 15 (3) of the Act) and are subject to all the requirements discussed below.

69. After being set up, the company must file for registration in the commercial register with the local court in the district of its domicile (section 7 of the *GmbH Act*). Articles of incorporation, a list, signed by the applicants, of the shareholders showing the latter's surname, first name, date of birth and domicile as well as the nominal amounts and the consecutive numbers of the shares assumed by each of them and a domestic business address must, amongst other things, be provided by a *GmbH* for registration (section 8).

70. Any change in the composition of shareholders must be registered, without delay, with the commercial register (section 40 *GmbH Act*). The list to be submitted to the commercial register is signed by the managing entities' directors and must contain the shareholder's surname, first name, date

of birth and domicile as well as the nominal amounts and the consecutive numbers of shares which each of them has assumed.

Tax requirements

71. A *GmbH* that has its seat or place of management in Germany is subject to tax on its worldwide income. As is the case for *AG* and *KGaA*, a list disclosing the identity of all shareholders owning more than 1% of the capital of the company must be provided to the revenue authorities with the annual tax return.

Conclusion for *GmbH*

72. *GmbH* ownership information is maintained in Germany by registration authorities and kept updated in a timely manner. In addition, the revenue authorities have on an annual basis an overview of *GmbH*s' shareholding for all shareholders owning more than 1% of the capital.

Genossenschaft

Registration requirements

73. A co-operative acquires legal personality upon registration, and the co-operative register is published electronically (sections 10 to 13 of the *Co-operatives Act*). Pursuant to section 10, the bylaws, as well as the members of the board of directors, shall be entered in the register of co-operatives of the court where the co-operative has its head office. For registration, pursuant to section 11, the application for registration must be accompanied by:

- the bylaws, which have to be signed by the members;
- a copy of the deeds confirming the appointment of the board of directors and the supervisory council;
- the certificate of an auditing association confirming that the co-operative is eligible for admission; and
- the powers of representation the members of the board of directors have.

74. The registered bylaws must be made public by the court. The published information includes:

- the date of the bylaws;
- the legal name of the co-operative and where its head office is located;
- the object of the undertaking;

- the members of the board of directors and their powers or representation; and
- the duration of the co-operative if it is limited to a specific period of time.

Register of members

75. While no ownership information is to be disclosed to registration authorities, pursuant to section 30 of the *Co-operatives Act*, the board of directors is required to keep the list of members of a co-operative. Every member of the co-operative must be entered in the list of members with the following information:

- family name, given names and address, in the case of legal persons and commercial partnerships the legal name and address, in the case of other associations the designation and address of the association or family names, given names and addresses of its members;
- the number of additional shares subscribed by him ; and
- his withdrawal from the co-operative.

76. Documents on the basis of which entries in the list of members are made must be kept for a period of three years.

Conclusion for *Genossenschaften*

77. Thanks to the information available in the shares registers kept by co-operatives, ownership information pertaining to co-operatives is available in Germany and can be obtained by the German revenue authorities considering their powers to gather information (see section B.1).

Foreign companies

78. Companies formed under the laws of other jurisdictions which set up branches in Germany are required to register the branch with the commercial register of the local court (section 13d *et seqq*. of the *Commercial Code*).

79. For a stock corporation, the managing board must file for registration of the establishment of a branch office in the commercial register; for a limited liability company, this has to be done by managing directors. With the filing, proof must be provided of the existence of the company and the filing must also contain information on:

- a domestic business address;

- an indication of the purpose of the branch;
- the domestic address of a person authorised to accept service of documents for the company;
- the name of the foreign commercial register in which the company is entered and its registration number, to the extent that the law of the country in which the company has its domicile foresees such registration;
- the legal form of the company;
- the names of the persons who are empowered to represent the company in judicial and non-judicial matters and an indication of their powers; and
- if the company is not subject to the law of a member state of the European Union or of another contracting party to the European Economic Area Agreement, the law of the country the company is subject to.

80. When registering foreign branches of stock corporations and limited liability companies in Germany, a publicly certified copy of the articles of incorporation must be provided and, if the articles are not in German, a certified translation into German.

81. Foreign companies must also include as part of its registration evidence that the company exists, its foreign place of registration and the name of the persons authorised to act on behalf of the company. This enables the German authorities to know the country a company is registered in and notify this to the foreign authorities or, alternatively, to ask the authorities in the country of registration to furnish information to answer the incoming EOI request.

82. Foreign companies are required to provide information to the revenue authorities under the same condition as German companies. In particular, these companies must submit an annual tax return and provide information on their shareholders owning more than 1% of the company's capital.

Ownership information held by nominees and service providers

Anti-money laundering legislation requirements

83. In Germany, AML/CFT provisions are primarily set out in the Money Laundering Act (*Geldwäschegesetz*) as amended on 21 of August 2008. Pursuant to section 2, the following legal and natural persons are *inter alia* covered by the requirements of this legislation and must perform a CDD in any instances:

- credit and financial institutions;
- investment companies;
- lawyers, legal advisers, patent lawyers and notaries; and
- auditors, chartered accountants, tax advisers and tax agents.

84. In addition, professionals other than the above mentioned and acting as company service providers must also perform a CDD when providing certain services to third parties such as creating a legal person, acting as director of a legal person, or providing a registered office or a business office to legal persons.

85. Pursuant to section 3, this Act requires the identification of customers and clients when:

- establishing a business relationship;
- carrying out occasional transactions amounting to EUR 15 000 or more;
- there is reason to suspect that a transaction may have served or would serve money laundering or terrorist financing; or
- there are doubts about the veracity or adequacy of data identifying the contracting party or beneficial owner.

86. To establish the identity of the contracting party, institutions and persons covered by the Act are obliged to gather, pursuant to section 4(3), information on:

- for natural persons: name, place and date of birth, nationality and address; and
- for legal persons or partnerships: company, name or title, legal form, registry number if available, address of headquarters or head office, names of members of the representative body (such as the Board of Directors) or legal representatives.

87. In addition, all persons and entities covered by the provision of the *AML/CFT Act* must identify all beneficial owners. For the purposes of the AML legislation "beneficial owner" means the natural person(s) who ultimately owns or controls the contracting party, or the natural person on whose behalf a transaction or activity is being conducted. This includes in particular:

- in the case of corporate entities which are not listed on a regulated market: the natural person(s) who directly or indirectly hold more than 25% of the capital shares or control more than 25% of the voting rights;

- in the case of other legal entities, such as foundations and legal arrangements which administer and distribute funds or arrange for third parties to administer and distribute funds:
  - the natural person(s) who exercises control over 25% or more of the property of a legal arrangement or entity;
  - the natural person(s) who is the beneficiary of 25% or more of the property of a legal arrangement or entity; and
  - where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates.

88. This information, as well as all documents establishing the identity of customers, must be kept, pursuant to section 8(3), for at least five years.

Nominees

89. Nominee ownership is regulated by *AML/CFT Act*. All professionals covered by the provisions of this act as well as a company service provider acting as a nominee shareholder are required according to section 4 of the aforementioned Act, to undertake customer due diligence and verify the identity of the person for whose benefit the shares are held. Thus, when someone is acting as a nominee, it is possible to obtain the identity of the real holders of the shares.

Bearer shares (ToR A.1.2)

90. Pursuant to section 10 of the *Stock Corporation Act*, *AG* and *KGaA* may choose to issue their shares either in nominative or bearer form. Under German legislation, a company is not required *per se* to identify bearer share holders in all circumstances.

91. Nevertheless, there are mechanisms ensuring information on bearer share holders' identities is available under certain circumstances:

- for publicly-listed stock corporations, as described above, a duty of notification exists for shareholders who own 3, 5, 10, 15, 20, 25, 30, 50 or 75% of the company's shares, including bearer shares (section 21 of the *Securities Trading Act* [*Wertpapierhandelsgesetz*]). The company is obliged to provide this information to the business register pursuant to section 26 of the *Securities Trading Act*;

- companies when filling out their tax return are required to enclose a list of all shareholders owning more than 1% of the company's capital, whether these shares take the form of bearer shares or not;
- financial institutions and certain non-financial businesses and professions are subject to the obligations in the *AML/CFT Act*, and must, therefore, identify customers, including those who open securities portfolios.

92. Therefore, while there is no general requirement in Germany to identify holders of bearer shares, there are parallel mechanisms ensuring this information is available in some defined situations. There is, however no mechanism to ensure the availability of participation under 1% of companies' capital.

Partnerships (ToR A.1.3)

93. There are three main forms of partnerships that can be set up in Germany:

- **Offene Handelsgesellschaft – oHG** ("general partnership", section 105 *et seqq*. *Commercial Code*): an association of two or more natural persons or legal entities deciding to operate together under a joint name on a trade. A general partnership is set up by contract which is not required to be under the form of a notarial deed. Partners in a general partnership are fully liable for the partnership's debts. 265 800 German partnerships took the form of an *oHG* in 2008;
- **Kommanditgesellschaft – KG** ("limited partnership", section 161 *et seqq*. *Commercial Code*): a partnership comprising two or more natural persons or legal entities where at least one shareholder is a general partner and at least one a limited partner. The liability of the limited partner is limited while the general partner is fully liable for the debts of the partnership. In 2008, 137 100 *KG* are incorporated in Germany; and
- **Gesellschaft bürgerlichen Rechts –** *GbR* ("Civil Law Partnership", section 705 *et seqq*. *Civil Code*), an association of at least two partners (natural or legal persons or partnerships) who are committed to each other through a social contract, to achieve a common purpose which cannot be used for the purpose of running a commercial business. If a *GbR* runs a commercial business, it automatically becomes an *OHG* or a *KG*, depending of the article of association. *GbR* are often used for the pooling of joint interest in ventures or for passive investments such as interest in real estate.

94. The Commercial Code also provides for a Stille Gesellschaft ("silent partnership", section 230 *et seqq. Commercial Code*). Under a *Stille Gesellschaft*, a person makes an equity contribution into another person's business. This arrangement can be characterised as a contract, and like a contract, its existence is typically not disclosed to the public.Stille Gesellschaften do not have any legal status and cannot hold real estate or own assets. They have no income or credits for tax purposes, do not carry on business and cannot be compared to a limited partnership. Therefore, these arrangements are clearly not under the scope of the Terms of Reference.

Registration requirements

95. Pursuant to section 105 of the *Commercial Code*, an *oHG* formed for the purpose of operating a commercial enterprise under a common firm name is a general commercial partnership where no partner's liability is limited with regard to the partnership's creditors. Section 106 indicates that general commercial partnerships must file for registration in the commercial register of the court where they are domiciled and that the filing must contain information on:

- the family name, the first name, date of birth and residence of every partner;
- the firm name of the partnership, its place of domicile, and the domestic business address; and
- the authority of the partners to represent the partnership.

96. Any changes in the composition of the partners must be registered. There is no requirement to disclose the ownership of partners that are not individuals but this information can be found in the register where this partner having the status of a legal entity is registered. Partnerships cannot conduct business under the partnership name until they are properly registered. According to section 107, where a new partner enters the partnership or the authority of a partner to represent the partnership is changed, this fact must likewise be filed for registration in the commercial register.

97. With some minor exceptions, the rules that apply to *oHG* pursuant to the German *Commercial Code* apply equally to *KG*. The application for registration by a limited partnership contains, in addition to the information specified in the previous paragraph:

- the names of the limited partners; and
- the amount of the capital contribution of each of them.

98. Any changes in the composition of the partners in a *KG* must be registered (section 162 (3) of the Commercial Code) and can be accessed by administrative authorities for EOI purposes.

99. There are no rules for registration of *GbR*. The German authorities have nevertheless indicated that, pursuant to section 138 (1) of the *Fiscal Code* anyone commencing a agricultural and forestry undertaking, a commercial operation or a permanent establishment, civil partnership included, is required to inform the local authorities (municipalities) where the business or the permanent establishment is located. The municipality receiving the information must inform without undue delay the competent local tax office responsible of the content of the notification. Certain businesses require an administrative authorisation upon opening and non-compliance with these requirements is subject to penalties. It was not possible for the assessment team to know the type of information to be provided to municipalities to get this administrative authorisation and therefore the type of information that could be available to the revenue authorities.

Tax requirements

100. A partnership is not a person liable to tax since it is treated for income tax purposes as transparent. However, the taxable profit is determined at the partnership level by way of a uniform and separate determination of profits (*einheitliche und gesonderte Gewinnfeststellung*) pursuant to section 180(1) no. 2 lit. A) of the *Fiscal Code.* All partnerships are required to fill out an annual tax return and to mention in an annex to this return the attribution of the partnership's profit to each partner. Due to this requirement, partnerships must disclose partners' identity in their annual partnership tax returns.

101. Additionally, each partner having an interest in a partnership, whatever its nature, must also submit a personal tax return showing in particular its interest and equity in the partnership. Thanks to these requirements, the German revenue authorities have, as a consequence, all information regarding the partners.

