

Ordinance on the application of the arm's length principle to permanent establishments under section 1(5) of the External Tax Relations Act (*Außensteuergesetz*)¹

**Ordinance on the allocation of profits of permanent establishments
(*Betriebsstättengewinnaufteilungsverordnung*)**

Complete text in the version applicable between 20 July 2017 and 2 January 2018

Ordinance on the application of the arm's length principle to permanent establishments under section 1(5) of the External Tax Relations Act (*Außensteuergesetz*)

Enacting clause

By virtue of section 1(6) of the External Tax Relations Act, added by Article 6(1)(e) of the Act of 26 June 2013 (Federal Law Gazette I, p. 1809), the Federal Ministry of Finance issues the following ordinance:

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¹ This working translation of the *Verordnung zur Anwendung des Fremdvergleichsgrundsatzes auf Betriebsstätten nach § 1 Absatz 5 des Außensteuergesetzes (Betriebsstättengewinnaufteilungsverordnung)* is provided by the Language Service of the Federal Ministry of Finance. Only the German text of this ordinance is authentic.

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Section 1 – Attribution of income to a permanent establishment

(1) ¹In order to attribute income for tax purposes to a permanent establishment of an enterprise under section 1(5) of the External Tax Relations Act, a function and risk analysis must be performed of the business activities of the permanent establishment (section 12 of the Fiscal Code (*Abgabenordnung*)) as part of the enterprise's business activities. ²Building on the function and risk analysis under sentence 1, a comparability analysis of the permanent establishment's business activities must be performed in order to determine transfer prices for the permanent establishment's business relations, as defined in section 1(4) of the External Tax Relations Act, that comply with the arm's length principle (section 1(1) sentence 1 of the External Tax Relations Act).

(2) On the basis of the function and risk analysis of the permanent establishment's business activities,

1. the people functions (section 1(5) sentence 3 no. 1 of the External Tax Relations Act) to be attributed to the permanent establishment or to the rest of the enterprise must be determined, particularly the significant people functions,
2. assets (section 1(5) sentence 3 no. 2 of the External Tax Relations Act) as well as opportunities and risks (section 1(5) sentence 3 no. 3 of the External Tax Relations Act) must be attributed to the permanent establishment based on the significant people functions,
3. free capital (section 1(5) sentence 3 no. 4 of the External Tax Relations Act) must be attributed to the permanent establishment based on the assets attributed to it as well as the opportunities and risks attributed to it,
4. liability items must be attributed to the permanent establishment insofar as this is necessary due to the attribution of assets, of opportunities and risks, and of free capital,
5. business transactions of the enterprise with independent third parties and with related parties as defined in section 1(2) of the External Tax Relations Act must be attributed to the permanent establishment and
6. dealings as defined in section 1(4) sentence 1 no. 2 of the External Tax Relations Act that the permanent establishment has with the rest of the enterprise must be determined.

Section 2 – Definitions

(1) For the purposes of this ordinance, an enterprise is domestic if its place of effective management is located in Germany.

(2) For the purposes of this ordinance, an enterprise is foreign if its place of effective management is located outside Germany.

(3) ¹A people function is a business activity performed for the enterprise by the enterprise's own personnel. ²The following business activities in particular are deemed to be people functions:

1. use,
2. acquisition,
3. production,
4. management,
5. sale,
6. development,
7. protection
8. risk management and
9. the decision to undertake changes with regard to opportunities and risks.

(4) ¹Own personnel includes any individual who performs activities for the enterprise on the basis of a partnership or employment agreement with the enterprise. ²An individual is also part of an enterprise's own personnel if another enterprise entered into a contract agreeing to hire out the individual to the enterprise as personnel and the agreement is restricted to such hiring. ³An individual who performs activities for the enterprise without any contractual agreement is part of the enterprise's own personnel if the individual

1. is an entrepreneur or partner or shareholder of the enterprise or
2. is related to the enterprise or the enterprise's partners or shareholders as described in section 1(2) of the External Tax Relations Act.

