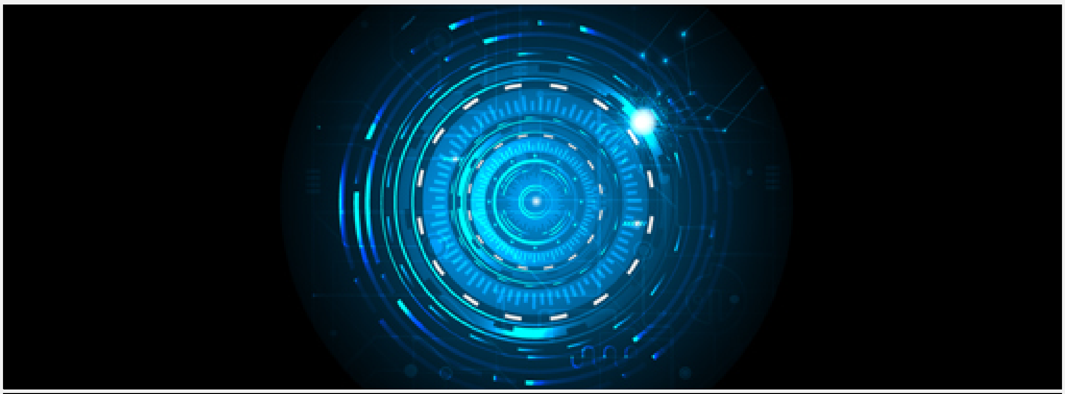

Germany introduces legislation to enact significant changes to transfer pricing rules

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The German Federal Ministry of Finance (MoF) on 10 December published a draft law that would implement the EU anti-tax avoidance directive. The draft includes a far-reaching revision of sec. 1 Foreign Tax Code (FTC) and certain amendments to the General Tax Code (GTC) pertaining to the German taxation of cross-border transactions. Sec. 1 FTC serves as the core legal basis for transfer pricing adjustments in German tax law and defines the main aspects of the German interpretation of the arm's length principle.

The draft law is intended to represent a profound revision reflecting recent developments based on the OECD's base erosion and profit shifting (BEPS) project.

An overview of the most important aspects of the draft law from a German transfer pricing perspective follows.

Function and risk analysis and transfer pricing method

According to the MoF's explanatory memorandum accompanying the draft legislation, the goal of the sec. 1 FTC revision is to introduce a more precise version of the German interpretation of the arm's length principle by comprehensively implementing the principles laid out in the OECD's 2017 transfer pricing guidelines into German law. The MoF proposes the following changes to the existing law:

- Dismissing the current hierarchy of transfer pricing methods;
- Prioritizing the taxpayer's actual conduct, and the facts and circumstances of the business transactions (instead of the contractually agreed conditions); and
- Codifying the functional and risk analysis as the basis to determine if the business transactions are deemed comparable.

The MoF also proposes implementing the internationally adopted "best method rule" as per the draft provisions in sec. 1 para. 3 sentence 5 of the FTC. The draft law requires that the taxpayer select the most appropriate transfer pricing method, considering the advantages and disadvantages of each method. Moreover, the draft states that only information objectively available at the time the agreement regarding the business transaction was concluded may be used to determine the arm's length price; however, the practical consequences of this proposed provision are not further clarified. Finally, in the draft sec. 1 para. 3a FTC, the German MoF proposes the adoption of the interquartile range as the general approach for narrowing the range resulting from benchmarking analyses.

Intangibles

For the first time, the German MoF has introduced a legal definition of the term "intangibles" in the newly proposed sec. 1 para. 3c FTC, based on the OECD transfer pricing guidelines. However, the proposed definition is vague, and it is unclear whether it will achieve the desired outcome.

The draft law proposes the implementation of the so-called DEMPE (development, enhancement, maintenance, protection and exploitation of intangibles) concept – originally developed by the OECD – in German tax law. The DEMPE concept provides for entitlement to returns derived from intangibles based on the performance of essential functions and the bearing of risks, as well as the use of assets in connection with intangibles. However, the draft does not provide clear guidance on the extent of the income allocation associated with the performance of these functions in specific cases. Nevertheless, a mere financing of these functions should not entitle the financer to a return from the financed intangibles but should be remunerated as a mere financing function.