General Conclusion

102. Considering the registration requirements foreseen by the *Commercial Code* for *oHG* and *KG*, for these two types of partnerships, all ownership information is possession of German governmental authorities and can be accessed for tax purposes. For *GbR*, the availability of ownership information is the result of multiple sources of information: application by municipalities, knowledge of the partners' identity by the partnership itself and requirements to submit to revenue authorities an annual tax return mentioning the name of all partners in a *GbR*.

Anti-money laundering legislation

103. Service providers hold the same information on partnerships as they hold with respect to companies in accordance with the *AML/CFT Act* (see earlier description in section A.1.1). Essentially, a wide range of financial institutions, financial businesses and professionals involved in providing financial services for their clients are obliged to conduct customer due diligence and must therefore know the identity of his/her clients, including; name, address and ID-number.

Trusts (ToR A.1.4)

104. German law does not recognise the concept of a trust. Germany has not signed the *Convention on the Law Applicable to Trusts and on their Recognition* (1 July 1985, The Hague). There are, however, no obstacles that prevent a German citizen or service provider to act as a trustee of a foreign trust or for a foreign trust to own real estate in Germany.

105. As regards the availability of information regarding settlors, trustees and beneficiaries of trusts, the German legislation does not require registration or disclosure of this information to government authorities.

106. Further, German legislation does not contain, any provisions stating the information to be held obliging trustees resident in Germany to maintain information on the trusts they administer.

107. However, if a person states that assets are held in a fiduciary relationship, then this person has to provide evidence of the existence of such a relationship in order to avoid tax liability attaching to the assets or any income derived within Germany from the trust, or other fiduciary relationship, to be attributed to him or her for tax purposes (section 159 of the *Fiscal Code*). In addition, a trustee in Germany is a taxpayer subject to the provisions of the German tax law, and in particular section 93 of the Tax Code stating that any persons "shall provide the tax authority with the information needed to ascertain facts and circumstances which are significant for taxation". Pursuant to section 117 of the *Fiscal Code*, the powers to access information granted to the revenue authorities by section 93 can be used whether the information required relates to German taxes or not. This means that, a trustee resident in Germany must be in position to provide on request of the German authorities all information on settlors and beneficiaries of trusts administered from Germany.

Anti-money laundering legislation

108. Auditors, lawyers, notaries legal and tax advisers as well as any other professional acting as trust service providers are also entities with reporting obligations under Germany's *AML/CFT Act* (see above, section A.1.1). Section 2(4) of that Act defines trust service providers as natural and legal persons who provide the services of *inter alia* forming legal entities, acting as a trustee to legal persons, or administering or managing a trust or corresponding legal arrangement.

109. Pursuant to the AML/CFT legislation, when a professional is required to perform a CDD, identification of its clients and beneficial owners is required. Beneficial owners is defined as the natural person(s) who ultimately owns or controls the contracting party, or the natural person on whose behalf a transaction or activity is being conducted (section 1(6) *Geldwäschegesetz*).

110. In the case of legal arrangement, beneficial owner includes, in particular:

- the natural person(s) who exercises control over 25% or more of the property of a legal arrangement or entity;
- the natural person(s) who is the beneficiary of 25% or more of the property of a legal arrangement or entity; or
- where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates.

Conclusion

111. While trustees are not required under the German law to keep identity information regarding settlors and beneficiaries of express trusts in all circumstances, the *AML/CFT* obligation plus the obligation to submit information to the revenue authorities allow for maintenance of information on the settlors and beneficiaries of trusts which have trustees in Germany. In addition, comments from Germany peers do not indicate that in any instance the German authorities were not in position to provide information on trusts. It can therefore be concluded that Germany has taken all reasonable measures to ensure that information is available to its competent authorities that identifies the settlor, trustee and beneficiaries of express trusts administered in Germany or in respect of which a trustee is resident in Germany.

Foundations (ToR A.1.5) and Treuhand

Foundations

112. German law recognises the concept of foundations. A foundation (*Stiftung*) is an organisation intended to promote on a long-term (indefinite) basis a particular purpose (designated by the founder) through assets dedicated to that purpose. While the basic rules on foundations are to be found in the *Civil Code* (sections 80 to 88), *Länder* law (and not federal law) regulates recognition and supervision of foundations. This means that there are as many pieces of legislation on foundations as there are *Länder* in Germany. In 2008, 15 000 foundations were incorporated in Germany, most of them for pure charitable purposes.

113. The act of forming a foundation is a unilateral legal transaction by means of which the founder assigns assets to fulfil the purpose defined in the act, and in which the founder defines the constitution of the future foundation. In addition, a foundation has statutes, which stipulates among other things, the purposes of the foundation, the way these purposes will be realised and how the foundation is managed.The beneficiaries can also be named in the deed, or be referred to as a class of persons relating to the purpose of the foundation.

114. The foundation is to be recognised and given legal capacity if the act of the foundation complies with the statutory requirements, if the long-term sustained fulfilment of the objectives of the foundation appears to be safeguarded, and if the objectives of the foundation do not endanger the public good. Private foundations are subject to the supervision of the foundation authorities of the respective *Land* in which they are headquartered.

115. After recognition of the foundation, the purpose of the foundation can be changed neither by the founder nor by the foundation's Council. If the foundation statute allows for modifications, such modifications require approval by the supervisory authority. Certain transactions may be subject to approval by authorities.

Registration requirements

116. There are, in Germany, 16 supervisory authorities at the *Länder* level, for the supervision of foundations. These supervisory bodies monitor the foundation's compliance with its object and ensure the preservation of its assets.

117. Section 80 of the German *Civil Code* states that "the creation of a foundation with legal personality requires an endowment transaction and the recognition of this by the competent public authority of the land the

foundation has its seat in". Pursuant to section 81 of the same Code, this endowment must be in writing and must give the foundation a charter with provisions on the name of the foundation, its seat, its object, its assets and the composition of its board. This endowment must contain a binding declaration by the founder.

118. The information to be furnished to authorities for the purpose of recognition and supervision includes the act of formation and the statutes of the foundation due to the binding declaration enclosed to the endowment. It means that the supervisory authorities always know founders' identity. These authorities also maintain a public directory of the supervised foundations. The directories, one in each German *Länder*, are opened to public inspection and contain:

- name of foundation;
- legal status;
- object;
- bodies;
- legal representatives;
- name of the founder (insofar as he or she agrees to be mentioned in the register);
- date of establishment or termination; and
- address.

119. In addition, in their supervision duty, supervisory authorities must ensure that the purpose of the foundation is met and in particular that all assets held by a foundation were used in compliance with this purpose and to the benefit of the persons or class of persons mentioned in the statutes. To this extent, foundations are required to provide an annual report and accounting records (see section A.2) to the supervisory authorities, making the information on foundation beneficiaries know from these authorities.

120. There are also foundations with no legal capacity and no recognition. This is the case when the foundation is not registered by the competent land supervisory authority. Foundations without legal capacity are not regulated. They may be structured like a recognised foundation. However, they are based on a contractual agreement between the founder and the fiduciary which includes the statute of the foundation. The contractual agreement may be compared with a *Treuhand* agreement (see below).

Tax requirements

121. Foundation income – when the foundation does not follow a charitable purpose – is subject to corporate income tax (section 1 *Corporate Income Tax act*). In that case, a foundation must fill out an annual tax return. This is the case for all private foundations incorporated in Germany.

122. Assets transferred by the founder to the foundation, whether resident of Germany or not, are subject to inheritance tax. In addition, the assets of foundations serving substantially the interest of one or more families are subject to inheritance tax every thirty years (section 1 of the *Inheritance and Gift Tax Act – Erbschaft- und Schenkungsteuergesetz*). Due to this requirement, the information on the founders is known to the revenue authorities.

AML/CFT legislation

123. Service providers must also hold certain information on foundations under the *AML/CFT Act*. As noted previously, a wide range of financial institutions, businesses and professions are required to conduct customer due diligence. As a result, comprehensive identification of foundations – including ascertaining their ownership and control structure and beneficial owners – is conducted by the relevant financial institution, business or profession when foundations open account or are engaged in financial activities. Under the *AML/CFT Act*, beneficial ownership must be understood as the natural person(s) who ultimately owns or controls the contracting party, or the natural person on whose behalf a transaction or activity is being conducted (section 1(6) *Geldwäschegesetz*). This includes, in particular:

- the natural person(s) who exercises control over 25% or more of the property of a legal arrangement or entity;
- the natural person(s) who is the beneficiary of 25% or more of the property of a legal arrangement or entity; and
- where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates.

Conclusion

124. The German legal and regulatory framework ensures the availability of information on the founders, members of the foundation council, and beneficiaries of foundation.

Treuhand (fiduciary relationship)

125. In a broad sense, the *Treuhand*, or *Treuhandverhältnis*, is a contractual relationship by which one party, the *Treugeber*, requires another, the *Treuhänder*, to manage his or her assets in a certain way. It is a contract which is not regulated *per se* in the German Civil Code, but is based on the general principle of the autonomy of the contracting parties and delimited by jurisprudence and doctrine.

126. The *Treuhand* can exist without any written underpinning document. It can be concluded between any two persons capable of being party to a contract. It is created when the *Treuhänder* is authorised to exercise rights over property in his or her own name, on the basis of and in accordance with a binding agreement with the *Treugeber*. It may involve third party beneficiaries but is most often a two-party relationship. It may also take different forms: it may be hidden (*verdeckte Treuhand*) or disclosed to third parties (*offene Treuhand*); the *Treuhänder* may be authorised to manage the assets under the *Treuhand* (das *Treugut*) in the interest of a third party (*fremdnützige Treuhand*) or in his or her own interest (*eigennützige Treuhand*).

127. In a narrower sense, a *Treuhand* relationship is deemed to be given only for relationships entailing the performance of obligations in which the *Treugeber* enters into an agreement to transfer the objects or rights to the *Treuhänder*, and the latter agrees to hold and administer them in the interest of the *Treugeber.*

128. If the *Treuhänder* acts on a not-for-profit basis, this constitutes a mandate in accordance with Sec. 662 of the Civil Code; if the *Treuhänder* receives a fee, this constitutes a business management contract in accordance with Sec. 675 of the *Civil Code*.

129. Even though the German *Treuhand* is sometimes compared to the Anglo-Saxon express trust, it does not have effects in *rem* comparable to those of a trust. All dispositions by the *Treuhänder* regarding the property transferred to him are effective, even if he were to act in bad faith and contrary to the contractual arrangements made. Like the trust, however, it may offer the relative anonymity of the beneficial owner of the *Treugut*.

130. As regards the availability of information regarding, *Treuhänder* and *Treugeber*, the German legislation does not require either *Treuhänder* registration or prior disclosure of this information to government authorities in order to make this information available. The German legislation does not contain in addition, any provisions stating the information to be held by *Treuhand*. Moreover, a *Treuhand* is not an entity taxable *per se* in Germany. It means that there is no information that is directly available regarding persons involved in a *Treuhand*.

131. However, section 39 (2) No. 1 2nd sentence of the *Fiscal Code* provides that under a *Treuhand* relationship assets are to be attributed to the *Treugeber*. Consequently, if a person states that assets are held in a fiduciary relationship, then this person has to provide evidence of the existence of such a relationship in order to avoid the assets or any income derived therefrom to be attributed to him or her for tax purposes (section 159 of the *Fiscal Code*). In addition, all persons in Germany administering assets (*Treugut*) held in a fiduciary relationship are taxpayer subject to the provisions of the German tax law, and in particular section 93 of the *Fiscal Code* stating that any persons "shall provide the revenue authority with the information needed to ascertain facts which are of significance for taxation".

132. Therefore, considering this set of rules, a *Treuhänder* resident in Germany must be in position to provide the German authorities all information on the *Treugeber* and beneficiaries of *Treuhand* administered from Germany on request of the German authorities.

134. In addition service providers must also hold certain information on customers/clients under the *AML/CFT Act*. As noted previously, a wide range of financial institutions, businesses and professions are required to conduct customer due diligence. As a result, identification of *Treuhänder* – including ascertaining the identity of *Treugeber* and beneficiaries of *Treuhand*, is conducted by the relevant financial institution, business or profession when *Treuhänder* open accounts or engage in financial activities.

General conclusion

135. In conclusion, while *Treuhänder* are not required to disclose all information regarding the identities of all persons involved in a *Treuhand* in all circumstances, when read together, the obligations in the *Civil Code*, *Fiscal Code* and *AML/CFT Act* require *Treuhänder* to maintain records on the identities of persons involved in the *Treuhand*.

Enforcement provisions to ensure availability of information (ToR A.1.6)

Registration

136. For partnerships and sole proprietorships, the rules that apply in case of failure to comply with the registration requirements are found in Article 14 of the *Commercial Code* which provides that any person who fails to comply with his duty to file for registration, or to file documents with the commercial register, shall be induced to do so by the registry court by means of a coercive fine the amount of which many not exceed EUR 5 000. According to the German authorities, multiple application of this fine is possible.

