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Information on the latest tax developments in Germany

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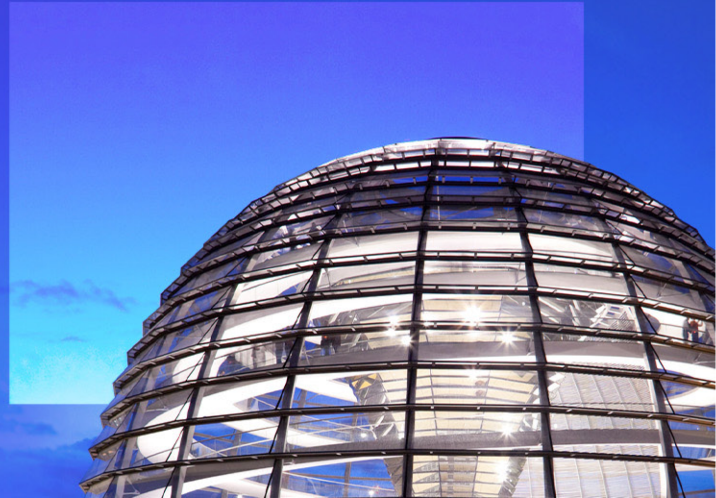

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Bundestag passes Act to implement the EU Minimum Taxation Directive

The German Bundestag passed the "Act for the implementation of the EU Directive to ensure a global minimum taxation" (Minimum Tax Directive Implementation Act) on 10 November 2023. The Act is closely based on the so-called Minimum Taxation Directive of the EU (Council Directive (EU) 2022/2523 of 15 December 2022) and takes into account the OECD model regulations and Administrative Guidances of the OECD.

The significant changes compared to the government draft are:

- Addition of the administrative guidelines for the administration of the GloBE (Global Anti-Base Erosion Rules) model rules adopted by the Inclusive Framework on BEPS on 13 July 2023: Implementation with regard to, among other things, tax allowances; QDMTT (Qualified Domestic Minimum Top-up Tax) that are not levied, e.g. due to so-called investment protection agreements, or are disputed by the group of companies on the basis of such agreements; to mobile employees and assets, finance leases and rental leases; to an ultimate parent company with a dividend deduction system; and reductions to be made and to currency conversions.
- Safe harbour (implementation of the administrative guidelines adopted by the Inclusive Framework on BEPS on 15 December 2022 and 13 July 2023): simplified calculations if various tests are met (routine profit test, materiality threshold test or effective tax rate test) as well as safe harbour for QDMTT and UTPR (Undertaxed Payment Rule).

The Act is intended to transpose the EU's minimum taxation directive into national law. The aim is to implement central elements of the international agreements on Pillar 2 (rules on minimum taxation) of the so-called two-pillar solution of the OECD. The relevant rules are to be regulated in Germany in a new tax law, the Minimum Tax Act (MTA).

Business units located in Germany are subject to tax. Prerequisite is that the consolidated financial statements of the ultimate parent company must show annual turnovers of at least 750 million euros in at least two of the four financial years immediately preceding the financial year (turnover limit).

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Both, internationally and nationally active groups of companies are covered. However, a five-year tax exemption is provided for groups with minor international activities (business units in a maximum of six tax jurisdictions and tangible assets of the foreign business units of a maximum of 50 million euros). Government units, international organisations, non-profit organisations, pension funds, investment vehicles (as ultimate parent company) and real estate investment vehicles (as ultimate parent company) are exempt.

The tax liability of domestically located business units is independent of the respective legal form - i.e. partnerships can also be subject to the minimum tax - and is added to the income tax or corporation tax liability. The taxation is independent of the taxation of the shareholder or partner (separation principle).

The minimum tax is composed of the IIR (Income Inclusion Rule – in German “primary supplementary tax”), the UTPR (in German “secondary supplementary tax”) and the QDMTT (in German “national supplementary tax”). The UTPR is to be applied subsidiarily to the IIR and serves as a catch-all measure, if the low taxation is not already compensated by the application of the IIR.

The calculation of the minimum tax – country-specific calculation of the top-up tax based on a minimum tax rate of 15 percent – is based on GAAP (usually the accounting standard of the parent company) and certain necessary adjustments. Starting point is the so-called “minimum tax net income”, i.e. the result of the commercial balance sheet calculated for the financial year. The minimum tax net income is to be adjusted by certain amounts, including total tax expenditure and dividends.