(5) ¹A people function of a permanent establishment is deemed to be significant for the attribution of assets, of opportunities and risks, and of business transactions if the performance of this people function in the ordinary course of business is most important for the attribution item in question, in relation to the people functions performed in other permanent establishments of the enterprise.

²Not deemed to be significant are, in particular, people functions that, in relation to the attribution item,

1. are merely supportive in nature or

2. relate solely to the enterprise's general business policy.

(6) Assets as described in this ordinance are economic goods and benefits. Assets include, in particular,

1. tangible assets,
2. intangible values, including intangible assets,
3. stakes and
4. financial assets.

Section 3 – Auxiliary and ancillary accounts

(1) ¹Auxiliary and ancillary accounts must be prepared for a permanent establishment at the beginning of each fiscal year, updated during the fiscal year, and closed at the end of the fiscal year.

²The result for the permanent establishment must be included when closing the auxiliary and ancillary accounts. ³The auxiliary and ancillary accounts must have been prepared by the date of filing a tax return

1. that the enterprise is obliged to file (section 149 of the Fiscal Code (*Abgabenordnung*)) and
2. in which the permanent establishment's income must be taken into account.

(2) ¹The auxiliary and ancillary accounts must include all components to be attributed to the permanent establishment based on its people functions (section 4). ²This includes

1. assets (sections 5 to 8) that would have to be recognised by an independent enterprise in the determination of profit for tax purposes,
2. free capital (sections 12 and 13),
3. remaining liability items (section 14) and
4. business income and business expenses relating to components as described in sentence 1.

³The auxiliary and ancillary accounts must also include notional business income and notional business expenses arising on the basis of dealings (sections 16 and 17).

(3) The records to be prepared and submitted upon request under section 90(3) of the Fiscal Code must also set out

1. the reasons for the attribution of components, including the reasons for the attribution of the enterprise's business transactions (section 9), opportunities and risks (section 10) and hedging transactions (section 11) and

2. the reasons for the existence of dealings (sections 16 and 17).

(4) ¹If a permanent establishment is formed, the first auxiliary and ancillary accounts for this permanent establishment must be prepared as of this date. ²If a permanent establishment is terminated, the auxiliary and ancillary accounts must be closed as of this date. ³The assumed transfer of assets and liability items as well as of opportunities and risks between the permanent establishment and the rest of the enterprise at the time a permanent establishment is formed or terminated gives rise to dealings as defined in section 16.

(5) ¹The auxiliary and ancillary accounts of the permanent establishment of an enterprise that is not required under domestic or foreign law to keep records and does not, in fact, keep records must be prepared according to the net income method as described in section 4(3) of the Income Tax Act (*Einkommensteuergesetz*). ²At the time a permanent establishment is terminated, auxiliary and ancillary accounts containing a list of assets must be prepared.

Subdivision 2 – Attribution rules

Section 4 – Attribution of people functions

(1) ¹A people function must be attributed to the permanent establishment in which it is performed. ²However, a people function is not to be attributed to a permanent establishment if the people function

1. has no material connection with the permanent establishment's business activities and
2. is performed in this permanent establishment on less than 30 days within a fiscal year.

(2) If a people function is performed neither in the permanent establishment nor in the rest of the enterprise, and in cases described in subsection (1) sentence 2, the people function must be attributed to the permanent establishment to which the people function has the closest material connection.

(3) If a people function cannot be clearly attributed, it must be attributed in a manner that does not conflict with subsections (1) and (2).

Section 5 – Attribution of tangible assets

(1) ¹The significant people function for the attribution of a tangible asset to a permanent establishment is its use. ²If the same tangible asset is subsequently used in another permanent establishment on a long-term basis, this asset must be attributed to the other permanent establishment as from the time of the change of use. ³If its use changes frequently, a tangible asset must be attributed to the permanent establishment for whose business activities it is used predominantly.