137. There are no specific penalties for *AG*, *KGaA* and *GmbH* failing to register in the commercial register. Indeed, as set out by section 41 of the *Stock Corporation Act* and 11 of the *Limited Liability Company Act*, without registration, these companies cannot operate. German authorities have mentioned that there is no public interest to force someone to bring a company into existence and this explains the reason why there is no specific sanction tied to the requirement to be registered.

138. In addition, section 38 of the *Stock Corporation Act* provides that a court can examine whether or not a company has been duly established and duly files for registration. If not the case, section 23 of the *Regulation on the Commercial Code* provides that the court has to ensure that required registration takes place. There is a similar provision in the *Limited Liability Company Act*.

139. For two types of entities (trusts and *Treuhänder*), there is no registration requirement and as a consequence no sanction associated to a lack of registration. Foundations are subject to a registration requirement but there is no sanction in absence of registration. However, a foundation failing to register does not get any legal capacity and is then considered as *Treuhand* relationship.

140. To the extent sec. 14 of the *Gewerbeordnung* does not apply (*e.g.* agriculture, forestry and free lance), notification is required under sec 138 (1) of the *Fiscal Code*. Non-compliance may trigger a penalty of up to EUR 5 000.

141. German authorities think that these existing measures to ensure relevant information being kept are fairly adequate.

Stock corporation Act and Limited Liability Company Act

142. Sections 399 to 408 of the Stock Corporation Act foresee a large range of sanctions, including imprisonment up to three years, in the case of failure to comply with the requirement of the act. In particular section 405 (2a) states that whoever as a member of the management board or of the supervisory board or as liquidator fails to keep the share register is punished by fine up to EUR 25 000. These stipulations apply both for *AG*, *KGaA* and *GmbH* (see section 82 of the *Limited Liability Company Act* for this last mentioned company). Fines are imposed according to section 40 of the criminal Code on a “per day” basis. The court may impose from five to 360 daily fines. Daily fines amount from EUR 1 to 30 000. In year 2009, there were 25 instances where the criminal courts decided that the offences were serious enough to be considered as violations of the *Stock Corporation* and *Limited Liability Companies Acts*.[9]

9. Not counted here are the cases where such violations occurred in coincidence with other more serious offences.

Co-operative Act

143. In case of serious violation of obligations, including false statements, punishment may result in imprisonment up to three years or a fine. Less serious offences may be sanctioned by fines.

Securities Trading Act

144. Non compliance with notification requirements under section 21 may result in a penalty up too EUR 200 000. Less serious offences may be subject to administrative penalties.

Information to be furnished to tax authorities

145. When a taxpayer fails to provide information or tax returns to the revenue authorities, coercive measures including imposition of fine up to EUR 25 000 may be applied. (sections 328 to 331 of the *Fiscal Code*). Multiple imposition of this fine is possible. If incomplete or false entries may – due to serious negligence – lead to tax not being assessed, and administration fine up to EUR 50 000 may be imposed. Not filing or incomplete or false entries made intentionally may meet the requirements from tax evasion which is subject to imprisonment up to five years or a fine (see previous paragraph).

146. At the end of 2009, there were 69 458 criminal tax cases pending (for both direct taxes and VAT). For the same year, there were 8 517 cases ending by imposing a fine/penalty and 317 cases ending by imprisonment.

Anti-money laundering legislation

147. Pursuant to the section 17 of the *AML/CFT Act*, obliged entities may be subject to a fine of up to EUR 50 000 if they:

- fail to verify the identity of a contracting party or fails to ensure that the first transaction is carried out through an account opened in the contracting party's name;
- fail to clarify whether the contracting party is acting on behalf of a beneficial owner; or
- fail to find out the name of the beneficial owner

148. According to the FATF Mutual evaluation report published in 2010, "Administrative fines for failing to declare or making false declarations or disclosures are used quite extensively, though the fines, in the aggregate amounted to less than 10% of the undeclared funds. In 2007, there were 265 administrative fines levied by Customs for reporting violations, involving

EUR 14.7 million, with fines of just over EUR 1 million. Of the 265 cases, 42 were recorded as -intentional and 23 as negligent. In 2006, there were fines of EUR 1 275 million levied in 272 cases. In 2008, owing to some organizational changes and changes in the way in which data were collected and recorded, the numbers are not directly comparable to 2007. However, Customs reports indicate that there were 663 cases of undeclared cash or equivalents (160 intentional and 513 found to be negligent). There were 673 fines levied valued at EUR 1 485 million against EUR 17.3 million being transported. In the period 2005–2008, there were 197 Money Laundering investigations processed on the basis of funds detected during cash controls. Only one of those resulted in a conviction for Money Laundering."

Conclusion

149. There is a range of penalties available under each of these laws to ensure that information required to be maintained or disclosed to administrative authorities is in fact maintained or disclosed. The range of penalties allows for the authorities to apply a sanction proportionate to the nature and level of a breach of these laws. These penalties appear to be dissuasive enough to ensure compliance, even by legal persons. Germany's international partners have not identified any cases where a request for information was not responded to because the information had not been maintained in accordance with the law.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement	
Factors underlying recommendations	**Recommendations**
Germany has no legal requirements that information be maintained identifying the owners of bearer shares.	Germany should ensure that ownership information for all relevant entities and arrangements is available to its competent authorities, including information on owners of bearer shares.

Phase 2 Rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

A.2. Accounting records

Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

General requirements (ToR A.2.1)

150. The *Terms of Reference* sets out the standards for the maintenance of reliable accounting records and the necessary accounting record retention period. It provides that reliable accounting records should be kept for all relevant entities and arrangements. To be reliable, accounting records should; (i) correctly explain all transactions, (ii) enable the financial position of the entity or arrangement to be determined with reasonable accuracy at any time; and (iii) allow financial statements to be prepared. Accounting records should further include underlying documentation, such as invoices, contracts, etc. Accounting records need to be kept for a minimum of five years.

Requirements set out in the Commercial Code

151. The accounting requirements set out by Germany's Commercial Code cover companies such as *AG*, *GmbH* and *KGaA* as well as partnerships (*oHG* and *KG*) and foundations with commercial purposes. Professional trustees are also covered by these accounting obligations.

152. Pursuant to section 238(1) of the *Commercial Code*, entities covered by the provision of this code must keep books and records to clearly show their commercial transactions and their financial position pursuant to generally accepted accounting principles. The business operations must be comprehensible from their beginning to end. The entity must retain copies of all mailed business correspondence that conforms to the original (such as a copy, print, duplicate or other reproduction of the text on a written, photographic or other data storage device).

153. Section 239 of the *Commercial Code* further provides that entries in the books and other required records must be complete, correct – timely and orderly – and that entries or recordings may not be altered in such a way that the original meaning is no longer ascertainable.

154. Pursuant to section 240 of the *Commercial Code* in addition to the books and records, all accounting information must:

- record precisely the real property, the receivables and liabilities, the amount of cash on hand as well as other assets and, in doing so; specify the value of the individual assets and liabilities; and
- include an inventory for the close of every fiscal year.

Requirements for foundations

155. In its supervision duty, the foundation supervisory authority requires annual accounts be provided by every single foundation to ensure that the use of the foundation's assets are used in a way consistent with the foundation endowment. Detailed information is required to be kept by foundations allowing for the submission to the supervisory authority of an annual statement of accounts and a statement of assets and liabilities (annual account) together with a report showing how the foundation has served the purposes set out in its constitutive documents. These requirements are consistent with the Terms of Reference.

Tax requirements

156. Provisions on proper accounting are further transcribed in the *Fiscal Code* (section 140 through 142) and provide in particular that "whoever is obliged under laws other than tax laws to keep accounts and records of relevance for taxation shall be obliged to fulfil the obligations imposed by such other laws in the interests of taxation as well".

157. Books and records must be kept within Germany (section 146 of the *Fiscal Code*). However, under certain circumstances the tax authorities may allow the taxpayer to keep electronic books and records within a different EU member State or – under certain requirements – within a different European Economic Area member State. The statutory requirements for this procedure ensure that the German authorities have access to the data in all circumstances.

158. These requirements ensure that accounting records will correctly explain all transactions, enable the financial position of entites covered by the provision of the commercial code to be determined with accuracy and allow financial statements to be prepared.

159. Small businesses, typically small proprietorships are not required to keep books and records under the *Commercial Code*. Pursuant to section 241(a) of the Commercial Code, sole proprietorships that do not exceed sales revenue of EUR 500 000 and annual net income of EUR 50 000 for two consecutive business years are exempt from the accounting requirements of sections 238 through 241. Under these limited circumstances, small businesses are also not required to keep books and records according to general accounting principles pursuant to sec. 141 of the *Fiscal Code*. They are entitled to determine taxable income on a cash basis (sec. 4 (3) of the *Income Tax Act*), and income must be calculated by using an official form (sec. 60 (4) of the *Income Tax Regulations*).

160. Calculation on a cash basis generally requires documentation to be kept. Otherwise taxpayers may be unable to comply with their obligation to co-operate (section 90 (1) of the *Fiscal Code*), for example, to substantiate – upon request by tax authorities – the numbers reported in the tax return. Certain documentation, in particular all invoices, must be kept for VAT purposes (Sec. 14b, 22 of *Turnover Tax Act* (*Umsatzsteuergesetz*). Foundations – if they do not run a business (which is usually the case) – and *GbR* are also entitled to calculate taxable income on a cash basis.

161. Under sec. 666 of the Civil Code the *Treugeber* may request the *Treuhänder* to provide information as to the use of the *Treugut* and to render transaction records related thereto. Association with this is a requirement to keep records to explain how the income received by the settlor or *Treugeber* has been calculated. In addition, in the case of fiduciary relationships (*Treuhand* but also trusts), and pursuant to section 39 (2) of the *Fiscal Code*, all assets are to be attributed to the *Treugeber* or the settlor. Consequently, if a person states that assets are held in a fiduciary relationship, then this person has to provide evidence of the existence of such a relationship in order to avoid the assets or any income derived therefrom to be attributed to him or her for tax purposes (section 159 of the *Fiscal Code*).

Sanctions

162. Pursuant to section 283b of the *Criminal Code*, a penalty of up to two years imprisonment or a monetary fine may be imposed on any person who fail to keep books of account which are required to be kept or destroys or damages books of account or other documentation which must be maintained in accordance with the commercial law

Conclusion

163. Considering the commercial, civil and tax requirements that apply with respect to accounting records keeping requirements, it is possible to conclude that for all relevant arrangements and entities the German legal framework ensures the maintenance of accounting records explaining correctly all transactions, enabling the financial position of entities to be determined and allowing financial statements to be prepared.

Underlying documentation (ToR A.2.2)

164. Pursuant to section 257 of the Commercial Code, every entity or arrangement covered by the provision of this code (as referred to in para 151) is, amongst other things, obliged to keep all books of account, inventories, opening balances, management reports, annual accounts, corporate accounts,

corporate management report and all working instructions necessary for their understanding as well as further organisational documents.

165. Except for opening balances, annual accounts and corporate accounts, the above mentioned documents may be stored as reproduction on an image recording or another data carrier if this corresponds to the generally accepted accounting principles and if it is guaranteed that the reproduction or the data stored

- corresponds with the received trade letters and the receipts for bookings visually and the other documents in content when they are made readable; and
- is available during the retention-period and can at any time be made available for reading within an appropriate period of time.

166. When an entity is required, under section 141 of the *Fiscal Code* to keep books and records, it is also required to keep documentation under section 147 of the same Code. Entities not covered by s. 141 of the *Fiscal Code* are nevertheless still obliged to cooperate with the tax authorities (s. 90 of the *Fiscal Code*) and must be in position to provide all documentation enabling the revenue authorities to control their tax returns and therefore to keep comprehensive accompanying documentation.

167. Moreover, as a member of the European Union and therefore involved in the EU common VAT system, all German entities are subject to special requirements for justification of their transactions. It is especially required to preserve all documents tracing the delivery of intra-Community goods and provision of services including, among others, the invoices issued and received, purchase or supply of goods, and contracts, purchases and sales were made under.

Conclusion

168. This accompanying documentation reflects details of all sums and money received, all sales and purchases and other transactions as well as the assets and liabilities of the relevant entities required to keep accounting records, *i.e.* all German entities.

Document retention (ToR A.2.3)

169. According to *Commercial Code* section 257, books of accounts, inventories, opening balances, management reports, annual accounts, corporate accounts, corporate management report and all working instructions necessary for their understanding as well as further organisational documents, must be kept for ten years; any other documentation must be kept for six years. The period of storage commences with the end of the calendar year

in which the entry into the books of accounts was made, the inventory was compiled, the opening balance or the annual account was ascertained, the corporate account was compiled, the trade letter was received or dispatched, or the booking receipt was generated.

170. In addition, section 147 of the *Fiscal Code* requires accounts and records, inventories, annual reports, situation reports, the opening balance sheet as well as the operating instructions and other organisational documents needed for their comprehension, the trade or business letters received, reproductions of trade or business letters sent, accounting records, and any other documents of relevance for taxation be stored at least for a period of six years.