Accepted accounting standards, according to which the relevant consolidated financial statements are prepared, are defined by the Law as International Financial Reporting Standards (IFRSs or IFRSs adopted by the EU in accordance with Regulation (EC) No. 1606/2002 on the application of international accounting standards) and generally accepted accounting principles of Australia, Brazil, EU/EEA Member States, Hong Kong (People's Republic of China), Japan, Canada, Mexico, New Zealand, India, Republic of Korea, Russia, Switzerland, Singapore, the United Kingdom, the United States of America and the People's Republic of China. The recognized accounting standards also govern the status of a QDMTT.

The Act contains special provisions for the transition year, the transition period and the initial phase. It contains provisions on the use of tax attributes at the time when a group of companies becomes liable to minimum taxation for the first time in relation to a tax jurisdiction (including taking account of recognized deferred taxes when calculating the effective tax rate). This also includes special provisions for intra-group transfers of assets, which, according to the explanatory memorandum, are intended to prevent "step-up models". Transfers after 30 November 2021 will be affected, meaning that companies will have to have data ready for a significantly longer period before the minimum tax rules are applied for the first time.

Furthermore, the internationally agreed simplifications are included, in particular transitional CbCR safe harbour (use of country-by-country reports of multinational groups), transitional rules for blended CFC tax regimes, rules on simplified calculations when different tests are met (routine profit test, materiality threshold test or effective tax rate test) and simplifications for insignificant business units, safe harbour regulation for QDMTT, which applies not only to EU member states, but also to third countries, as well as UTPR safe harbour.

The central actor in the national taxation procedure is the so-called minimum tax group. Several taxable business units of a group of companies form a minimum tax group. The IIR, UTPR and QDMTT amounts of the business units belonging to the group are attributed to the group parent. All business units as well as joint venture and joint venture subsidiaries are obliged to provide the group parent with the information required to prepare the tax return. The group parent has to file an annual tax return and owes the minimum tax.

In addition, an annual minimum tax report must be submitted to the Federal Central Tax Office (BZSt), inter alia, for purposes of international exchange. The intentional or reckless omission, incomplete or untimely submission of the minimum tax report is an administrative offence, which can be punished with a fine up to 30,000 euros. However, for a transitional period – financial years beginning on or before 31 December 2026 and ending before 1 July 2028 – there shall be no administrative offence if it is proven that appropriate measures have been taken to justify an untimely or not prescribed manner or an incorrect or incomplete transmission.

In principle, the Minimum Tax Act is to be applicable for the first time for financial years beginning after 30 December 2023. The UTPR, on the other hand, will only apply one year later, for the first time for business years beginning after 30 December 2024.

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In line with international accounting standards, a mandatory exception to the recognition (recognition and measurement) of deferred taxes resulting from the application of the German Minimum Tax Act or corresponding foreign tax laws is included. For annual and consolidated financial statements for a financial year ending after 30 December 2023, new disclosures are required in the appendix.

Accompanying measures connected with the implementation of the Minimum Tax Directive have been implemented: The low tax threshold is uniformly lowered to 15 percent for both the royalty deduction limitation rule (§ 4j Income Tax Act) and the CFC taxation. The amendments are applied for the first time in 2024.

After the Bundestag, the Act still has to be passed by the Bundesrat. This could happen on 15 December 2023. After the resolutions by the Bundestag and the Bundesrat, the Act still has to be promulgated in the Federal Law Gazette. The legislative process can therefore still be concluded in time this year.

Bundestag passes Growth Opportunities Act

The German Bundestag passed the"Act to strengthen growth opportunities, investment and innovation as well as tax simplification and tax fairness" (Growth Opportunities Act).

The Act contains a large number of amendments in various areas of tax law. Extensive changes were made in the course of the Bundestag resolution. These are the main contents at a glance:

1. Restrictions on the deduction of interest expenses

Adjustments to the interest limitation rule (IRL)

- Compared to the government draft: cancellation of the planned "anti-fragmentation rule" (grouping of similar businesses in the tax-free amount)
- Exceptions to the IRL will only apply to current interest expenses of a year
- Adjustments to the exemption regulations (stand-alone clause and equity escape) in line with the ATAD requirements
- Extension of the concept of interest (e.g. also economically equivalent expenses and other expenses in connection with the procurement of borrowed capital)

Financial transactions

- Cancellation of the planned interest rate barrier
- Instead: Addition of regulations on financing transactions for multinational corporate groups (group rating, low-function and low-risk services of intra-group financing companies) to the Foreign Transactions Tax Act
- Regulations already apply from 2024