(2) ¹By way of derogation from subsection (1), a tangible asset must be attributed to a permanent establishment other than that in which it is used only if the importance of another people function performed in this other permanent establishment is clearly greater than that of the people function referred to in subsection (1). ²In particular, other people functions are those related to the acquisition, production, management or sale of the relevant tangible asset. ³Immovable property in which a permanent establishment's business activities are performed must always be attributed to that permanent establishment.

(3) If other people functions as described in subsection (2) sentence 1 are simultaneously performed in multiple permanent establishments of the enterprise, the tangible asset must be attributed to the permanent establishment whose other people function is of the greatest importance for the tangible asset.

(4) If a tangible asset cannot be clearly attributed, it must be attributed in a manner that does not conflict with subsections (1) to (3).

Section 6 – Attribution of intangible assets

(1) ¹The significant people function for the attribution of an intangible asset to a permanent establishment is its creation or acquisition. ²If people functions through whose performance an intangible asset is created or acquired are simultaneously performed in multiple permanent establishments, the intangible asset must be attributed to the permanent establishment whose people function is of the greatest importance for the intangible asset.

(2) ¹By way of derogation from subsection (1), an intangible asset must be attributed to a permanent establishment other than that through whose people function the intangible asset is created or acquired only if the importance of another people function performed in this other permanent establishment is clearly greater than that of the people function referred to in subsection (1). ²In particular, other people functions are those related to the use, management, development, protection or sale of the intangible asset.

(3) If other people functions as described in subsection (2) sentence 1 are simultaneously performed in multiple permanent establishments of the enterprise, the intangible asset must be attributed to the permanent establishment whose other people function is of the greatest importance for the intangible asset.

(4) ¹If an intangible asset cannot be clearly attributed, it must be attributed in a manner that does not conflict with subsections (1) to (3). ²In such cases, an intangible asset can be attributed *pro rata* to the permanent establishments in which the most important people functions are performed on a long-term basis.

Section 7 – Attribution of stakes, financial assets and similar assets

(1) ¹The significant people function for the attribution of a stake, a financial asset or a similar asset to a permanent establishment is the use of this stake, financial asset or similar asset. ²The use is determined by the functional connection with the permanent establishment's business activities. ³If a functional connection exists simultaneously with the business activities of multiple permanent establishments, the asset must be attributed to the permanent establishment with which the predominant functional connection exists.

(2) ¹By way of derogation from subsection (1), an asset as described in subsection (1) sentence 1 must be attributed to a permanent establishment other than that in which it is used only if the importance of another people function performed in this other permanent establishment is clearly greater than that of the people function referred to in subsection (1). ²In particular, other people functions are those related to the acquisition, management, risk management or sale of an asset as described in subsection (1) sentence 1.

(3) If other people functions as described in subsection (2) sentence 1 are simultaneously performed in multiple permanent establishments of the enterprise, an asset as described in subsection (1) sentence 1 must be attributed to the permanent establishment whose other staff function is most important.

(4) If an asset as described in subsection (1) sentence 1 cannot be clearly attributed or if the predominant functional connection changes frequently, it must be attributed in a manner that does not conflict with subsections (1) to (3).

Section 8 – Attribution of other assets

(1) ¹The significant people function for the attribution of an asset not covered by sections 5 to 7 (other asset) to a permanent establishment is its creation or acquisition. ²If people functions through whose performance other assets are created or acquired are simultaneously performed in multiple permanent establishments, the other assets must be attributed to the permanent establishment whose people function is of the greatest importance for the other assets.

(2) ¹By way of derogation from subsection (1), other assets must be attributed to a permanent establishment other than that through whose people function the other assets are created or acquired if the importance of another people function performed in this other permanent establishment is clearly greater than that of the people functions referred to in subsection (1). ²In particular, other people functions are those related to the use, management, risk management or sale of the relevant other asset.