171. Section 146 of the German *Fiscal Code* requires the data to be stored within Germany or a European Economic Area country. This last possibility is however subject to a mutual assistance instrument granting the German authorities an access to these records. Moreover, in that case, and under fine, the taxpayer is required to disclose to the German authorities the state where these records are stored.

172. Therefore, through the provisions contained in both *Commercial* and *Fiscal Codes*, the availability for at least six years and in most the time ten years of all accounting records explaining correctly all transactions, enabling the financial position and allowing financial statements to be prepared is ensured for all entities that are covered by a record keeping requirement.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place

Phase 2 Rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

A.3. Banking information

Banking information should be available for all account-holders.

Record-keeping requirements (ToR A.3.1)

173. According to section 8(1) of the *AML/CFT Act*, all data collected and information gathered in fulfilling the requirement to perform customer due diligence on contracting parties, beneficial owners, business relationships,

and all information on transactions must be recorded. According to section 8(3), these records and other evidence pertaining to business relationships and transactions must be kept for at least five years, without prejudice to other legal provisions. With regard to information on business relationships (including transactions), the retention period must begin at the end of the calendar year in which the business relationship was terminated. In all other cases (in particular one-off transactions), it must begin at the end of the calendar year in which the information was obtained.

174. In addition, for all other documents, including contractual correspondence, the duty on the part of financial institutions to record and retain documents follows from the general duties contained in section 257 of the *Commercial Code*. This requires all persons covered by the provisions of the *Commercial Code* (including financial institutions) conducting commercial transactions to retain specific records and to furnish information on demand. These include the following:

- books of account, inventories, opening balances, management reports, annual accounts, corporate accounts, corporate management report and all working instructions necessary for their understanding as well as further organisational documents;
- any trade letters received (documents concerning a trading transaction);
- copies of trade letters dispatched; and
- receipts for bookings in the records which must be kept according to section 238(1) of the *Commercial Code* (booking receipts).

175. The documents specified in the first and fourth bullets have to be retained for ten years; the other documents specified in the second and third bullets for six years (section 257(4) of the *Commercial Code*). The period of storage commences with the end of the calendar year in which the entry into the book of account was made, the inventory was compiled, the opening balance or the annual account was ascertained, the corporate account was compiled, the trade letter was received or dispatched, or the booking receipt was generated (section 257(5) of the Commercial Code).

176. According to *EU Regulation 1781/2006* on wire transfers, the payment service provider must keep records of complete information on the payer which accompanies transfers of funds for five years (Article 5(5) of the Regulation) and the payment service provider of the payee must keep records of any information received on the payer for five years (Article 11).

177. Finally, there are additional specific duties for credit institutions and financial services institutions in the tax and regulatory laws. The first arises from section 154(2) of the *Fiscal Code*, read in conjunction with the *Fiscal Code Application Ordinance* on section 154.This duty obliges credit institutions to

record the data established on the opening of an account, securities account or the allocation of a safe deposit box and to retain it for a period of five years. The second is contained in section 25a(1) of the Banking Act and requires credit institutions and financial services institutions to have in place a proper business organisation which must, among other things, cover complete documentation of the business activity in order to enable overall supervision by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*). The relevant records have to be kept for at least five years.

178. Finally, under EU law, Article 3 of *Council Directive 2003/48/EC of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payments*, as amended (the EU Savings Directive) requires that financial insitutions which pay interest to their customers hold information on account holders that are not resident in Germany but are resident in other EU Member States.

179. Pursuant to section 17 of the *AML/CFT Act*, a fine of up to EUR 100 000 may be applied when someone fails to identify a contracting part, to provide records information correctly and completely or to keep records and other evidence of business relationships and transactions.

180. The majority of incoming exchange of information requests regarding direct taxes is handled by local tax authorities. When the taxpayer fails to provide the requested bank information, the local revenue authorities may ask the relevant financial institution to provide it. While in a very limited number of cases, Germany's counterparts mentioned there were delay in obtaining bank information, financial institutions have rarely refused to provide the competent authority with banking information.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place

Phase 2 Rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

B. Access to Information

Overview

181. A variety of information may be needed in a tax enquiry and jurisdictions should have the authority to obtain all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, as well as accounting information in respect of all such entities. This section of the report examines whether Germany's legal and regulatory framework gives the authorities access powers that cover all relevant people and information, and whether rights and safeguards are compatible with effective exchange of information. It also assesses the effectiveness of this framework in practice.

182. Due to the German federal organisation, all incoming requests received by the *Bundeszentralamt für Steuern*, the German competent authority located in the city of Bonn, are sent to the tax authorities of the *Länder* and processed by the relevant local tax office. To this extent, the central authorities rely on the support of a contact point network at the *Länder* level. No information can directly be collected by the competent authorities neither in databases, nor by using gathering measures to compel its production.

183. When the information requested by a foreign competent authority is not already in the possession of the tax administration, the local revenue authorities responsible for processing the case use their powers to compel the production of any information "of significance for taxation" in accordance with the German *Fiscal Code*. These powers are very broad and can be used to obtain ownership, accounting and bank information from any person, including third parties. It is accompanied by effective enforcement provisions.

184. Before the gathered information is sent to the requesting authorities, a prior notification of the provision of this information to foreign authorities must be sent to the taxpayer. Usually, and to ease the process, this notification is part of the notice sent by the German authorities to gather the requested information. Even if there are exceptions to this notification procedure allowed for in the legislation, in practice the German authorities have indicated that the taxpayer is always notified even though they have also

confirmed that in recent years, cases where the notification had a real impact on the exchange of information were very rare.

185. In all situations, the person subject of the request – if a resident of Germany – is first asked to provide the information. If the information is not provided within the expected timeframe, or if the person required to furnish the information is not a resident of Germany, the German authorities ask any relevant third party/parties to provide the information. The information gathering powers of the German authorities are strong enough to ensure, in all situations the provision of the requested information.

B.1. Competent Authority's ability to obtain and provide information

Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).

The German competent authority

186. In Germany, the assessment and collection of taxes – with the exception of the tax on insurance premiums and the motor vehicle tax – is the exclusive competence of the *Länder*. However, the fiscal legislation is the same in all areas of the German territory and it is duty of the Federation to ensure that this legislation will be applied in the same way by each *Land*. To this extent, there are strong ties between the federal Ministry of Finance and the Ministries of Finance at the *Länder* level in particular with on-going discussions and meetings where the enforcement of the national legislation as well as the administrative regulations to be published by the Federal Ministry of Finance for the implementation of the fiscal law are discussed.

187. In this context, the *Bundeszentralamt für Steuern* (*BZSt*, the Federal Central Office for Taxes), which perform its duty under the supervision of the Federal Ministry of Finance, plays a key role. This office, situated in Bonn (the former German federal capital) has responsibilities on issues binding the 16 *Länder*. This office is for instance involved in value-added tax (VAT) matters, in particular in countering VAT fraud, and in joint audits where there are issues concerning several *Länder*.

188. The *BZSt* is the competent authority in Germany for international exchange of information for tax purposes and is the sole point of contact for foreign administration wishing to request information from the German Tax Authorities. There is, within the *BZSt*, a unit fully dedicated to the issues tied to EOI in the field of direct taxation.

189. Regarding EOI, the role of *BZSt* is:

- to process all incoming and outgoing requests of information;
- to issue all common guidance, by which all *Länder* are bound; and
- to manage a decentralised contact point network in the field of EOI to ensure the smooth provision of answers to incoming requests for information.

190. Seventeen civil servants are working in the unit dealing with EOI in the field of direct taxation, divided into three teams, each of them comprising a supervisor and officials in charge of processing of incoming requests. Each team is responsible for a portfolio of countries.

191. Upon receipt of a request for information, the request is sent to a translation provider. After translation, the competent authority determines whether the request is in conformity with the relevant international agreement. If the request cannot be processed, the German authorities provide to the requesting party the reason why the request cannot be answered. Over the last three years, on 227 instances (out of 5 008 requests received) where Germany declined to provide the requested information, In 57% of these cases, this was the result of the request seeking information not covered by the provisions of the applicable tax treaty[10] and in 30% of the cases there was a need for additional information from the requesting jurisdiction to determine whether the requested information was foreseeably relevant. This additional information was never provided by the requesting jurisdiction.

192. As the assessment and collection of taxes occurs at the local level, information is held locally and the *Länder* have dedicated competence to gather information, all incoming requests are passed on to the regional authorities. It is then the duty of the *Länder*'s Revenue Administration to use the domestic gathering powers granted by the *Fiscal Code* to collect this information and send it, in response, to the *BZSt*. Where an incoming request covers several German taxpayers situated in several *Länder*, this incoming request is sent to each competent *Land*. Each answer received from a land by the *BZSt* is sent to the requesting jurisdiction as a partial response.

Powers to collect information

193. In German law, the powers of investigation of the Revenue Authorities are set out in sections 88 to 140 of the *Fiscal Code*. In particular, section 93(1) of that Code states that "The participants and other persons shall provide the revenue authority with the information needed to ascertain facts

10. For instance, information relating to a tax not covered by the applicable treaty or to the enforcement of the law of the requesting jurisdiction.

which are of significance for taxation. This shall also apply to associations without legal capacity, conglomerations of assets, authorities and commercial enterprises of public-law entities. Persons other than the participants should be required to provide information only if clarification of the matter by the participants does not or is not likely to produce any results." This broadly defined power can be exercised to obtain information for international tax matters. The German authorities indicated that the term "persons other than the taxpayer" must be understood in this context as entities of any kind that are in the possession or control of the relevant information.

194. One of the German specificities in accessing tax information is that the taxpayer concerned should be first asked to provide the information. Only to the extent that recourse to the taxpayer does not or is not likely to produce any results, a third party is asked to provide the information not provided in first instance by the taxpayer himself. However, in the context of EOI the German authorities are only required to first contact the taxpayer where it is a German resident who is the subject of interest to the requesting (foreign) authority. In any other situation, revenue authorities can directly ask the German party involved in the EOI request to provide the information.

195. Pursuant to section 117 of the *Fiscal Code*:

- "(2) the revenue authorities may provide international legal and administrative assistance on the basis of nationally applicable international agreements, nationally applicable legal instruments of the European Communities and the EC Mutual Assistance Act; and
- (4) when implementing legal and administrative assistance, the powers of the revenue authorities and the rights and obligations of the participants and other persons shall be based on the provisions applying to taxes."

196. Thus, section 93(1) applies also for EOI purposes and German domestic information gathering measures can equally be used to obtain information for domestic and EOI purposes.

197. If there are search and seizure powers in Germany for the purpose of investigating criminal cases, these powers cannot be used to answer incoming EOI requests.

Bank, ownership and identity information (ToR B.1.1) / Accounting records (ToR B.1.2)

198. There is no difference in Germany in the way bank information, ownership information and accounting records are accessed for tax purposes. The procedure is, in each case, based on the domestic gathering powers under section 93 of the *Fiscal Code*, as described above. 199. All requests received

and checked by the *BZSt* to ensure their conformity with the rules set out in the applicable international agreement are sent to the *Länder* authorities for processing. Indeed, the lack of information available at the federal level means the local authorities are always involved in collecting information to respond to international requests for information. It is the responsibility of officials working in local tax offices to ask taxpayers or third parties to provide the requested information. Two steps must be followed in this respect:

- first of all, the person subject of the request – if a German resident – should first be requested to furnish the information (section 93 of the *Fiscal Code*). This is always done in writing. The official in charge of the matter establishes a timeframe within which the taxpayer should answer. According to the German authorities, even though there is no specific timeframe set out in the German legislation, it is usually less than one month. If the person subject to the request is not a German resident, there is no need to first ask him to provide the information;
- if the taxpayer fails to comply with the request, the German authorities can ask a third party to provide the information. This is done in the same way as described above. A written request is sent to the person in possession of the information. The official in charge of the case establishes a timeframe, not exceeding one month, within which the third party must answer.

Use of information gathering measures absent domestic tax interest (ToR B.1.3)

200. As described above, section 117 of the German *Fiscal Code* states that the revenue authorities may use their domestic information gathering measures to answer incoming EOI requests. In this context, the powers granted by section 93 of the *Fiscal Code* will be used. Any requirement that there be a domestic interest in the matter is, as a consequence, absent from the German legislation.

Compulsory powers (ToR B.1.4)

201. Section 93 of the *Fiscal Code* provides that the taxpayer and persons other than the taxpayer concerned are required to co-operate, *i.e.* upon request by tax authorities these persons have to furnish any information relevant to the determination of the tax liability of the taxpayer under examination.

202. To ensure the information to be provided, section 328 of the *Fiscal Code* foresees that:

1. “An administrative act that is directed at the performance of an action or at the tolerance or omission of an action may be enforced

using coercive measures (coercive fine, substitutive execution, direct enforcement) […];

2. The coercive measure least detrimental to the liable party and to the public shall be determined. The coercive measure shall be proportionate to its purpose."