2. Improvement of the tax loss deduction

Loss carry-back

- Extension to 3 years (for the first time for losses in 2024)
- Increase to 10 million euros (20 million euros in the case of joint assessment) applicable also for 2024 and 2025 (government draft: permanent application); from 2026, a maximum amount of EUR 5 million applies (or EUR 10 million for joint assessment)

Loss carry-forward (unlimited loss offset only up to 1 million euros, above that only on a pro-rata basis)

- Temporary increase of the share for 2024 to 2027 from currently 60% to 75% (government draft: 80%)

3. Climate protection investment premium

- For all taxable enterprises irrespective of legal form, size and activity
- Funding period: Limited to approx. six years; In principle, investments started after 29 February 2024 (government draft: 31 December 2023) and completed before 1 January 2030
- Amount of funding: 15% and a maximum of 30 million euros per beneficiary for the entire funding period
- Beneficiary investments:
  - Acquisition and production of new depreciable movable assets of fixed assets as well as measures on existing movable assets of fixed assets
  - the assets must be used in the business for two years; new: can be used not only in Germany, but also in a permanent establishment in an EU/EEA country or Switzerland
  - the assets must serve to improve energy efficiency in the company, be included in a savings concept (prepared with the help of an energy consultant or an in-house energy manager) and be able to exceed applicable EU standards
  - acquisition/production costs of at least 5,000 euros per asset
- Application: can generally be submitted at the time of pur-

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chase/production until 31 December 2031; Maximum of four applications per eligible person in the entire funding period
- Receipt as a contribution without affecting profit or loss

4. Improvement of depreciation possibilities and further investment incentives

Improvement of depreciation possibilities

- Temporary reintroduction of **declining-balance depreciation** of up to 25%, up to a maximum of 2.5 times straight-line depreciation, for movable fixed assets acquired after 30 September 2023 and before 1 January 2025; introduction of declining-balance depreciation of 6% for residential buildings whose construction is started after 30 September 2023 and before 1 October 2029 or whose acquisition lies within this period
- **Special depreciation for new rental housing:** Extension of the increased depreciation (up to 5% annually) for certain climate-friendly new buildings with building applications / building notifications before 1 October 2029 (currently 1 January 2027); upper construction cost limit will be significantly increased to EUR 5,200 per square metre (previously EUR 4,800) and the maximum assessment basis for special depreciation to EUR 4,000 per square metre (previously EUR 2,500)
- **Immediate depreciation of low-value assets**: Increase of the limit of acquisition or production costs (from previously 800 euros) to 1,000 euros; from 2024
- **Collective item method**: Increase of the limit of acquisition or production costs (from previously 1,000 euros) to 5,000 euros; reduction of the liquidation period (from previously five years) to three years; from 2024
- **Special depreciation** (in the year of acquisition and in the four following years): Increase from currently up to 20% of the investment costs to up to 50%; from 2024

Expansion of research allowance (in principle from 2024)

- Among other things, expansion of the eligible expenses to include the reduction in value of depreciable movable assets of the fixed assets used in the research and development project benefiting from the subsidy, which are necessary and indispensable for the implementation of the research and development project
- Increase of the eligible cost share for contract research from 60% to 70%
- Increase of the maximum assessment basis for the research allowance from currently four million euros to twelve million euros

5. Partnerships

Option for corporate income taxation

- Access for trading partnerships and partnerships and registered civil law companies (government draft: all partnerships)
- Also, for newly established companies and for corporations that have been transformed into partnerships
- Improvements to the fictitious distribution of retained profits
- Entry into force on the day after promulgation of the Act

Adjustments to the Act to Modernise the Law on Partnerships

- Continuation of the joint ownership principle in income taxation
- Procedural changes for associations of persons with legal capacity, among others: Fulfilment of tax obligations by the legal representatives; tax declaration obligation should be primarily incumbent on the association of persons, the association of persons is held liable for late payment surcharges, notification of administrative acts to the association of persons, right of objection/appeal of the association of persons itself
- Continuation of tax benefits for partnerships with regard to real estate transfer tax

After the Bundestag, the Act still has to be passed by the Bundesrat. However, at its meeting on 24 November 2023, the Bundesrat decided to request that the Mediation Committee be convened with the aim of fundamentally revising the Act. Nevertheless, the legislative process can still be completed before the end of the year, assuming an agreement is reached in the Mediation Committee.

