

German Cross-border Tax Reporting Requirements: an Urgent Need for Action

Steven Guttman at Vistra in Germany examines how EU cross-border tax rules are being transposed into German law, and the impact they are having on reporting obligations in the country



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While the new notification rules for ‘cross-border tax arrangements subject to reporting requirements’ will come into force next year, there is an urgent need for action right now.

With the enactment of the EU Directive 2018/822 (DAC 6 Official Assistance Directive) on 25 June 2018, the reporting obligations became binding under EU law. The German legislator is obliged to transpose the concrete requirements of the EU Directive into German law by 31 December 2019 at the latest.

The Directive requires that for all structures which have been implemented since 25 June 2018, documentation from tax, legal and business advisers is needed and a report must be submitted by 31 August 2020.

The German implementation draft bill

In September 2018, a first draft discussion on the German bill became public. On 30 January 2019, the Federal Ministry of Finance submitted a draft for further revision and implementation in the relevant government departments. The provisions of the DAC6 Official Assistance Directive are implemented by the German draft, in particular, in the new paragraphs 138d to 138f of the German Fiscal Code, or Abgabenordnung (AO).

To a large extent, the implementation of the EU requirements has been set at a 1:1 ratio, which in principle stipulates a ‘reporting obligation’ (according to the German implementation draft) if a tax structure

is cross-border and fulfils one of the so-called ‘hallmarks’, which will be addressed later.

National structures

Currently, the German implementation draft from January envisages an obligation to report national tax structures which goes beyond EU requirements. Accordingly, § 138j AO is to be introduced in the Fiscal Code, whereby certain domestic tax arrangements must also be reported. If a national structuring fulfils a so-called ‘hallmark’, the national reporting obligation is triggered similar to the reporting obligation for cross-border structuring.

There are seven instead of 16 hallmarks provided for these national structures. Most of these are identical to those for cross-border designs.

Requirements for the reporting obligation

The reporting obligation for cross-border design exists concurrently according to the DAC6 Assistance Directive, as well as according to the German implementation draft if:

- a tax category covered is affected
- a structuring is used
- this structuring is cross-border, and
- this structuring fulfils at least one of the so-called ‘hallmarks’ (listed in Annex IV of the DAC6 Assistance Directive or in the draft transposition),

if necessary with additional consideration of the ‘main benefit’/‘relevance’ test.

If all of the above criteria are met (type of tax, form, cross-border reference, hallmark), then the cross-border design is subject to mandatory reporting.

All direct taxes such as income tax, corporation tax, inheritance tax and gift tax are affected by the reporting obligation. Import VAT, on the other hand, is excluded as an indirect tax. The same applies to consumer taxes, customs duties and social insurance contributions.

Generic and specific hallmarks

The hallmarks are central to the DAC6 Assistance Directive. The reporting obligation stands or falls with them – so understandably these cause the most work and most inconsistencies for its users. The hallmarks are divided into generic and specific classifications.

The **generic hallmarks** are:

- the agreement of a confidentiality clause or a performance-related remuneration
- the standardised documentation or structure of tax planning
- one of a total of five structuring variants described in more detail (use of losses, reclassification of income, circular transactions, inclusion of tax havens, use of preferential tax regimes).

The **specific hallmarks** are defined as structures:

- that in particular take advantage of the residence of payees in non-cooperating jurisdictions
- which have as their objective the multiple deduction of depreciation or the generation of ‘white income’
- which undermine reporting obligations for financial accounts
- with which beneficial owners are disguised, and
- have certain transfer pricing arrangements.

If one of the characteristics of the second group is fulfilled, there is no possibility of proof to the contrary, and the legislator automatically classifies the situation as a tax-avoidance strategy. This does not apply to generic hallmarks, which is why the so-called ‘main benefit test’ must also be fulfilled for them.

“If one of the characteristics of the specific hallmarks is fulfilled, the legislator automatically classifies the situation as a tax-avoidance strategy”

Main benefit test

The main benefit test asks whether the structuring is used to achieve a tax advantage as ‘one of the essential advantages’ of the structuring.

The test is reminiscent of the proof of considerable extra-tax reasons for the choice of a form in § 42 AO. It has been made somewhat more concrete in the German implementation draft (tax advantage not provided for by law, § 138d (3) AO-E).