(3) If other people functions as described in subsection (2) sentence 1 are simultaneously performed in multiple permanent establishments of the enterprise, the other asset must be attributed to the permanent establishment whose other people function is of the greatest importance for this other asset.

(4) If other assets cannot be clearly attributed, they must be attributed in a manner that does not conflict with subsections (1) to (3).

Section 9 – Attribution of an enterprise’s business transactions

(1) ¹The significant people function for the attribution to a permanent establishment of a business transaction (section 1(4) sentence 1 no. 1 of the External Tax Relations Act) that the enterprise has concluded with an independent third party or with a related party is the people function which gives rise to the transaction. ²If multiple permanent establishments simultaneously each perform a people function that gives rise to such a transaction, the business transaction must be attributed to the permanent establishment whose people function is of the greatest importance for the transaction.

(2) ¹By way of derogation from subsection (1), a business transaction must be attributed to a permanent establishment other than that whose people function gave rise to the transaction only if the importance of another people function performed in this other permanent establishment is clearly greater than that of the people function referred to in subsection (1). ²In particular, other people functions are those related to the fulfilment of obligations arising from the business transaction or to its management or risk management.

(3) If other people functions as described in subsection (2) sentence 1 are simultaneously performed in multiple permanent establishments of the enterprise, the business transaction must be attributed to the permanent establishment whose other people function is of the greatest importance for the transaction.

(4) If a business transaction cannot be clearly attributed, it must be attributed in a manner that does not conflict with subsections (1) to (3).

Section 10 – Attribution of opportunities and risks

(1) If opportunities and risks are directly related to an asset as described in sections 5 to 8 or to a business transaction as described in section 9, these opportunities and risks must be attributed to the permanent establishment to which the relevant asset or transaction is attributed.

(2) ¹If opportunities and risks that are not directly related to an asset or to a business transaction are based on a permanent establishment’s people function, this people function is significant for attributing opportunities and risks to a permanent establishment. ²If such a people function is simultaneously performed in multiple permanent establishments, the relevant opportunities and risks

must be attributed to the permanent establishment whose people function is of the greatest importance for these opportunities and risks.

(3) ¹By way of derogation from subsection (2), opportunities and risks must be attributed to a permanent establishment other than that whose people function gave rise to these opportunities and risks only if the importance of another people function performed in this other permanent establishment is clearly greater than that of the people function referred to in subsection (2). ²In particular, other people functions are those related to the management, risk management or realisation of opportunities and risks or to the decision to undertake changes with regard to opportunities and risks.

(4) If other people functions as described in subsection (3) sentence 1 are simultaneously performed in multiple permanent establishments of the enterprise, the relevant opportunities and risks must be attributed to the permanent establishment whose other people function is of the greatest importance for the opportunities and risks.

(5) If opportunities and risks cannot be clearly attributed, they must be attributed in a manner that does not conflict with subsections (1) to (4).

Section 11 – Attribution of hedging transactions

(1) If an enterprise concludes a hedging transaction for the purpose of

1. hedging specific risks of a people function that must be attributed to a permanent establishment under section 4,
2. hedging specific risks of an asset that must be attributed to a permanent establishment under sections 5 to 8 or
3. hedging specific risks of a business transaction that must be attributed to a permanent establishment under section 9,

the hedging transaction including related assets used for hedging purposes must be attributed to that permanent establishment.

(2) ¹If an enterprise concludes one or more hedging transactions for the purpose of

1. hedging specific risks of people functions that must be attributed to multiple permanent establishments under section 4,
2. hedging specific risks of assets that must be attributed to multiple permanent establishments under sections 5 to 8 or
3. hedging specific risks of business transactions that must be attributed to multiple permanent

establishments under section 9,

and if a direct attribution of individual assets used for hedging purposes to specific risks is not possible or if such direct attribution would involve disproportionate effort, then an indirect hedging relationship exists.²In these cases, hedging transactions, including related assets used for hedging purposes, must be attributed on a *pro rata* basis to the permanent establishments to which the people functions, assets or business transactions whose risks are being hedged must be attributed.³The proportion is determined using an appropriate allocation formula.