Bundestag and Bundesrat pass Future Financing Act

The German Bundestag and Bundesrat passed the Law on the Financing of future-proofing Investments (Future Financing Act).

The Future Financing Act contains measures in financial market law, company law and tax law that are intended to strengthen the performance of the German capital market and increase the attractiveness of Germany as a financial location for both national and international companies and investors. In particular, start-ups, growth companies and small and

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medium-sized enterprises (SMEs) as drivers of innovation are to be facilitated in accessing the capital market and raising equity capital.

In the area of tax law, a reform of the tax treatment is to facilitate employee share ownership in particular with effect from 2024.

Tax exemption for the transfer of employee share ownership at a discount

The tax-free maximum amount is raised from 1,440 to 2,000 euros. The Bundestag has not adopted the requirement of additionality ("in addition to the salary owed anyway") previously provided for in the draft bill. Deferred compensation thus remains possible. In addition, the originally planned three-year holding period has been waived.

Deferral model for employee share ownerships provided at a discount

The scope of application of the preferential treatment is extended in that in future it will no longer be based on the single SME threshold but on multiplied SME thresholds. The companies must then have fewer than 1,000 employees (instead of the previous 250 employees) and may have an annual turnover of no more than 100 million euros (instead of the previous 50 million euros) or an annual balance sheet total of no more than 86 million euros (instead of the previous 43 million euros).

In this context, the period in which exceeding the threshold is harmless is also extended. In future, the preferential treatment can be claimed if the threshold was not exceeded at the time of the transfer of the share or in one of the six preceding calendar years (7-year period, previously 2-year period). So far, "young" companies whose date of foundation is no more than 12 years ago are eligible. In future, the date of foundation may be up to 20 years before the date of the transfer of the share.

The tax exemption is extended to cases where the company shares are not granted by the employer itself, but by the (founding) partners of the employer. The extension of the deferral model provided for in the government draft to cases in which shares in group companies are granted was not included in the adopted law. On the other hand, shares with restricted transferability, which - according to the explanatory memorandum - play a particularly important role for start-ups, are now included.

In future, the final taxation of the non-cash benefit does not take place after twelve years, but only after 15 years (in the previous draft: 20 years), if the employee has not sold the shareholding or terminated his employment relationship beforehand.

Finally, it is possible to further postpone taxation for the facts "expiry of 15 years" and "termination of employment relationship" (dry income) if the employer irrevocably declares that he assumes liability for the wage tax (optional liability regulation). In these cases, only the later fact of the actual "transfer or sale" triggers taxation.

Lower Tax Court of Cologne (2 K 1315/13): German Anti-Treaty Shopping Rule

In its judgement of 21 June 2023 (2 K 1315/13), the Lower Tax Court of Cologne decided that it is possible to take the circumstances of the group of companies into consideration in the context of the new German Anti-Treaty Shopping Rule (§ 50d (3) EStG new version) as part of the so-called motive test.

Certain payments from Germany to other countries are generally subject to withholding tax (WHT), irrespective of an existing Double Tax Treaty (DTT). The foreign payee can apply for a refund of the German withholding tax to the German Federal Central Tax Office (BZSt). However, it must fulfill certain substance requirements or prove that none of the main purposes of its interposition is to obtain a tax advantage (motive test) in accordance with the German anti-treaty shopping rule (§ 50d (3) German Income Tax Act [EStG]).

In 2017 and 2018, the European Court of Justice (ECJ) ruled on dividend payments that § 50d (3) EStG (old version) is contrary to European law due to the strict substance requirements (C-504/16 and C-613/16 as well as C-440/17). § 50d (3) EStG old version was therefore revised. The new version came into force on 9 June 2021 and is generally applicable to all outstanding cases. In order to avoid an impermissible retroactive effect in cases in which the new regulation would place the taxpayer in a worse position, a more favorable review is provided for if the payments were received before the new version came into force. In these cases, the old version continues to apply.

In the case in dispute, the plaintiff was located in Cyprus and operated in the international shipping industry. In the years in dispute, 2010 and 2011, it earned limited taxable interest from a convertible bond, which was subject to WHT in Germany. The plaintiff had no substance. However, a sister company of the plaintiff, which was also located in Cyprus, had its own offices and staff. In addition, the offices were equipped with the necessary work facilities and communication equipment.