203. The penalty can be up to EUR 25 000 but in applying this penalty, the revenues authorities proportionality principles must be respected. This principle requires proportionality between the penalties that will be applied and the size of the tax matters being considered or the financial status of the person being penalised.

204. Beyond these administrative fines, and pursuant to the translation of section 334 of the *Fiscal Code* provided by the German authorities, "there is also the possibility of substitutive coercive detention when the fine imposed cannot be recovered". Section 331 of the *Fiscal Code* also states that "the coercive fine or substitutive execution do not attain the objective or where they are not appropriate, the tax authorities may force the liable party to perform, tolerate or omit to do an action, or to perform the action itself.

205. The German authorities have search and seizure powers, though these powers cannot be used as such to answer incoming request for information. However the German authorities have advised that due to a strong tax compliance culture in Germany, the availability of search and seizure powers only in criminal cases does not hinder the German authorities to access information in civil cases. Furthermore, comments received from peers show that Germany is able to provide the information requested, even when this information is not already within the hands of the revenue authorities.

Secrecy provisions (ToR B.1.5)

206. Pursuant to section 30a(2) of the *Fiscal Code* "the revenue authorities may not require credit institutions to submit non-recurrent or regular notifications with regard to accounts of specific types or specific amounts for general supervisory purposes". However, paragraph 5 of the same section explicitly states that "a credit institution shall, furnish information and documents when a request for information was addressed to the taxpayer to the extent that:

- co-operation by the taxpayer is insufficient; or
- requesting the information from the taxpayer will not produce the expected result."

207. In always sending an invitation to taxpayers requesting the information to be provided, German authorities ensure that these requirements are

respected. If the taxpayer does not provide the expected information, will the revenue authorities ask banks to provide it.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place

Phase 2 Rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

B.2. Notification requirements and rights and safeguards

The rights and safeguards (*e.g.* notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

Not unduly prevent or delay exchange of information (ToR B.2.1)

208. German law provides a requirement that domestic taxpayers (parties, participants) be notified of requests for information which concern them, and the law allows for some exceptions to this notification requirement. This notification procedure was introduced in 1985 when Germany transposed the *EU Mutual Assistance Directive* into domestic law.

209. Pursuant to section 117(4) of the *Fiscal Code*, "when implementing legal and administrative assistance, […] and notwithstanding section 91(1), domestic participants shall invariably be heard where legal and administrative assistance concerns taxes administered by the revenue authorities of the *Länder*, unless turnover tax is concerned or exceptional circumstances within the meaning of section 91(2) or (3) exist."

210. However section 91(2) and 91(3) explicitly states that:

- "(2) The hearing may be dispensed with when not required by the circumstances of an individual case, in particular when:
  - 1. an immediate decision appears necessary because of imminent danger or in the public interest, […]
- (3) The hearing shall not be conducted when there is an overriding public interest in the hearing not taking place."

211. According to a Regulation issued by the German authorities,[11] it is not required to notify the taxpayer before sending information to a counterpart in the following cases:

- publicly accessible material;
- information already provided by a taxpayer in an application or declaration provided the form to be used points to the possibility of the information being passed on to foreign tax authorities, *e.g.* application for reduced withholding;
- if there is no domestic taxpayer/party involved, *e.g.* the request pertains to the foreign taxpayer's immovable property situated in Germany;
- sale of real estate and transfer of shares provided the information is based on details already reported by the taxpayer in accordance with sec. 54 of the Income Tax Regulations or sec. 29(4) of the Valuation Act (*Bewertungsgesetz*);
- automatic exchange of information.

212. This notification is information of the domestic taxpayer/party that the requesting information will be sent to a foreign jurisdiction. German legislation does not require a specific form for this notification. As a matter of practice, if the information requested needs to be collected from the taxpayer or from third parties, the notification is part of the request sent to the taxpayer or to the third party to provide the information and consists into a sentence informing the taxpayer that the information provided will be sent abroad.

213. If the information is already in the possession of the German tax authorities, the domestic party involved is notified in writing of the intended exchange before the response is sent to the requesting country. The persons concerned are usually granted three weeks to one month to object to the exchange of information.

214. The taxpayer or a third party may object to the exchange of information. In that case, he may request a temporary injunction by the Tax Court in the timeframe granted by the tax official processing the incoming request. If the Tax Court rejects the request – this usually takes three months – the information will be transmitted to the requesting jurisdiction. In very rare cases the tax court's decision may be appealed to the Federal Tax Court, which also commonly takes three months to hand down its decision. If the Federal Tax Court rejects the appeal, the information will be transmitted to the requesting foreign tax authorities. However, the transmission of information to foreign revenue authorities was only challenged 12 times in the last 30 years.

11. Guidance note No IV B 1 – S 1320 – 11/06 dated 25 January 2006.

215. According to the German authorities, even though there are some exceptions allowed for by law, the prior notification procedure is applied in each case. The assessment team also noted that the cases where the notification had a real impact on the exchange of information are very rare. In addition, the jurisprudence in the field of prior notification procedure is not favourable to the taxpayer. In particular it cannot be used as a delaying tactic. As a result the notification procedure can be seen as having limited impact on the EOI processes in Germany.

216. The communication between a client and an attorney are only privileged to the extent that the attorney acts in his or her professional capacity as attorney. Where an attorney acts in any other capacity, the attorney client privilege does not apply. In this case, exchange of information resulting from and relating to any such communications cannot be declined because of the attorney-client privilege. The situation is the same for accountants/auditors.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place

Phase 2 Rating	
To be finalised as soon as a representative subset of Phase 2 reviews is completed.	
Factors underlying recommendations	**Recommendations**
While the German legal and regulatory framework allows for some exceptions to the notification procedure, these exceptions have never been applied in practice.	The German authorities in charge of EOI should, when necessary, make use of the exceptions to the notification procedure as provided for in the *Fiscal Code*.

C. Exchanging Information

Overview

217. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanisms for doing so. A jurisdiction's practical capacity to effectively exchange information relies both on having adequate mechanisms in place as well as an adequate institutional framework. This section of the report assesses Germany's network of EOI agreements against the standards and the adequacy of its institutional framework to achieve effective exchange of information in practice.

218. Germany is able to exchange information under bilateral treaties but also with other European Union (EU) member States[12] under the *EU Mutual Assistance Directive 77/799/EEC* of 19 December 1977.[13] While this report is focused on the terms of its EOI agreements and practices concerning the

12. The current EU members, covered by this Council Directive, are: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. Regarding Cyprus – note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue". Note by all the European Union Member States of the OECD and the European Commission: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.
13. This Directive came into force on 23 December 1977 and all EU members were required to transpose it into national legislation by 1 January 1979. It has been amended since that time. A new Mutual Assistance Directive was adopted by the EU Council on 7 December 2010 and will enter into force on 1 January 2013.

exchange of information on request, Germany is also involved in spontaneous and automatic exchange of information. In addition, Germany exchanges a large amount of data on an annual basis under the scope of the *EU Savings Directive 2003/48/EC*. The German approach in these areas is relevant as it shows the importance that Germany places on EOI.

219. Power to make treaties is the responsibility of the Federal Ministry of Finance and is implemented by Law. Ratified treaties are considered part of the tax law and they are treated as any other tax act (all bilateral and multilateral treaties bind the *Länder*). In the German Ministry of Finance, there are three units dealing, on a geographic basis, with negotiations of tax treaties. In addition, one unit is in charge of horizontal issues, such as EOI.

220. Germany has a very broad network of double-taxation conventions (DTCs), with agreements currently in force covering 89 countries including almost all OECD/EU/G20 countries. The majority of these agreements only allow for exchange for the purpose of the agreement leading to a treaty network comprising only 41 DTCs in force to the standard. All partners of relevance, in particular those with which Germany has the closest relationships, are covered – see Annex 2. In the field of treaty negotiations, Germany has focussed in recent months on bringing the treaties signed with its most significant partners to the standard. Relevant protocols have now been established with some jurisdictions, including Belgium, Luxemburg and Switzerland. In addition, 17 tax information exchange agreements (TIEAs) have been signed since July 2008, four of which are now in force.

221. All exchange of information agreements include confidentiality provisions and Germany's domestic legislation also contains relevant confidentiality provisions. These provisions ensure the full confidentiality of all information exchanged.

222. Foreign exchange of information requests totalled between 1 200 and 2 000 in the last three years. In terms of the number of requests managed each year, Russia, Poland, Hungary, France and the Netherlands are the most significant partners of Germany in the field of EOI on request.

223. Regarding the effectiveness of exchange of information, Germany's competent authority is sufficiently resourced with skilled a staff that takes care to answer all incoming requests. While many other competent authorities have commented positively on the quality of the relationship with their German counterpart, some concerns still remain regarding the ability of Germany to provide information in a timely manner. This may be partly a consequence of the high volume of EOI matters in which Germany is involved but also to the obligation to send all incoming requests to the local authorities as well as the lack of management and monitoring of the process by the *BZSt*.

224. 12% of the incoming requests were answered in the last three years within three months. Germany should try to improve its process to ensure that in more cases the information is provided in 90 days or status updates are provided to its partners for those requests which are not answered within 90 days. Closer monitoring and a new guidance note more consistent with the Global Forum's Terms of Reference could be a way to improve German practices.

C.1. Exchange-of-information mechanisms

Exchange of information mechanisms should allow for effective exchange of information.

225. Germany transmits and receives information both on request, spontaneously and automatically. These exchanges take place under the *EU Mutual Assistance Directive* as well as an extensive treaty network. Moreover, Germany implemented in 1976 a unilateral EOI mechanism. Foreseen by section 117 of the German *Fiscal Code*, this mechanism allows for exchange of information when, in particular, reciprocity and guarantees that the information received will be kept confidential is assured. Considering the number of Germany's partners covered by a bilateral or multilateral agreement, this mechanism is likely to be used in very few instances.

226. It is the current German policy to negotiate only treaties meeting, in matters of EOI, the international standard on transparency and exchange of information. This covers in particular an Article 26 in conformity with the 2005 update of the OECD *Model Taxation Convention*. Considering the wide German treaty network (more than 100 EOI arrangements to date), many of them do not include this last update. However, as stated, in particular in section B of the report, the German capacity to access a wide range of information, in particular bank information, without reference to a domestic tax interest, ensures from the German side, an exchange of information in line with the international standard.

Other forms of exchange of information and co-operation

227. The procedure for spontaneous exchange of information is not significantly different from the procedure applicable to the requests for information.

228. Germany spontaneously provided information to its partners more than 25 000 times in 2008 and 2009 and is also involved in automatic exchange (more than 100 000 exchanges a year). At the same time, Germany receives more than 1 000 000 pieces of information a year from its treaty partners. As

an EU member and under the scope of *Regulation (CE) 1798/2003*, Germany is also involved in exchange of information in the field of VAT.

229. Germany is involved in automatic exchange of information under the *EU Savings Directive 2003/48/EC* which provides for automatic exchange of savings information to ensure the effective taxation of interest proceeds of individuals (beneficial owners) and non-commercial associations of persons (foreign entities). Under the scope of this text, Germany is sending, on an annual basis, more than 400 000 data to its partners covered by the provisions of this instrument[14] while receiving between 1.1 and 2.4 million reports.

230. As a EU member, Germany is involved in the *European Fiscalis Program*[15] the purpose of which is, through various tools such as exchange of officials or seminars, to ensure a continuously improving administrative procedures and practices to the benefit of administrations and business within the EU and ensuring the exchange of information between national administrations.

231. It is also possible under the *European Fiscalis Program* to finance multilateral controls as joint audits of the European arms of multinational companies with respect to VAT (in accordance with *Council Regulation 1798/2003*), direct taxes (*Council Directive 77/799/EEC*) and excise duties (*Council Directive 2073/2004*). Such controls are commonly triggered by: (i) proposals from tax auditors who participate in the audit/control of larger companies; (ii) automatic or spontaneous exchange of information between countries; or (iii) VIES.[16] Administrative enquiries (possibility for tax officials to be involved in the gathering of information in another EU country) can also take place under the same legal framework. Germany is actively participating in these co-operation tools.

Foreseeably relevant standard (ToR C.1.1)

232. The international standard for exchange of information envisages information exchange to the widest possible extent. Nevertheless it does not allow "fishing expeditions," *i.e.* speculative requests for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of

14. States of the European Union as well as Aruba, British Virgin Islands, Guernsey, Isle of Man, Montserrat, and Netherlands Antilles.
15. *Decision No 1482/2007/EC* of the European Parliament and of the Council of 11 December 2007 establishing a Community programme to improve the operation of taxation systems in the internal market (Fiscalis 2013).
16. VAT Information Exchange System. See *http://ec.europa.eu/taxation_customs/vies/*.

"foreseeable relevance" which is included in paragraph 1 of Article 26 of the OECD *Model Taxation Convention* set out below:

- "The competent authorities of the contracting states shall exchange such information as is foreseeably relevant to the carrying out of the provisions this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the contracting states or their political subdivisions or local authorities in so far as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2."