(3) Hedging transactions must be attributed by way of derogation from subsections (1) and (2) only if, in the specific case in question, this produces a result for the permanent establishment that is more in line with the arm's length principle.

(4) If assets hedge the risks of other assets without having a hedging purpose, the relevant transactions and related assets are attributed in accordance with sections 5 to 8.

Subdivision 3 – Free capital, remaining liability items and financing expenses

Section 12 – Free capital of domestic permanent establishments of foreign enterprises

(1) A domestic permanent establishment of a foreign enterprise that is required under foreign law to keep accounts or which, in fact, keeps accounts under foreign law is attributed such portion of the enterprise's equity capital as, at the beginning of the fiscal year, equates to the domestic permanent establishment's portion of the assets and of the opportunities and risks in proportion to the rest of the enterprise (capital allocation method).

(2) ¹For the attribution of free capital using the capital allocation method, the amount of the foreign enterprise's equity capital must be determined in accordance with German tax law. ²For simplification purposes, contributed capital plus reserves and profit carried forward and less loss carried forward as shown in the enterprise's foreign balance sheet can be used as a basis for the allocation if the enterprise provides *prima facie* evidence that

1. this amount of equity capital does not significantly differ from the amount of equity capital that must be applied under German tax law or
2. differences are balanced by adjustments so that the result does not significantly differ from sentence 1.

(3) ¹To determine the domestic permanent establishment's capital ratio that is used to calculate its free capital using the capital allocation method, the assets of both the permanent establishment and the rest of the enterprise are measured at values that comply with the arm's length principle and take

account of opportunities and risks. For simplification purposes, book values or similar values from the foreign enterprise's records may be used if the enterprise provides *prima facie* evidence that

1. this valuation produces a capital ratio that does not significantly differ from the capital ratio that would result from using values that comply with the arm's length principle or
2. differences are balanced by adjustments so that the result does not significantly differ from sentence 1.

(4) If the free capital calculated for the domestic permanent establishment using the capital allocation method permanently produces results that a prudent and conscientious manager would not be willing to accept, and if the foreign enterprise to which the permanent establishment belongs is part of a group of enterprises as described in section 18 of the Stock Corporation Act (*Aktiengesetz*), the free capital to be attributed to the permanent establishment must be determined as follows:

1. the consolidated equity capital of the group must be determined in accordance with subsection (2) and
2. a portion of the group's consolidated equity capital must be attributed to the permanent establishment as free capital on a consolidated basis in accordance with subsections (1) to (3).

(5) Notwithstanding subsections (1) to (4), the minimum amount of free capital that must be attributed to a domestic permanent establishment is the capital actually shown in domestic commercial accounts of the domestic permanent establishment.

(6) If, over the course of a fiscal year, the attribution of people functions, of assets or of opportunities and risks changes compared with the situation at the beginning of this fiscal year, and if this results in a significant change in the amount of free capital that must be attributed to the domestic permanent establishment under subsection (1), the free capital must be adjusted accordingly within this fiscal year.

Section 13 – Free capital of foreign permanent establishments of domestic enterprises

(1) At the beginning of a fiscal year, free capital must be attributed to a foreign permanent establishment of a domestic enterprise that is required under domestic law to keep accounts or which, in fact, keeps accounts under domestic law only if the enterprise provides *prima facie* evidence that the relevant amount of free capital is required for commercial reasons (minimum capital method).