In this context, some relevant questions remain unanswered, such as: Which DEMPE functions, and under which circumstances, would entitle an entity to the returns derived from the exploitation of intangibles, and what is the extent of the entitlement? Under what circumstances is the profit split method applicable, and what criteria should be applied for an appropriate profit allocation? How should losses be treated and what are the consequences of the sale of an intangible for the parties involved? Finally, the draft does not include legally binding clarifications, which would be indispensable for the application of the DEMPE concept in practice.

Price adjustment clause

The new price adjustment clause, outlined in a newly proposed sec. 1 b FTC, would be applicable to all business transactions that involve valuable intangibles. The clause therefore would no longer be applicable only to business transactions with intangibles to which the so-called hypothetical arm's length comparison is to be applied. A significant deviation during the first seven years (more than 20 percent in relation to the original arm's length price based on actual profit development) would trigger the application of the envisaged price adjustment clause. An income adjustment equal to the amount of the deviation would be made in the eighth year after the conclusion of the transaction.

There draft law includes three defined exceptions to this rule:

1. The provision of prima facie evidence of the unpredictability of the circumstances triggering the actual developments;
2. Proof of appropriate consideration of the uncertainty resulting from future developments within the transfer pricing agreement; and
3. A license/IP transfer agreement with revenue-based or profit-based compensation.

The draft does not specify how "proof" under the second exception may be provided. In this respect, prima facie evidence seems possible at best.

The extension of the scope for the application of the price adjustment clause -- based on the current wording of the draft -- contradicts the explanatory memorandum, which appears to assume that the content of the draft corresponds to the provision currently in place. This would have a significant impact, in particular because in practice the arm's length pricing for intangibles transactions is usually demonstrated via databases.

The reduction of the relevant period from 10 to seven years is generally favorable. However, the arm's length nature of this regulation remains questionable, as unrelated parties most likely will not agree on price adjustment clauses covering a seven-year period into the future.

Transfer of functions

The so-called "escape clauses" – currently in force in sec. 1 para. 3 sentence 10 FTC – that allow an individual valuation of the transferred assets instead of a transfer package valuation under certain conditions has been removed in the proposed draft. This would result in a stricter application of transfer of function taxation rules compared to current law. As a result, in the future, cases that involve neither a transfer nor a license of essential intangibles would become subject to the transfer of functions rules.

The draft emphasizes that transfer packages should be valued using economically accepted valuation methods. To this end, the relevant valuation and presumption rules of the current legislative decree (e.g., unlimited capitalization period and tax gross-up), which deviate from the international standard, will no longer apply. Consequently, the currently valid relocation of functions decree would lose its legal basis in this respect.

Financial Transactions

The newly proposed sec. 1a of FTC begins with a so-called treaty override provision, which stipulates that the positions set out in the section apply irrespective of existing double tax treaties.

In our view, the new section would apply only to the interest expenses of German taxpayers (that is, only for inbound transactions). The deductibility of any interest expense incurred would be denied for tax purposes unless prima facie evidence can be presented that:

- The debtor will be able to serve the debt (including both interest payments and principal repayment, according to the explanation to the draft law) over the term of the debt, and was able to do so at the time the loan was granted;

  AND

- The loan is required from a business perspective and the funds are used for the company's business purpose (based on explanations to the draft law, the primary purpose of this provision seems to be the desire to keep the borrowing company from depositing the proceeds from that loan in the group's cash pool).

The arm's length interest rate would resemble the interest rate at which the group could finance itself on the capital market. The guidance on creditworthiness in the draft law suggests that the group rating would apply, unless the borrower's creditworthiness is better than the group's creditworthiness (that is, if the borrower is rated higher than the group); in that case, the borrower's stand-alone rating would apply.

Taxpayers would be free to demonstrate that a different interest rate (a higher interest rate than the interest rate determined with the group rating) is at arm's length. While it would be expected that the tools to demonstrate this would include state-of-the art transfer pricing loan benchmark analyses, the explanation of the draft law does not elaborate on this issue.

In practice, this may effectively lead to a shift of the burden of proof to the taxpayer if the taxpayer deems another approach/interest rate more appropriate than the one determined based on the group rating or based on the interest rate at which the group could refinance itself.