233. DTCs signed by Germany on or after 2005 make a clear reference to the "foreseeably relevant standard". Older DTCs generally use the term "as is necessary" or "as is relevant" in lieu of "as is foreseeably relevant". The terms "as is necessary" and "as is relevant" are recognised in the commentary to Article 26 of the OECD *Model Taxation Convention* to allow for the same scope of exchange as does the term "foreseeably relevant".

234. Even with clear references to exchange of information as is foreseeably relevant, relevant, or necessary, 40 out of Germany's 89 DTCs do not specifically allow for exchange of information for the enforcement of the domestic tax law of the requesting countries. It is in particular the case for treaties signed with major economies such as China or India or relevant Germany neighbours such as the Czech Republic, the Slovak Republic, Hungary, or Switzerland.[17]

235. It must however be mentioned that:

- DTCs signed by Germany with its main economic partners – European countries or the US – allow exchanges for the enforcement of the domestic tax law; and
- as Germany, the Czech Republic, the Slovak Republic and Hungary are EU members, EOI between these countries can also take place under the *EU Mutual Assistance Directive*. It is therefore possible for such exchanges to take place.

In respect of all persons (ToR C.1.2)

236. For exchange of information to be effective it is necessary that a jurisdiction's obligation to provide information is not restricted by the residence or nationality of the person to whom the information relates or by the residence or nationality of the person in possession or control of the information

17. Please note that a protocol was signed by Germany with Switzerland on 27 October 2010.

requested. For this reason the international standard for exchange of information envisages that exchange of information mechanisms will provide for exchange of information with respect to all persons.

237. Many of Germany DTCs (40 out of 89) do not provide for the exchange of information for the purpose of enforcing the domestic law of the other contracting state. Thus, these treaties do not provide for the EOI on persons who are not residents in both contracting states. With the exception of the DTC with Switzerland signed in 2002, these agreements were all signed before 1997.

Obligation to exchange all types of information (ToR C.1.3)

238. Jurisdictions cannot engage in effective exchange of information if they cannot exchange information held by financial institutions, and nominees or persons acting in an agency or a fiduciary capacity. Both the OECD *Model Taxation Convention* and the OECD *Model TIEA*, which are the authoritative sources of the standards, stipulate that bank secrecy cannot form the basis for declining a request to provide information and that a request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest.

239. Only Germany's DTCs initially signed or amended by protocol after 2005 include paragraph 26(5) of the OECD *Model Taxation Convention*, which provides that a contracting state may not to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. Eleven post-2007 DTC's include Article 26(5) of the OECD model convention (Algeria, Belgium, Bulgaria, Luxemburg, Malaysia, Mexico, Russia, Syria, UK, USA and Uruguay) while five do not include such a provision (Croatia, Georgia, FYROM, Slovenia and South Africa). Germany's policy is to include Article 26(5) in all of its new agreements.

240. All of Germany's TIEAs include the provisions contained in Article 5(4) (a) and (b) of the OECD *Model TIEA*; obliging the contracting parties to exchange all types of information.

241. However, 78 of Germany's DTCs do not contain such a provision as these are older agreements, predating changes to the OECD *Model Tax Convention*. For 37 of these,[18] as neither Germany nor its partner suffers from limitations to its access to bank information, the absence of a provision in

18. Australia, Azerbaijan, Belarus, Canada, Czech Republic, Denmark Estonia, Finland, France, Georgia, Ghana, Greece, Hungary, Iceland, Ireland, Italy, Kazakhstan, Korea, Kyrgyzstan, Latvia, Liberia, Lithuania, FYROM, Malta,

line with Article 26(5) of the OECD *Model Tax Convention* does not result in the agreement falling below the international standard

242. For some of Germany's partners which have domestic restrictions on access to information, the absence of a provision akin to Article 26(5) of the OECD *Model Tax Convention* means these agreements do not establish an obligation to exchange all types of information. It is particularly the case with Austria, Singapore and Switzerland. It should be noted through that a protocol between Germany and Switzerland bringing the EOI provision in their treaty to the standard was signed on 27 October 2010.

243. Nevertheless, as Germany has a large number of agreements, it is important that the current program of updating international agreements to incorporate wording in line with Article 26(5) of the OECD *Model Tax Convention* continues.

Absence of domestic tax interest (ToR C.1.4)

244. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. An inability to provide information based on a domestic tax interest requirement is not consistent with the international standard. Contracting parties must use their information gathering measures even though invoked solely to obtain and provide information to the other contracting party.

245. All of Germany's DTCs signed or amended by protocol after 2005 contain Article 26(4) of the OECD *Model Taxation Convention*, obliging the contracting parties to use information gathering measures to exchange requested information without regard to a domestic tax interest.

246. While Germany's older DTCs do not contain such a provision, as stated above in subsection B.1.3, the German legislation ensures, through section 117 of the German *Fiscal Code*, the use of domestic powers to collect the requested information by a treaty partner. Thus, even without the provision of paragraph 4 of Article 26 of the OECD *Model Taxation Convention*, Germany is able and does exchange all types of information without any reference to the domestic tax interest.

247. A domestic tax interest requirement may however exist in some of Germany's partners countries. In such cases, the absence of a specific provision requiring exchange of information unlimited by domestic tax interest

the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Turkey and Uzbekistan.

will serve as a limitation on the exchange of information which can occur under the relevant agreement.

Absence of dual criminality principles (ToR C.1.5)

248. The principle of dual criminality provides that assistance can only be provided if the conduct being investigated (and giving rise to an information request) would constitute a crime under the laws of the requested country if it had occurred in the requested country. In order to be effective, exchange of information should not be constrained by the application of the dual criminality principle.

249. From the German treaty network as currently designed, only the DTC signed with Switzerland contains a provision stating that "it is understood that the term "acts of fraud" means fraudulent conduct which is deemed to be an offence under the laws of both States, and is punishable by imprisonment". None of the other agreements signed by Germany include wording which would indicate that there is dual criminality principle to be applied.

Exchange of information in both civil and criminal tax matters (ToR C.1.6)

250. Information exchange may be requested both for tax administration purposes and for tax prosecution purposes. The international standard is not limited to information exchange in criminal tax matters but extends to information requested for tax administration purposes (also referred to as "civil tax matters").

251. There is no distinction drawn in most of Germany's agreements between civil and criminal matters as far as taxation is concerned. Indeed, some agreements refer to fighting fiscal evasion as one of the objects of the agreement and in some others the first paragraph of the exchange of information article mentions that the information exchange will occur "for the prevention of evasion or avoidance of, or fraud in relation to, such taxes".

252. Germany is able to exchange information in both civil and criminal matters. When a matter is under criminal investigation abroad and if Germany is required to provide information linked to this case, such information can be furnished by the German competent authority.

Provide information in specific form requested (ToR C.1.7)

253. There is no restriction in the exchange of information provisions in Germany's DTCs and TIEAs that would prevent Germany from providing information in a specific form, as long as this is consistent with its own

administrative practices. In particular, pursuant to section 117 of the *Fiscal Code*, the German authorities can use all their domestic gathering power to access information for EOI purposes.

254. In this respect, the German domestic legislation (section 93(5) of the *Fiscal Code*) states *inter alia* that "the revenue authority may stipulate that the person obliged to provide information does so on official premises in the form of an oral statement. They shall be empowered to do so in particular if information in writing has been demanded but not provided or if information provided in writing has not served to clarify the matter". It means that Germany is capable to provide the requested information in various ways, usually through the provision of copies of documents but under the form of oral statements as well.

In force (ToR C.1.8)

255. Exchange of information cannot take place unless a jurisdiction has exchange of information arrangements in force. Where exchange of information agreements has been signed the international standard requires that jurisdictions must take all steps necessary to bring them into force expeditiously.

256. When looking to the German treaty network, it can be seen that the time period between the signature of an EOI arrangement and its entry into force can be quite long. This seems to be particularly a consequence of the German Federal organisation which requires the consent of the *Länder* (through the Bundesrat, the *Länder* Chamber) for the ratification of an EOI arrangement as the *Länder* have (by majority vote) to approve any legislation affecting their tax revenue.

In effect (ToR C.1.9)

257. For exchange of information to be effective, the contracting parties must enact any legislation necessary to comply with the terms of the agreement.

258. According to the German Basic law (the "Constitution"), all treaties must be implemented by way of a federal Act. These treaties are then part of the tax law and treated as any other tax Act.

259. Considering the German legislation, in particular section 117 of the *Fiscal Code* and the capacity of the German authorities to gather information for EOI purposes, all EOI arrangements signed by Germany and in force are in effect.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
Although all of Germany main economic partners are covered by EOI arrangements meeting the standard of transparency, a significant number of the remaining treaties signed by Germany are not to the standard (48 of 89), in particular as regards the foreseeably relevance standard.	Germany should include in its DTA negotiation policy, the renegotiation of its treaties that do not meet the standard.

Phase 2 Rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

C.2. Exchange-of-information mechanisms with all relevant partners

> The jurisdictions' network of information exchange mechanisms should cover all relevant partners.

260. The international standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that jurisdiction in order to properly administer and enforce its tax laws it may indicate a lack of commitment to implement the standards.

261. To date, Germany has signed 89 agreements with countries all over the world. Since 2008 Germany has signed 17 TIEAs. Finally, Germany, as a member of the European Union, is involved in the exchange of information provided for by the *EU Mutual Assistance Directive*. Even if this last EOI arrangement does not meet, *per se*, the international standard, nothing in this arrangement prevents two jurisdictions, willing to do so, to exchange all type of information, bank information included, without any reference to a domestic tax interest.

262. All these EOI arrangements enable Germany to exchange information with close to 100 countries, all EU, OECD and G20 members being covered[19] with the exception of Brazil, Saudi Arabia and Chile. Of the treaties in force, 41 are to the standard[20] but this network covers Germany's main partners, in particular a majority of EU (22) and OECD (23) countries are covered by a treaty to the standard.

263. In negotiating tax treaties, the current German priorities are to renovate treaties concluded prior to the early 1990s, considering the current specific requirements of the German constitutional court regarding individuals' right to privacy and then to data protection. This required specific provisions ensuring datas being kept confidential and individuals to be information, upon application, on collection and use of data. These provisions are included either directly in Article 26 or in a protocol annexed to the convention.

264. With OECD countries, the priority is to amend the treaties that do not meet the international standard regarding bank information or domestic tax interest such as the one concluded with Austria. Nevertheless, for most OECD countries, the treaties currently in force generally allow for all type of information to be exchanged, even with an "old" EOI provision. There is therefore not a need to update them urgently, unless a full renovation of the treaties would be envisaged.

265. With EU members, this issue is even less crucial as a new framework under the EU Mutual Assistance Directive, adopted in 2010, will enter into force in 2013. This framework will bring EU legislation to the international standard on transparency and exchange of information.

266. Further, Germany started in 2008 to negotiate TIEAs. A priority has first been given in this respect to the closest German jurisdictions and in particular the European jurisdictions (Gibraltar, Guernsey, Isle of Man, Jersey, Monaco, Liechtenstein,). Germany now intends to extend its network in the Caribbean area and then in the Pacific area. To date the following TIEAs have been signed:

19. Argentina, Australia, Austria, Belgium, Canada, China, Czech Republic, Denmark, Finland, France, Greece, Hungary, Iceland, India, Indonesia, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Turkey, UK, US

20. Algeria, Australia, Azerbaijan, Belarus, Bulgaria, Canada, Czech republic, Denmark, Estonia, Finland, France, Georgia, Ghana, Greece, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liberia, Lithuania, Malta, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Slovak republic, Slovenia, Spain, Sweden, Tajikistan, Turkey, United Kingdom, United States, Uzbekistan.

Jurisdiction	Date signed	Date in force
Anguilla	19.03.2010	-
Antigua & Barbuda	19.10.2010	
Bahamas	09.04.2010	
Bermuda	03.07.2009	-
British Virgin Islands	05.10.2010	
Cayman Islands	27.05.2010	
Dominica	21.09.2010	
Gibraltar	13.08.2009	04.11.2010
Guernsey	26.03.2009	-
Isle of Man	02.03.2009	05.11.2010
Jersey	04.07.2008	28.08.2009
Liechtenstein	02.09.2009	28.10.2010
Monaco	27.07.2010	
San Marino	21.06.2010	
St. Lucia	07.06.2010	
St Vincent & Grenadines	29.03.2010	-
Turks & Caicos	04.06.2010	

267. The German network of treaties to the standard allows today exchange of information to take place with all Germany's relevant partners, as regard the diplomatic, economic and financial ties.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
	Germany should continue to develop its EOI network to the standard with all relevant partners.

Phase 2 Rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

C.3. Confidentiality

> The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

Information received: disclosure, use, and safeguards (ToR C.3.1)

268. Governments would not engage in information exchange without the assurance that the information provided would only be used for the purposes permitted under the exchange mechanism and that its confidentiality would be preserved. Information exchange instruments must therefore contain confidentiality provisions that spell out specifically to whom the information can be disclosed and the purposes for which the information can be used. In addition to the protections afforded by the confidentiality provisions of information exchange instruments countries with tax systems generally impose strict confidentiality requirements on information collected for tax purposes.