(2) ¹Free capital exceeding the amount referred to in subsection (1) may be attributed to a foreign permanent establishment if, in the specific case in question, this higher amount produces a result for the permanent establishment that is more in line with the arm's length principle. ²However, the free capital must not exceed the amount that results from the application of the capital allocation method in

accordance with section 12(1) to (3). ³The calculation of this maximum amount must be based on the amounts entered in the domestic enterprise's balance sheet that are relevant for taxation unless, in the specific case in question, applying other amounts produces a result for the permanent establishment that better complies with the arm's length principle.

(3) Free capital exceeding the amount referred to in subsection (2) sentence 2 may be attributed to a foreign permanent establishment only if this is required under non-tax provisions of the state in which the permanent establishment is located.

(4) Notwithstanding subsections (1) to (3), the maximum amount of free capital that must be attributed to a foreign permanent establishment is the capital actually shown in foreign commercial accounts of the foreign permanent establishment.

(5) If, over the course of a fiscal year, the attribution of people functions, of assets or of opportunities and risks changes compared with the situation at the beginning of this fiscal year, and if this results in a significant change in the amount of free capital that must be attributed to the foreign permanent establishment under subsection (1), the free capital must be adjusted accordingly.

Section 14 – Attribution of remaining liability items

(1) After attribution of risks that must be shown in the auxiliary and ancillary accounts and of free capital, the remaining liability items that are directly related to the assets and to the opportunities and risks attributed to the permanent establishment of an enterprise that is required to keep accounts or which, in fact, keeps accounts under domestic or foreign law must be attributed to the permanent establishment (direct attribution).

(2) ¹If the sum of remaining liability items that could be directly attributed to the permanent establishment (directly attributable liability items) exceeds the amount that remains, after the attribution of risks that must be shown in the auxiliary and ancillary accounts and of free capital, for an attribution of liability items to the permanent establishment, these directly attributable liability items must be reduced on a *pro rata* basis. ²The proportion of directly attributable liability items that remains after the reduction must be attributed to the permanent establishment.

(3) If, after the determination of risks that must be shown in the auxiliary and ancillary accounts and of free capital, and after the direct attribution of remaining liability items, there is a shortfall of liability items for the permanent establishment, this shortfall must be made up with remaining liability items of the enterprise (indirect attribution).

Section 15 – Attribution of financing expenses

(1) An enterprise's financing expenses that are related to liability items that must be directly attributed

to a permanent establishment of this enterprise under section 14(1) must also be attributed to this permanent establishment.

(2) If directly attributable liability items must be reduced on a *pro rata* basis under section 14(2), financing expenses directly related to these directly attributable liability items must be reduced accordingly on a *pro rata* basis.

(3) ¹If a direct attribution of the enterprise's financing expenses to the permanent establishment is not possible or would involve disproportionate effort, financing expenses of the enterprise must be attributed to the permanent establishment on a *pro rata* basis in accordance with the indirect attribution of liability items. ²In this case, the permanent establishment's portion of the enterprise's financing expenses is determined on the basis of the ratio, at the beginning of the relevant fiscal year, of remaining liability items that must be indirectly attributed to the permanent establishment to the enterprise's remaining liability items. ³The permanent establishment's portion of financing expenses must be determined by way of derogation from sentences 1 and 2 if, in the specific case in question, this produces a result for the permanent establishment that is more in line with the arm's length principle.

(4) ¹Financing expenses of a foreign enterprise that is not required under foreign law to keep accounts and does not, in fact, keep accounts must be attributed to a domestic permanent establishment of this foreign enterprise only if these financing expenses are directly related to the permanent establishment's business activities. ²An attribution under sentence 1 requires that the permanent establishment's remaining result from its business activities complies with the arm's length principle.

(5) ¹Financing expenses of a domestic enterprise that is not required under domestic law to keep accounts and does not, in fact, keep accounts must be attributed to a foreign permanent establishment of this domestic enterprise if these financing expenses are directly related to the permanent establishment's business activities. ²The minimum portion of financing expenses that must be attributed to the foreign permanent establishment is the portion that equates to its portion of the domestic enterprise's external sales. ³Subsection (3) sentence 3 applies *mutatis mutandis*.