Intragroup financing activities (including the arrangement of loans, back-to-back lending and forwarding, and typical functions of financing companies such as liquidity management, financial risk management, and foreign exchange risk management, which are explicitly mentioned) are generally regarded as routine services. According to the explanations to the draft law, such services, would be remunerated on a cost-plus basis (explicitly referring to the cash pool leader). However, the draft law continues to stipulate that such activities should be remunerated based on a “risk-free interest rate,” based on “term-equivalent governments bonds of the highest creditworthiness,” which we believe to be an obvious contradiction.

Related parties

The draft expands the definition of related parties in sec. 1 para. 2 FTC, partly to avoid the tax evasion that would occur in cases in which related entities issue non-voting shares or enter into voting agreements. Furthermore, a close relationship between entities can now be established through close strategic and professional coordination within a network; however, this is based only on the draft's explanatory memorandum, and no specific basis for this conclusion can be found in the draft law itself.

Master file

The draft law reduces the turnover threshold for the obligation to prepare a master file from EUR 100 million to EUR 50 million, which is likely to result in a considerable increase in the number of taxpayers subject to the master file filing requirement in Germany.

The master file must be filed electronically with the competent tax office "at the latest after the end of a fiscal year.” The draft law does not provide a specific due date for filing the master file, nor a reference to a specific event, such as the date of submission of the annual tax return for the respective fiscal year. It would be virtually impossible to fulfil this obligation if the taxpayer is required to file the documentation at the latest by the beginning of the next fiscal year.

Advance pricing agreements (APAs)

The draft law codifies the requirements and procedure to obtain an APA and creates a legal basis for the APA program? in sec. 89a GTC. The legislature intends to increase legal certainty in cross-border contexts to avoid international disputes.

The newly introduced draft defines a number of prerequisites that must be met before an APA request can be initiated. From a practical point of view, the draft law appears to be too restrictive in this regard. For example, it is unlikely that taxpayers would apply for an APA without the impending risk of double taxation. Unnecessary applications would also be kept in check given the increased obligations for cooperation in an APA procedure and the resulting transparency, as well as the application fees, which must be paid in advance.

The draft increases the basic fee for an APA application from EUR 20,000 to EUR 30,000. The fee may be reduced if the APA follows a coordinated bilateral or multilateral tax audit ("joint audit"). This would create an additional incentive to secure the outcome of a joint audit for the future. In our opinion, joint audits now offer a good opportunity for efficiently avoiding tax conflicts and double taxation in advance. A sort of “fast track” APA procedure would be possible, as a comprehensive fact-finding process would already be performed -- to a certain extent -- in the course of the joint audit.

The newly introduced legislation largely follows the already published information regarding APAs, last updated by the tax authorities in 2018.

Application and legislative decree

The new legislation would enter into force on the day following its promulgation. The following is planned for the application of the new regulations in the transfer pricing area:

- The amended sec. 1 and sec. 1a and 1b FTC would apply from the 2020 assessment period onwards.
- The change in the threshold value for the master file documentation would apply for the first time to fiscal years beginning after 31 December 2020.
- The starting date for the obligation to submit the master file electronically will be determined in a separate legislative decree.
- The new sec. 89a GTC would apply for the first time to applications received by the competent authority after the provision's date of entry into force.

Despite the vast scope of the new rules, the legislature has not addressed some important issues in the draft law in a comprehensive way. To fill those gaps, the draft law provides a legal basis to regulate details of the arm's length principle within the meaning of sec. 1 paragraphs 1, 3, 3a, 3b, 3c, and sec. 5 FTC in a separate legislative decree. In addition, it would also make sense to adapt the existing legislative decrees and MoF circulars in light of the new rules.

Surprisingly, the draft law does not include a corresponding legal basis for the newly created sec. 1a and 1b FTC.

Further legal procedure

The next step in the legislative process is for the cabinet to discuss and vote on the draft law. However, the date of the vote has been postponed indefinitely, possibly to January 2020 (originally, the vote was expected to take place on December 18, 2019). After that, the law will go through further legislative steps and may also undergo revisions before enactment. Despite the tight deadline and given the significance of the planned changes, Deloitte Germany has submitted a preliminary statement to the MoF on the transfer pricing provisions in the draft law.

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