It was disputed whether the refund claim under the DTT Germany - Cyprus pursuant to § 50d (3) EStG old or new version was to be denied. In the first course of

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law, the Lower Tax Court of Cologne decided, without further examination, that the refund claim existed due to the old version being contrary to European law. In this context, it also had to be considered that the group of companies to which the plaintiff belonged had a company in its country of residence, Cyprus, which was free of any doubts regarding abuse.

However, in its ruling of 21 December 2021 (I R 27/19), the BFH had considerable doubts as to whether the ECJ's case law on dividends could be transferred to the interest at issue in the dispute without further analysis. Furthermore, a blanket reference to the economic activity of another group company in the recipient's country of residence is not sufficient. Rather, a comprehensive examination of the relevant group relationships would be required, which relates to aspects such as the organizational, economic, or other relevant characteristics as well as the structures and strategies of this group. The Lower Tax Court of Cologne had also not examined whether the substance requirements pursuant to § 50d (3) EStG (new version) were fulfilled. The BFH therefore referred the case back to the Cologne tax court as the court of fact.

The Lower Tax Court of Cologne has now decided in the second course of law that the plaintiff is entitled to relief in accordance with § 50d (3) EStG (new version), as none of the main purposes for the plaintiff's involvement was to obtain a tax advantage and thus the counter-evidence of Section 50d (3) sentence 2 EStG (new version) could be provided. According to the new version of § 50d (3) EStG, it is now possible to take all companies in the group into account when examining the counter-evidence. Characteristics of a group company in the same country (in particular the characteristics of an actively operating sister company) could therefore be included for the counter-evidence (group view).

Lower Tax Court of Münster (10 K 2613/20 F): § 4i EStG (Avoidance of Double-Dip Arrangements) not applicable in the Case of Dutch Group Taxation

In its judgement of 31 August 2023, the Lower Tax Court of Münster decided that § 4i of the German Income Tax Act (EStG) (avoidance of double-dip arrangements) does not apply in the case of Dutch group taxation.

In German tax law, there is the particularity that debt capital of a corporation to finance the participation in a German partnership constitutes so-called special business assets. This means that the loan is not recognized as a liability in the regular balance sheet, but in the so-called special balance sheet, which is kept for the partnership. The interest payments constitute special business expenses, which are tax deductible at the level of the partnership. However, if the corporation is a foreign corporation, its country of residence generally does not recognize special business assets. The consequence would be that the interest payments can also be deducted for tax purposes in the foreign state (so-called double-dip).

To avoid such arrangements, § 4i EStG stipulates that expenses may not be deducted as special business expenses in Germany if they also reduce the tax base in another country.

In the case of dispute, a corporation based in the Netherlands (C-B.V.) was the 100% limited partner in the plaintiff (German partnership). The shares in C-B.V. were held 100% by a corporation (F-B.V.) also domiciled in the Netherlands. C-B.V. and F-B.V. were subject to Dutch group taxation for income tax purposes (so-called "fiscale eenheid") in the years in dispute. The loans granted by F-BV to C-BV served to provide the plaintiff with capital. Corresponding interest payments were considered by the plaintiff as special business expenses to reduce the tax profit.

The tax office took the view that although the loan interest paid by C-B.V. to F-B.V. constituted special business expenses at the level of the plaintiff, they were equally considered as a reduction in tax profit under the Dutch group taxation system "fiscale eenheid". Therefore, there is a reduction in the assessment basis both in Germany and abroad, which opens up the scope of application of § 4i EStG. In the opinion of the tax office, an effective tax reduction in the other state is not required, but rather the actual reduction of the tax base is sufficient, which is also to be affirmed in cases of consolidation within the framework of group taxation.

The Lower Tax Court of Münster, however, is of the opinion that § 4i EStG is not applicable to the case in dispute, as the tax base in the Netherlands was not reduced by the special business expenses. The provision of § 4i sentence 1 EStG expressly only refers to expenses that must lead to a reduction in the tax base in another country. In this respect, both the interest expenses of C- B.V. and the interest income of F- B.V. are, in the opinion of the court, two different situations which must also be assessed separately from each other for tax purposes. However, intra-group transactions are not considered in the context of Dutch group taxation. This means that mutual receivables and debts within this group no longer exist for tax purposes. This "non-existence" of intra-group transactions could therefore not lead to a reduction in the tax base for interest

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expenses. The appeal to the BFH was allowed.

Note: § 4k EStG (avoidance of hybrid mismatches - deduction / non-inclusion) was not yet applicable in the years in dispute. Since the 2020 assessment period, this prohibition on the deduction of business expenses must also be observed.

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