269. All DTCs and TIEAs signed by Germany have secrecy provisions ensuring that all information received will be kept secret. This secrecy provisions are primarily based on the EOI provisions contain in Article 26(2) of the OECD *Model Taxation Convention* or Article 8 of the OECD *Model TIEA* but the German legal and regulatory framework required additional protections being incorporated in the treaties.

270. Secrecy provisions also find their sources in the German legislation itself. Pursuant to section 30 of the *Fiscal Code*, Public officials shall be obliged to observe tax secrecy. Paragraph (2)1c of the same section states that public officials shall be in breach of tax secrecy if they disclose or make use of, without authorisation, circumstances of a third person which have become known to them for other reasons from notification by a revenue authority or from the statutory submission of a tax assessment notice or a certification of findings made in the course of taxation. Violation of these provisions is punished by imprisonment of up to two years or by a fine (Article 355 of the *Criminal Code*).

271. Within the *BZSt*, only those staff members who are entitled to view the data relating to exchanges of information are able to do so. This occurs via special access rights granted on separate IT systems for each individual and subsequent approval by the head of division. In addition, all information is kept electronically ensuring the highest level of confidentiality of the information received.

272. To avoid information being disclosed, the German authorities have implemented an IT system dedicated to EOI to store all requests on an electronic format and facilitate transmissions to local authorities by e-mail. Thanks to this system, no hard copies of requests are kept within the *BZSt*

and all communication occurs by secure e-mail. Regional and local authorities do not have any access to the IT system used within the *BZSt*. When corresponding with regional authorities with respect to an international request for information, the *BZSt* uses this secure email system.

273. From the answer provided by peers, there do not seem to have been any instances where the confidentiality of information received by Germany was not guaranteed.

All other information exchanged (ToR C.3.2)

274. The confidentiality provisions in Germany's exchange of information agreements and domestic law do not draw a distinction between information received in response to requests and information forming part of the requests themselves. The rules that apply are therefore the same ones as those described above.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place

Phase 2 Rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

C.4. Rights and safeguards of taxpayers and third parties

The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

Exceptions to requirement to provide information (ToR C.4.1)

275. Each of Germany's exchange of information agreements ensures that the parties are not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or information which is the subject of attorney client privilege or information the disclosure of which would be contrary to public policy.

276. Moreover, section 117(4) of the *Fiscal Code* provides that information requested under a treaty will be exchanged in accordance with the powers of the revenue authorities and the rights and obligations of the persons involved

under domestic law. Thus, the German authorities can decline to exchange information due to attorney client privilege as set out in the *Fiscal Code*.

277. Considering the prior notification procedure that apply in Germany, in cases where the person concerned by the exchange thinks the legal provisions in force do not allow for the envisaged exchange, he has the right to bring the case to a the Tax Court and to appeal to the Federal Tax Court. This system ensures that all exchange of information with a treaty partner will be made in accordance with the domestic and treaty rules governing these exchanges.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place

Phase 2 Rating
To be finalised as soon as a representative subset of Phase 2 reviews is completed.

C.5. Timeliness of responses to requests for information

The jurisdiction should provide information under its network of agreements in a timely manner.

Responses within 90 days (ToR C.5.1)

278. In order for exchange of information to be effective it needs to be provided in a timeframe which allows tax authorities to apply the information to the relevant cases. If a response is provided but only after a significant lapse of time the information may no longer be of use to the requesting authorities. This is particularly important in the context of international cooperation as cases in this area must be of sufficient importance to warrant making a request.

279. According to Germany's treaty partners that have provided information, in most cases Germany is neither able to provide information in 90 days nor do they send a status of update. Over the period 2007-2009, German revenue authorities provided final responses to information requests within 90 days approximately 12% of the time on average. Approximately 35 % of requests are finally responded to between 90 and 180 days and 25% between 6 months and one year.

280. The German authorities mentioned that there can be delays in providing information under the following circumstances:

- where the facts and circumstances related to the request are particularly complicated or difficult, for example where transfer pricing or sale and lease-back transactions are involved; and
- where the response to a request is postponed because an external audit of the taxpayer is planned during which the request will be answered. Collecting the information on the occasion of an audit may improve the quality of the answer to be provided. It may also be warranted in order to save time.
- where criminal proceedings are pending.

281. The assessment team notes that the federal organisation of the German federation could also, partly, explains the situation as:

- there is no direct access to some information sources at the federal level and therefore no possibility for the federal authorities to directly answer simple cases (for instance provision of income tax returns); and
- the gathering of information is the entire responsibility of the *Länder* without any hierarchic ties between the federal level and the regional level. Therefore the collection of information relies on each *Länder* internal policies.

282. During the on-site visit the assessment team noted that the organization of the German competent authority could also be more effective as:

- the time between the reception of an incoming request and the sending of the request to the regional authorities is on average one month time limit, even in the cases where there is no need to request additional information from the requesting party;
- there is no guidance provided to officials processing the requests in the *BZSt* to ensure that the 90 days objective mentioned in the Terms of Reference will be respected to the extent possible. In addition, there are no performance indicators for EOI related work;
- the way the processing of incoming requests by the *Länder* authorities is monitored by the *BZSt* could be improved, in particular to include the sending of systematic reminders to the local offices to speed up the provision of answers;
- the guidance note on administrative assistance published on 25 January 2006 by the Federal Ministry of Finance mentions that local authorities have a three or a six months time limit to answer

the request when the request is received b the enforcing authorities. Additionally it is only in cases where the request was classified as urgent by the *BZSt* that the local revenue authorities are required to provide an update of the status of the request if no answer is furnished within three months. This guidance note is clearly not in line with the international standard on transparency as the time limits stated in this document are not consistent with the 90 days rule; and

- there is no general policy to send a status update to the requesting country when the 90 days have elapsed.

283. During the on-site visit, the German authorities highlighted the fact that a new EOI framework within the European Union will be implemented soon.[21] While the European EOI legislation will be brought to the OECD standard and provide for a new 6 months time limit to answer incoming requests, new common forms to exchange information will be used by EU countries in the coming months making the processing of incoming requests easier. Indeed, these new forms consisting into a set of pre-formatted questions and will avoid any translation and misunderstanding issues. Additionally, the possibility to send these forms and their answers through a new secure IT network will ease and speed up the process considerably. Once implemented the German authorities are confident in their capacity to improve, at least for their EU partners, their answering time limit.

Organisational process and resources (ToR C.5.2)

Exchange between competent authorities

284. The German competent authority received between 1 200 and 2 000 requests a year over the last three years. Although the number of requests received is high, the Unit acting as competent authority within the *BZSt*, with 17 members, seems to be sufficiently staffed as there is no collection of information directly made at the Federal level. Additionally, the German authorities set up a comprehensive training program to ensure a high level of knowledge of the officials dealing with EOI.

285. Upon receipt, the *BZSt* first sends those requests not submitted in German to the translation division. These translation works can take up to one month during which the request is kept at the *BZSt* level.

286. Requests are then screened for requirements in order to be accepted. In particular, the foreseeably relevance standard is checked to ensure that

21. Since the onsite visit, the new EU Mutual Assistance Directive was adopted on 7 December 2010 and will enter into force on 1 January 2013.

the requesting country has a real interest to ask the requested information and that all domestic means were used in the requesting country before the request was sent to Germany. If additional information is needed to process the request, it is German policy to systematically ask the treaty partner to provide this missing information. Indeed, the *BZSt* does not have any possibility to find the missing information as no information on taxpayers is available within its hands.

287. Each request is registered in an IT system where a copy of every documents received is saved on an electronic format. All documents sent in paper format are then destroyed. *Länder* authorities do not have access to this system.

288. The request is electronically (with a secure network) transmitted to the liaison office of the competent *Land* which, after the request is checked, passes it on to the local tax office with the instruction to collect the information from the taxpayer or a third party if it cannot be taken from taxpayers' files themselves. There is, in each local tax office, civil servants in charge of international cases who are, primarily, in charge to process these requests by using the powers granting by section 93 of the German *Fiscal Code*. When the incoming request is received at the local level, it is registered in a local file to give the request a number. It is then checked. Information that is publicly available is not subject to notification obligations.

289. The requested information will be passed on from the local office to the *BZSt* via the liaison office of the respective *Land* where the answer provided will be checked from a legal perspective. When received at the federal level, the case-worker at the *BZSt* verifies quality and comprehensiveness of the information. Thereafter, the information, after translation, will be transmitted to the requesting competent authority.

290. Rules and procedures on EOI are set out in general guidance, published on 25 January 2006. The above guidance serves as the primary instruction material. A further source for reference is the OECD Manual. A working group is currently engaged in updating the Guidance note.

291. Persons obliged to provide information, be they the taxpayer or third parties, may be subjected to coercive measures to compel them to fulfil their obligations. Measures commence with a note that a fine will be levied if information and-/-or documentation is not furnished within a given amount of time. The individual fine may not exceed EUR 25 000. However, it may be levied multiple times. If a levied fine is not collectible, the tax office may request the court to order substitute coercive detention in place of the fine. Such substitute coercive detention will last at least one day and not more than two weeks.

Exchanges taking place under cross border agreements

292. Specific rules are in place under the cross border agreements signed by Germany with its neighbour countries. These agreements are signed under the provisions of the applicable bilateral DTA or/and the EU mutual assistance Directive. In those cases, the requests can directly be sent to the local authorities designated, in the applicable cross border agreement, as competent authority without any need for the requesting authorities to send the requests to the *BZSt*.

293. With Austria there are direct exchanges between the local tax office of Salzburg (Austria) and the regional authorities of Bavaria.

294. In the case of the relationships with the Czech Republic, the local tax office of Chemnitz is acting as competent authority for all requests coming from Saxony while the requests coming from Bavaria can be sent to the Czech authorities by the regional authorities. Nevertheless, in both situations, these requests must, on the Czech side, be sent to the Ministry of Finance.

295. The relationships with France are based on an agreement signed in 2003. Regional authorities of the East side of France are allowed to directly send their requests to the German authorities of Baden Württemberg, Saarland and Rheinland-Pfalz and vice-versa.

296. In the field of these cross border agreements, the time to answer the requests is close to 90 days showing a clear improvement compared to the usual German situation. Several reasons explain this favourable situation:

- quicker contacts as the central level can be bipassed;
- people know each others, facilitating the exchanges;
- meetings organised once a year allow for co-ordination;
- teaching in the other language; and
- no need to translate the requests as there are enough officials at the local level with the required language skills.

EOI training

297. When joining the EOI unit, the new officers do not undergo any formal training program in respect of EOI. However, they receive a carefully planned training and are closely monitored by senior staff during their initiation period.

298. In addition, three staff members have completed the course in international tax law offered by the Federal Finance Academy and there are plans

to send another officer during the course of 2010. Five staff members are taking English courses to ease the running of their missions.

299. Staff of the *BZSt* and the BMF also participate in international meetings in the area of EOI including the OECD's TIES Subgroup and EU ACDT[22] subgroups as well as bilateral meetings with the main EOI partners.

Absence of restrictive conditions on exchange of information (ToR C.5.3)

300. There are no laws or regulatory practices in Germany that impose restrictive conditions on exchange of information.

Determination and factors underlying recommendations

Phase 1 Determination
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review

Phase 2 Rating	
To be finalised as soon as a representative subset of Phase 2 reviews is completed.	
In most cases Germany is not able to respond within 90 days to international requests for information in tax matters and does not commonly provide requesting parties with status updates.	Germany should ensure that its authorities set appropriate internal deadlines to be able to respond to EOI requests in a timely manner, by providing the information requested within 90 days of receipt of the request, or if it has been unable to do so, to provide a status update,

22. Administrative co-operation/Direct taxation.

Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities *(ToR A.1)*		
The element is in place, but certain aspects of the legal implementation of the element need improvement	Germany has no legal requirements that information be maintained identifying the owners of bearer shares.	Germany should ensure that ownership information for all relevant entities and arrangements is available to its competent authorities, including information on owners of bearer shares.
To be finalised as soon as a representative subset of Phase 2 reviews is completed		
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements *(ToR A.2)*		
The element is in place		
To be finalised as soon as a representative subset of Phase 2 reviews is completed		
Banking information should be available for all account-holders *(ToR A.3)*		
The element is in place		
To be finalised as soon as a representative subset of Phase 2 reviews is completed		

Determination	Factors underlying recommendations	Recommendations
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information) *(ToR B.1)*		
The element is in place		
To be finalised as soon as a representative subset of Phase 2 reviews is completed		
The rights and safeguards (*e.g.* notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information *(ToR B.2)*		
The element is in place		
To be finalised as soon as a representative subset of Phase 2 reviews is completed	While the German legal and regulatory framework allows for some exceptions to the notification procedure, these exceptions have never been applied in practice.	The German authorities in charge of EOI should, when necessary, make use of the exceptions to the notification procedure as provided for in the *Fiscal Code*.
Exchange of information mechanisms should allow for effective exchange of information *(ToR C.1)*		
The element is in place	A significant number of treaties signed by Germany are not to the standard (48 of 89), in particular as regards the foreseeably relevance standard.	Germany should include in its DTA negotiation policy, the renegotiation of its treaties that do not meet the standard.
To be finalised as soon as a representative subset of Phase 2 reviews is completed		

Determination	Factors underlying recommendations	Recommendations
The jurisdictions' network of information exchange mechanisms should cover all relevant partners *(ToR C.2)*		
The element is in place		Germany should continue to develop its EOI network to the standard with all relevant partners.
To be finalised as soon as a representative subset of Phase 2 reviews is completed		
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received *(ToR C.3)*		
The element is in place		
To be finalised as soon as a representative subset of Phase 2 reviews is completed		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties *(ToR C.4)*		
The element is in place		
To be finalised as soon as a representative subset of Phase 2 reviews is completed		

Determination	Factors underlying recommendations	Recommendations
The jurisdiction should provide information under its network of agreements in a timely manner *(ToR C.5)*		
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review		
To be finalised as soon as a representative subset of Phase 2 reviews is completed	In most cases Germany is not able to respond within 90 days to international requests for information in tax matters and does not commonly provide requesting parties with status updates.	Germany should ensure that its authorities set appropriate internal deadlines to be able to respond to EOI requests in a timely manner, by providing the information requested within 90 days of receipt of the request, or if it has been unable to do so, toprovide a status update,

Annex 1: Jurisdiction's Response to the Review Report*

Germany will like to express a deep appreciation for the work done by the assessment team in evaluating Germany for this combined report. Germany agrees with the findings of the report.