Subdivision 4 – Dealings

Section 16 – Principle

(1) A dealing as described in section 1(4) sentence 1 no. 2 of the External Tax Relations Act exists between a permanent establishment and the rest of the enterprise if economic transactions are identified which

1. in the relationship between the permanent establishment and the rest of the enterprise, require a change to the attribution under sections 5 to 11 or
2. if the permanent establishment and the rest of the enterprise were independent enterprises,
 - a) would be regulated by *in personam* agreements or
 - b) would result in an assertion of legal positions.

(2) ¹Transfer prices that comply with the arm's length principle must be applied to dealings. ²These transfer prices result in notional business income and notional business expenses.

(3) ¹If a permanent establishment uses financial resources of the rest of the enterprise, no dealing exists. ²This does not apply if

1. section 17 is applicable or
2. as a result of a permanent establishment's business activities in the current fiscal year, financial resources are generated for the permanent establishment that are demonstrably used for specific purposes in the rest of the enterprise.

³A dealing under sentence 2 no. 2 is deemed to constitute a provision of financial resources between the permanent establishment and the rest of the enterprise and ends, at the latest,

1. at the end of the current fiscal year or
2. upon an adjustment of free capital under section 12(6) or section 13(5).

Section 17 – Financing function within an enterprise

(1) ¹A financing function within an enterprise includes liquidity management by a permanent establishment (financing permanent establishment) for one or several other permanent establishments of the same enterprise. ²Liquidity management comprises, in particular, the raising of funds, the appropriation of funds and the external investment of liquidity surpluses.

(2) ¹The performance of a financing function within an enterprise constitutes a dealing that must generally be considered a service and not the provision of own financial resources of the financing permanent establishment. ²The transfer price for such a service that is applicable under section 16(2) sentence 1 must be determined using a cost-based transfer pricing method. ³Financing expenses and financing income of the enterprise that are caused by the financing permanent establishment's activities do not affect the financing permanent establishment's cost base.

(3) If it cannot be ascertained that the financing permanent establishment incurs costs that are

directly caused by a specific other permanent establishment, or if ascertaining this would involve disproportionate effort, the financing permanent establishment's costs plus a reasonable mark-up must be allocated to the other permanent establishments that use the financing function according to the costs-by-cause principle.

(4) ¹Assets that form the basis of an external investment of a liquidity surplus or that arise as a result of the external investment of a liquidity surplus, as well as income resulting from these assets, are not to be attributed to the financing permanent establishment, but to the relevant other permanent establishments. ²If a direct attribution to the other permanent establishments of assets and income arising as a result of the financing function is not possible or would involve disproportionate effort, these assets and their income must be attributed to the other permanent establishments on a *pro rata* basis. ³The allocation is based on the source of the relevant liquidity surplus.

(5) ¹Liability items that arise for the enterprise as a result of the financing function are not to be attributed to the financing permanent establishment, but to the other permanent establishments under section 15(1). ²The corresponding financing expenses must be attributed in accordance with section 15(3).

(6) ¹Positive balances on settlement accounts that arise as a result of the financing function in the relationship between the financing permanent establishment and the other permanent establishments are not considered assets as described in section 7 or section 8. ²No interest accrues on them.

(7) Subsections (1) to (6) are not applicable if, in the specific case in question,

1. people functions are performed in the financing permanent establishment in respect of assets and liability items created as well as opportunities and risks related to them that require an attribution of the assets and liability items to the financing permanent establishment and
2. a transfer pricing method not referred to in subsection (2) produces a result for the financing function that is more in line with the arm's length principle.