The ‘main benefit’ test assumes that the tax benefits are weighed against those of the other financial and non-financial benefits. The main benefit test asks the following questions:

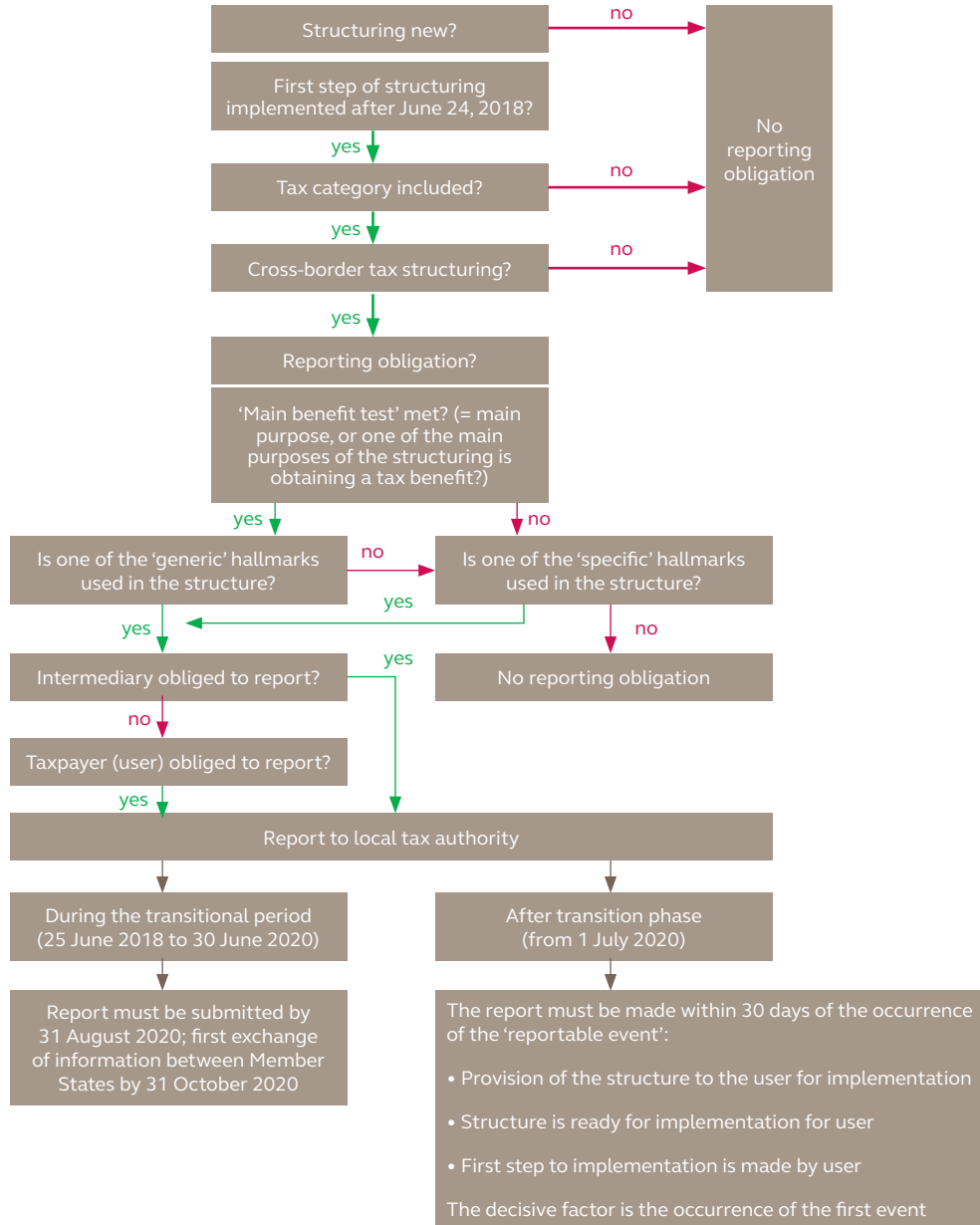
- Is there a tax advantage?
- Is the tax benefit the only or one of the main benefits?

The tax advantage can be the avoidance/reduction of taxation, a tax allowance or an increase in tax losses. These can be either temporary or definitive (e.g. tax deferral or deferred tax refunds).

The way ahead

The draft bill makes it clear that the criticism of practitioners has not been taken in and that the duty of reporting for national structures is to be maintained. The national implementation in Germany has not yet been completed, which must be done by the end of this year. Whether clarity will then prevail or whether even more question marks will be raised among those affected remains to be seen.

Reporting obligations: when reporting is required



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