

## **Ordinance of the Federal Ministry of Finance**

### **Ordinance governing the application of the arm's length principle in accordance with section 1 (1) of the External Tax Relations Act<sup>1</sup> in cases of cross-border relocations of business functions (Business Function Relocation Ordinance (*Funktionsverlagerungsverordnung – FVerIV*))**

#### **As at:**

On the basis of section 1 (6) of the External Tax Relations Act of 8 September 1972 (Federal Law Gazette I, p. 1713), as revised by Article 5 no 1 (c) of the Act of 2 June 2021 (Federal Law Gazette I, p. 1259), the Federal Ministry of Finance orders as follows:

#### **Division 1**

#### **General provisions**

#### **§ 1**

#### **Definitions**

(1) A business function is a business activity consisting of a combination of similar operational tasks performed by certain units or departments of an enterprise. It forms an organic part of a company without constituting a branch of activity for taxation purposes.

(2) The relocation of a business function within the meaning of section 1 (3b) of the External Tax Relations Act is deemed to exist if a business function, including the corresponding opportunities and risks as well as any assets or other benefits transferred or licensed along with it, is transferred or licensed in whole or in part, such that the transferee enterprise is able to perform this business function or expand an existing business function. The relocation of a business function as a whole, pursuant to sentence 1, constitutes a transfer package. Business transactions realised within five fiscal years must be consolidated as a single business function relocation at the time at which the requirements of sentence 1 have been met in economic terms on account of their joint realisation.

(3) In business function relocations, intangible assets are significant within the meaning of section 1 (3b) sentence 2 of the External Tax Relations Act if they are required for the relocated business function and their arm's length price amounts to a total of more than 25% of the sum total of the individual prices of all assets and other benefits of the transfer package and if this is plausible, taking into account the consequences of the business function relocation as documented in the records made pursuant to section 2 sentence 2.

(4) If a transferee enterprise independently provides the services previously rendered exclusively to the transferring enterprise, in whole or in part, to other enterprises at prices that exceed the remuneration in accordance with the cost plus method, or that are to be set higher in accordance with the arm's length principle, then, at the time the service previously provided gratuitously by the transferring enterprise is first rendered to the other enterprises, remuneration in accordance with section 2 must be charged for the assets and other

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<sup>1</sup> *Außensteuergesetz*

benefits made available; the relevant assets and other benefits are deemed to be a transfer package provided the other requirements for this have been met.

(5) A business function relocation as defined in subsection (2) does not exist if, despite the remaining requirements of subsection (2) sentence 1 having been met, there is no reduction in the transferring enterprise's performance of the business function in question within a period of five years of the business function being assumed by the transferee enterprise (duplication of business functions). If there is such a reduction within this period, then at the time at which such reduction occurs, a single business function relocation is deemed to exist, unless the taxable person can furnish evidence that there is no direct economic link between this reduction and the duplication of business functions.

## **Division 2**

### **Transfer package calculation**

#### **§ 2**

##### **Value of the transfer package**

The arm's length range (section 6) must be determined, taking into account all circumstances of the specific case, on the basis of a business-function and risk analysis before and after the business function has been relocated, and in doing so the options realistically available must be taken into account alongside location-based advantages or disadvantages, synergy effects and tax effects. The starting point for calculation purposes are the records used as the basis for the corporate decision to relocate the business function. A capital-based valuation method must be used to calculate the arm's length range. The anticipated financial surpluses of the enterprises involved in accordance with the criteria set out in section 1 (1) sentence 3 of the Externals Tax Relations Act, appropriate capitalisation interest rates (section 4) and a capitalisation period that is dependent on the circumstances of the business function being performed (section 5) must be used as a basis for the calculation.

#### **§ 3**

##### **Component parts of the transfer package**

(1) If different arrangements are made for individual parts of the transfer package, or if such arrangements are to be assumed in line with the arm's length principle, then arm's length prices must be applied to all parts of the transfer package which correspond to the value of the transfer package as a whole in accordance with section 2.