There are some developments in the EOI network of Germany since the report was finalized.

In the meantime Germany has signed three more TIEAs. Therewith Germany has concluded 20 TIEAs to date.

* This Annex presents the Jurisdiction's response to the review report and shall not be deemed to represent the Global Forum's views.

Annex 2: List of All Exchange-of-Information Mechanisms in Force

Multilateral agreements

Germany is a party to the:

- *EU Council Directive 77/799/EEC* of 19 December 1977 (as amended) concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums. This Directive came into force on 23 December 1977 and all EU members were required to transpose it into national legislation by 1 January 1979. The current EU members, covered by this Council Directive, are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom.
- *EU Council Directive 2003/48/EC* of 3 June 2003 on taxation of savings income in the form of interest payments. This Directive aims to ensure that savings income in the form of interest payments generated in an EU member state in favour of individuals or residual entities being resident of another EU member state are effectively taxed in accordance with the fiscal laws of their state of residence. It also aims to ensure exchange of information between member states.

	Jurisdiction	Type of EoI arrangement	Date signed	Date in force
1	Algeria	DTC	12.11.2007	23.12.2008
2	Argentine	DTC	13.07.1978 16.09.1996	25.11.1979 30.06.2001
3	Armenia (DTC with former USSR)	DTC	24.11.1981	15.06.1983
4	Australia	DTC	24.11.1972	15.02.1975
5	Austria	DTC	24.08.2000	18.08.2002
6	Azerbaijan	DTC	25.08.2004	28.12.2005
7	Bangladesh	DTC	29.05.1990	21.02.1993
8	Belarus	DTC	30.09.2005	31.12.2006
9	Belgium	DTC	11.04.1967/ 05.11.2002/ 21.01.2010	30.07.1969 28.12.2003
10	Bolivia	DTC	30.09.1992	12.07.1995
11	Bosnia-Herzegovina (DTC with former SFR Yugoslavia)	DTC	26.03.1987	25.12.1988
12	Bulgaria	DTC	02.06.1987 25.01.2010	21.12.1988
13	Canada	DTC	19.04.2001	28.03.2002
14	China (without Hong Kong and Macao)	DTC	10.06.1985	14.05.1986
15	Côte d'Ivoire	DTC	03.07.1979	08.07.1982
16	Croatia	DTC	06.02.2006	20.12.2007
17	Cyprus[23, 24]	DTC	09.05.1974	08.06.1977

23. Note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRN C). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".
24. Note by all the European Union Member States of the OE CD and the European Commission: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

	Jurisdiction	Type of EoI arrangement	Date signed	Date in force
18	Czech Republic (DTC with former Czechoslovakia)	DTC	19.12.1980	17.11.1983
19	Denmark	DTC	22.11.1995	25.12.1996
20	Ecuador	DTC	07.12.1982	25.06.1986
21	Egypt	DTC	08.12.1987	22.09.1991
22	Estonia	DTC	29.11.1996	30.12.1998
23	Finland	DTC	05.07.1979	04.06.1982
24	France	DTC	21.07.1959/ 09.06.1969/ 28.09.1989/ 20.12.2001	04.10.1961/ 08.10.1970/ 01.10.1990/ 01.06.2003
25	Georgia	DTC	01.06.2006	21.12.2007
26	Ghana	DTC	12.08.2004	14.12.2007
27	Greece	DTC	18.04.1966	08.12.1967
28	Hungary	DTC	18.07.1977	27.10.1979
29	Iceland	DTC	18.03.1971	02.11.1973
30	India	DTC	19.06.1995	19.12.1996
31	Indonesia	DTC	30.10.1990	28.12.1991
32	Iran	DTC	20.12.1968	30.12.1969
33	Ireland	DTC	17.10.1962	02.04.1964
34	Israel	DTC	09.07.1962/ 20.07.1977	21.08.1966 24.09.1979
35	Italy	DTC	18.10.1989	27.12.1992
36	Jamaica	DTC	08.10.1974	13.09.1976
37	Japan	DTC	22.04.1966/ 17.04.1979/ 17.02.1983	09.06.1967/ 10.11.1980/ 04.05.1984
38	Jersey	TIEA	04.07.2008	28.08.2009
39	Kazakhstan	DTC	26.11.1997	21.12.1998
40	Kenya	DTC	17.05.1977	17.07.1980
41	Kyrgyzstan	DTC	01.12.2005	22.12.2006
42	Korea	DTC	10.03.2000	31.10.2002
43	Kuwait	DTC	18.05.1999	02.08.2002
44	Latvia	DTC	21.02.1997	26.09.1998

	Jurisdiction	Type of EoI arrangement	Date signed	Date in force
45	Liberia	DTC	25.11.1970	25.04.1974
46	Lithuania	DTC	22.07.1997	11.11.1998
47	Luxembourg	DTC	23.08.1958/ 15.06.1973/ 11.12.2009	06.06.1960/ 25.11.1978
48	FYROM (DTC with former SFR Yugoslavia)	DTC	26.03.1987 13.07.2006	25.12.1988
49	Malaysia	DTC	08.04.1977 23.02.2010	11.02.1979
50	Malta	DTC	08.03.2001	27.12.2001
51	Mauritius	DTC	15.03.1978	14.01.1981
52	Mexico	DTC	09.07.2008	15.10.2009
53	Moldova (DTC with former USSR)	DTC	24.11.1981	15.06.1983
54	Mongolia	DTC	22.08.1994	23.06.1996
55	Morocco	DTC	07.06.1972	08.10.1974
56	Namibia	DTC	02.12.1993	26.07.1995
57	Netherlands	DTC	16.06.1959/ 13.03.1980/ 21.05.1991/ 04.06.2004	18.09.1960/ 01.01.1981/ 20.02.1992/ 30.12.2004
58	New Zealand	DTC	20.10.1978	21.12.1980
59	Norway	DTC	04.10.1991	07.10.1993
60	Pakistan	DTC	14.07.1994	30.12.1995
61	Philippines	DTC	22.07.1983	14.12.1984
62	Poland	DTC	14.05.2003	19.12.2004
63	Portugal	DTC	15.07.1980	08.10.1982
64	Romania	DTC	04.07.2001	17.12.2003
65	Russian Federation	DTC	29.05.1996/ 15.10.2007	30.12.1996/ 15.05.2009
66	Serbia (DTC with former SFR Yugoslavia)	DTC	26.03.1987	25.12.1988
67	Singapore	DTC	28.06.2004	12.12.2006

	Jurisdiction	Type of EoI arrangement	Date signed	Date in force
68	Slovak Republic (DTC with former Czechoslovakia)	DTC	19.12.1980	17.12.1983
69	Slovenia	DTC	03.05.2006	19.12.2006
70	South Africa	DTC	25.01.1973 09.09.2008	28.02.1975
71	Spain	DTC	05.12.1966	14.03.1968
72	Sri Lanka	DTC	13.09.1979	20.02.1982
73	Sweden	DTC	14.07.1992	13.10.1994
74	Switzerland	DTC	11.08.1971/ 17.10.1989/ 21.12.1992/ 12.03.2002	29.12.1972/ 30.11.1990/ 29.12.1993/ 24.03.2003
76	Tajikistan	DTC	27.03.2003	21.09.2004
77	Thailand	DTC	10.07.1967	04.12.1968
78	Trinidad and Tobago	DTC	04.04.1973	28.01.1977
79	Tunisia	DTC	23.12.1975	19.11.1976
80	Turkey (terminated with effect as of 01.01.2011)	DTC	16.04.1985	30.12.1989
81	Turkmenistan (DTC with former USSR)	DTC	24.11.1981	15.06.1983
82	Ukraine	DTC	03.07.1995	03.10.1996
83	United Kingdom	DTC	26.04.1964/ 23.03.1970/ 30.03.2010	30.01.1967/ 30.05.1971 30/12/2010
84	United States of America	DTC	29.08.1989/ 01.06.2006	21.08.1991/ 28.12.2007
85	Uruguay	DTC	05.05.1987 09.03.2010	28.06.1990
86	Uzbekistan	DTC	07.09.1999	14.12.2001
87	Venezuela	DTC	08.02.1995	19.08.1997
88	Vietnam	DTC	16.11.1995	27.12.1996
89	Zambia	DTC	30.05.1973	08.11.1975
90	Zimbabwe	DTC	22.04.1988	22.04.1990

Annex 3: List of all Laws, Regulations and Other Material Received

Basic Law (*Grundgesetz* – GG)

German Civil Code

Commercial laws

Commercial Code (*Handelsgesetzbuch* – HGB)

Excerpt of provisions regarding General Partnership

Excerpt of provisions regarding the Limited Partnership

Provisions regarding Commercial Records

Limited Liability Company Act (*GmbH-Gesetz*) – Excerpts

Co-operatives Act (*Genossenschaftsgesetz – GenG*) – Excerpts

German Stock Corporation Act

Taxation Laws

German *Fiscal Code*

Income Tax Act (*Einkommensteuergesetz – EStG*) – Excerpts

Income Tax Act Implementing Ordinance – Excerpts

Corporate Tax Act (*Körperschaftsteuergesetz – KStG*) – Excerpts

Inheritance and Gift Tax Act (*Erbschaft- und Schenkungsteuergesetz – ErbStG*) – Excerpts

Anti-money laundering laws

Money-Laundering Act, 2002

Money-Laundering Act, Amendment, 2008

Other laws

Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*) – Excerpts

Official Regulations for Notaries (*Dienstordnung für Notarinnen und Notare – DONot*) – Excerpts

Bavarian Foundation Act (*Bayerisches Stiftungsgesetz*) – Excerpts

EOI material

EOI guidance note

Direct *Länder* EoI with Austria, France, Czech Republic – Explanation note

Act implementing the EU Directive on mutual assistance

Automatic exchange under EU Savings Directive

Numbers of requests and frequency of answers – statistics

Chart about declined requests

Chart about EoI without prior request

Compilation of EOI Arrangements in Germany's Double Tax Conventions

Companies and partnerships tax return forms

Annex 4: People Interviewed During On-Site Visit

Federal Minister of Finance – Tax policy department

Head of the Unit dealing with EOI and treaty negotiations policy

Deputy Head of Unit dealing with EOI and treaty negotiations policy

Deputy Head of Unit dealing with TIEA negotiations

Federal Minister of Finance – Treasury

Head of Unit dealing with AML issues

Registration authorities

Commercial register authorities of Berlin

Foundations register authorities of Berlin

Foundations register authorities of Potsdam

Financial Unit

Federal central office for taxes – German competent authority

Head of EOI Unit

Deputy Head of EOI Unit

Manager of an EOI team

Regional tax offices of Frankfort, Karlsruhe and Gummersbach

Officials dealing with the collection of information at the local level

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PEER REVIEWS, COMBINED: PHASE 1 + PHASE 2

GERMANY

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 100 jurisdictions which participate in the work of the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the standards of transparency and exchange of information for tax purposes. These standards are primarily reflected in the 2002 OECD *Model Agreement on Exchange of Information on Tax Matters* and its commentary, and in Article 26 of the OECD *Model Tax Convention on Income and on Capital* and its commentary as updated in 2004, which has been incorporated in the UN *Model Tax Convention*.

The standards provide for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. "Fishing expeditions" are not authorised, but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard.

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