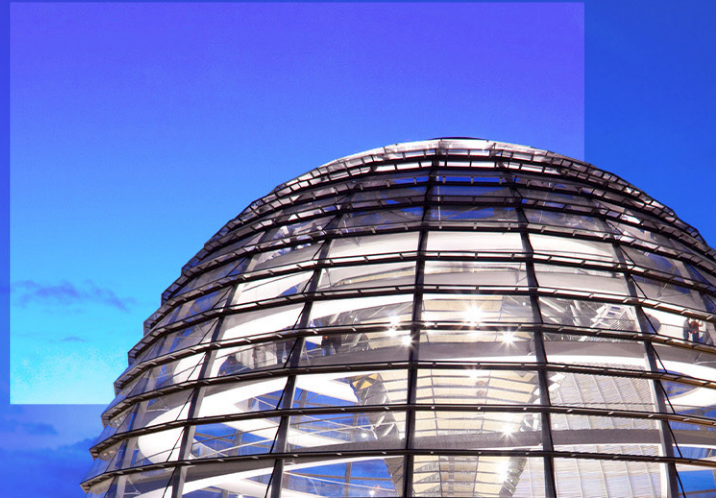


# German Tax Monthly

Information on the latest tax developments  
in Germany

July | 2023



## Country-by-Country Reporting with the USA enters into Force

In the Federal Law Gazette of 10 May 2023, the entry into force of the German-American agreement on the exchange of country-by-country reporting (CbCR) was announced as of 4 April 2023.

However, the automatic exchange of information of the country-specific reports under the agreement will only begin once the agreement on the concrete design of the exchange of information, which has yet to be concluded by the competent authorities, has become effective.

The OECD's BEPS Action Item 13 provides for standardised documentation requirements in the area of transfer pricing for multinational companies as well as the exchange of country-by-country reports between participating states. The aim of this information exchange is to ensure that tax authorities receive the necessary information to maintain the integrity of tax law and that multinational companies comply with their documentation obligations according to a uniform standard.

The United States of America did not sign the "Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports" required for the international automatic exchange.

The agreement between the government of the Federal Republic of Germany and the government of the United States of America on the exchange of country-by-country reports signed on 14 August 2020 creates the basis for a mutual exchange of country-by-country reports with the United States of America also by means of the automatic exchange of information.

Up to now, Germany and the USA had carried out the exchange of the CbCR by way of a spontaneous exchange (see most recently BMF guidance dated 16 March 2023 for financial years beginning in 2021).

## Implementation of Public Country-by-Country Reporting in Germany

The German legislator passed the bill on the implementation of public country-by-country reporting (CbCR). Public CbCR is governed at EU level by Directive (EU) 2021/2101, which Germany is required to implement. The bill was promulgated in the Federal Law Gazette of 21 June 2023.

Public CbCR aims to create transparency regarding income tax information of high-revenue, multinational companies and groups that are either based or which have subsidiaries or branches of a certain size in the European Union. Reporting on income

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tax information is to be broken down by EU Member State and specific other tax jurisdictions in which a business activity is carried out. For all other tax jurisdictions with business activities, the necessary disclosures are to be presented on an aggregated basis.

To implement public CbCR, the German Commercial Code (HGB) will incorporate requirements governing the preparation and publication of reports on income tax information, specifications on the content and form of the reports, requirements for the statutory audit and provisions for sanctions.

An obligation to prepare a report on income tax information and to publish this in the commercial register is relevant for Germany-based standalone companies, ultimate parent companies and medium-sized and large subsidiary companies of ultimate parent companies based in a third country.

The obligation arises if revenue or consolidated revenue in each of two consecutive financial years exceeds EUR 750 million ("high-revenue") and if a business activity is carried out in at least one other state ("multinational"). Credit institutions and large securities institutions are exempt if they publish a country-specific report in accordance with the relevant regulatory requirements.

For non-EU-based standalone companies and ultimate parent companies with comparably high revenues that are active in Germany via a medium-sized or large subsidiary company or a branch of comparable size, the report on income tax information will have to be obtained and published by that subsidiary undertaking or branch. If a legally compliant report cannot be obtained, the subsidiary or the branch must publish an appropriate statement and must itself draw up and publish a report on income

tax information containing all information in its possession.

The required disclosures of the report on income tax information include a description of the business activity, the number of employees, the income, the profit/loss before income tax, the income tax accrued for the reporting period, the income tax paid in the reporting period and the amount of accumulated earnings. For consolidated reports, the data is to include all companies consolidated in the financial statements.

The supervisory board will be required to examine the content of the report on income tax information. In the future, the statutory auditor is also to assess whether the company to be audited was required to publish a report on income tax information in the prior year and whether it has fulfilled that obligation. Information on the result of the audit is to be provided in the auditor's report.

Any infringements of the obligations to prepare and publish the report on income tax information may result in administrative fines and penalties of a maximum of EUR 250,000 each.

The EU Directive is to be transposed into German law by 22 June 2023. The requirements on income tax information reporting apply for the first time to reports on income tax information for financial years beginning after 21 June 2024. The requirements concerning the expanded audit scope are first applicable one year later, i.e., for the audit of financial years beginning after 21 June 2025.

### **German Federal Ministry of Finance: Administrative Guidelines Transfer Pricing**

With date 6 June 2023, the German Federal Ministry of Finance

[BMF] published the new Administrative Guidelines – Transfer Pricing (Verwaltungsgrundsätze Verrechnungspreise, AG TP). The BMF guidance contains regulations for the application of the international arm's length principle with reference to the OECD Transfer Pricing Guidelines (OECD TPG). It also contains the administrative guidelines on transfer of functions.

The updated AG TP 2023 contain, in particular, general explanations on the principles of income correction, the competitive relationship with other correction regulations, the term of a related person and the term of a business relationship (Chapter I). Newly included in the AG TP 2023 are explanations on the recently revised Business Function Relocation Ordinance (Funktionsverlagerungsverordnung, FVerIV). Furthermore, the tax authorities comment on the regulations for the application of the international arm's length principle (Chapters II and III) with reference to the current OECD Transfer Pricing Guidelines 2022, which are attached to the guidance.

After the FVerIV was adapted to the "Act to Modernise the Relief from Withholding Tax" and revised (among other things, concretisation of the provisions on the relocation of business functions as well as legal definition of the so-called transfer package), the incorporation of the FVerIV into the AG TP now follows (Chapter III, Subchapter I). In this part, the BMF comments in particular on the determination and relocation of a business function, the transfer package and the determination of value. In addition, explanatory examples of the FVerIV are attached to the guidance in a further annex.

With regard to financing relationships (Chapter III, Subchapter J), the BFH case law on the determination of arm's length loan interest

on group loans (judgements I R 4/17 of 18 May 2021 and I R 15/21 of 13 January 2022) is adopted into the BMF guidance: According to this, there may be further transactions between the financing company and the company that exercises actual control of the functions or risks associated with the granting of the loan if the granting of the loan and the actual control of the associated functions or risks diverge. Furthermore, both collateralisation and non-collateralisation of loans can be arm's length. Whether a lack of collateralisation of a loan is in conformity with arm's length depends on whether a third party would have granted the loan under the same conditions, taking into account possible risk compensation.

The publication of the AG TP repeals several BMF guidances. The new AG TP are in principle to be applied to all open cases and thus retroactively. The statements contained in Chapter I on the relocation of business functions, on the other hand, are to be applied to relocations of business functions that are realised after 31 December 2021 in accordance with the new FVerIV as of 1 January 2022.

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