(2) In the cases set out in section 1 (2) sentence 3, section 1 (4) and section 1 (5) sentence 2, the transfer prices for business transactions that led to the relocation of a business function must be established in accordance with the arm's length principle in such a manner that, together with the originally determined transfer prices, they correspond to the value of the transfer package as a whole determined in accordance with section 2.

§ 4

**Capitalisation interest rate**

To determine the appropriate capitalisation interest rate, taking into account the principles of equivalence, the interest rate for a risk-free investment must be assumed, on which a surcharge must be imposed that is adequate for the risk in question. The term of the comparable risk-free investment depends on how long the assumed business function is expected to be performed. The surcharge must be calculated in such a manner as to take into account the circumstances relevant for risk assessment in comparable cases between unrelated third parties for both the transferee and the transferring enterprise.

§ 5

**Capitalisation period**

If no substantiated reasons are presented for a specific capitalisation period that is dependent on the circumstances of the business function being performed, an unlimited capitalisation period must be used as a basis.

§ 6

**Determining the arm's length range**

(1) For a transferring enterprise that can expect financial surpluses from the business function, the lower limit of the arm's length range (minimum price) in accordance with section 1 (3a) sentence 5 of the External Tax Relations Act amounts to the compensation for the loss or reduction of the financial surpluses plus any closure costs that may be involved. The cash value is decisive. Any realistically available options that the transferring enterprise would have as an enterprise independent of the transferee enterprise must be taken into account without questioning the entrepreneurial decision-making powers of the transferring enterprise.

(2) In cases where the transferring enterprise is no longer in a position to perform the business function itself with its own resources, for legal, factual or economic reasons, the minimum price is the liquidation value.

(3) If an enterprise relocates a business function from which it can expect to make losses on a long-term basis, it may be considered appropriate behaviour of a prudent and conscientious manager of a transferring enterprise, in order to limit losses, to accept as a minimum price a remuneration for the relocation of the business function that only partially covers the closure costs, or to make a compensation payment to the transferee enterprise for assuming the source of losses.

(4) The cash value of the anticipated financial surpluses of the transferee enterprise from the business function assumed generally represents the upper limit of the arm's length range (maximum price) as defined in section 1 (3a) sentence 5 of the External Tax Relations Act. Any options realistically available that the transferee enterprise would have as an enterprise independent of the transferring enterprise must be taken into account without questioning the entrepreneurial decision-making powers of the transferee enterprise.

(5) In the cases of subsections (2) and (3), above, too, in which the minimum price of the transferring enterprise amounts to zero or less, the arm's length principle must be used to ascertain what price an independent third party would be prepared to pay for assuming the business function.

§ 7

**Claims for damages, indemnification and compensation**

Statutory or contractual claims for damages, indemnification and compensation as well as claims to which third parties independent of one another would be entitled if the options available to them were contractually or de facto precluded can be used as a basis for taxation of a business function relocation if the taxable person can furnish plausible evidence that such third parties would have acted in a comparable manner in similar circumstances. Furthermore, the taxable person must also prove that no significant intangible assets or other benefits were transferred or licensed, unless the transfer or licensing is the necessary consequence of claims within the meaning of sentence 1.

**Division 3**

**Final provisions**

§ 8

**Application to cases involving permanent establishments**

The provisions of this ordinance apply accordingly insofar as, pursuant to section 1 (5) of the External Tax Relations Act, section 1 (3b) of the Act applies to a business relationship within the meaning of section 1 (4) sentence 1 no 2 of the Act.

§ 9

**Application provision**

This Ordinance applies only to the assessment periods that begin after 31 December 2021.

§ 10

**Entry into force, expiration**

This ordinance enters into force on the day following its promulgation. The Business Function Relocation Ordinance of 12 August 2008 (Federal Law Gazette I, p. 1680), amended by Article 24 of the Act of 26 June 2013 (Federal Law Gazette I, p. 1809), expires at the same time.

The German Bundesrat has approved this Ordinance.