Part 2 – Special provisions for banking permanent establishments

Section 18 – General

A permanent establishment

1. which is part of a credit institution as defined in section 1(1) of the Banking Act (*Kreditwesengesetz*), of a financial services institution as defined in section 1(1a) of the Banking Act, or of a similar enterprise for the purposes of foreign banking supervisory law and
2. which conducts banking business

is a banking permanent establishment to which sections 1 to 17 apply unless provided otherwise in

this Part of this ordinance.

Section 19 – Special attribution rules

(1) ¹An asset that is the subject of banking transactions as defined in section 1(1) of the Banking Act or of financial services as defined in section 1(1a) of the Banking Act must be attributed to a banking permanent establishment if the commercial risk-taking function is performed in this banking permanent establishment. ²The commercial risk-taking function of credit institutions is the people function whose performance results in the creation of the enterprise's opportunities and risks related to the relevant asset.

(2) ¹If, in respect of an asset, multiple banking permanent establishments each simultaneously perform a people function that fulfils the requirements of subsection (1), this asset must be attributed to the banking permanent establishment whose people function is of the greatest importance. ²This people function is deemed to be the commercial risk-taking function. ³The attribution is determined on the basis of the people functions performed until the time the relevant asset is created. ⁴The relevant asset and the opportunities and risks related to this asset are attributed to the banking permanent establishment that performs the commercial risk-taking function in respect of this asset.

(3) ¹If an asset cannot be clearly attributed under subsection (2), it must be attributed to the banking permanent establishment to which the client relationship involving the asset must be attributed. ²A different attribution is to be made only if, in the specific case in question, this produces a result for the banking permanent establishment that is more in line with the arm's length principle.

(4) The appropriate attribution of an asset may be changed only if

1. the change results in the asset's being attributed to the banking permanent establishment with which the relevant client relationship exists, and if no people functions in respect of the asset are performed any longer in the banking permanent establishment to which the asset was attributed or
2. in the specific case in question, the attribution produces a result for the banking permanent establishment that is more in line with the arm's length principle.

(5) ¹If an asset as described in subsection (1) must be attributed to a banking permanent establishment, and if another permanent establishment performs a supporting people function in respect of this asset, a transfer price that complies with the arm's length principle must be applied to the performance of this people function under section 16(2) sentence 1. ²Such supporting people functions may

1. serve to perform the actual commercial risk-taking function,

2. involve the subsequent management of the asset or
3. include other auxiliary functions.

(6) Section 16(3) applies to banking permanent establishments subject to the proviso that a dealing constituting a provision of financial resources is deemed to exist beyond section 16(3) sentence 2 if

1. the credit institution proves that the period beyond section 16(3) is appropriate in connection with the credit institution's business policy and in view of the people functions that are performed in connection with the provision and receipt of financial resources and
2. in the specific case in question, the period beyond section 16(3) produces a result for the banking permanent establishment that is more in line with the arm's length principle.

Section 20 – Free capital of domestic permanent establishments of foreign credit institutions, banking supervision law

(1) ¹A domestic banking permanent establishment of a foreign credit institution is attributed such portion of the foreign credit institution's equity capital that equates to the domestic banking permanent establishment's portion of the sum of the foreign credit institution's risk-weighted exposure amounts for the purposes of foreign banking supervisory law (capital allocation method for banking permanent establishments). ²When determining the relevant portion, the credit institution's internal risk-weighted exposure amounts are not to be taken into account.

(2) ¹The foreign credit institution may attribute to the domestic banking permanent establishment an amount of free capital lower than that provided for in subsection (1) only if this produces a result for the domestic banking permanent establishment that, in relation to the rest of the enterprise, is more in line with the arm's length principle based on the assets attributed to it and the opportunities and risk attributed to it. ²However, the domestic banking permanent establishment must report at least the amount of free capital it would be required to report as tier 1 capital under banking supervisory law if it were a legally independent domestic credit institution (minimum capital method for banking permanent establishments). ³If the minimum capital method is applied, the amount of free capital must be increased by 0.5 percentage points of the sum of the domestic banking permanent establishment's risk-weighted exposure amounts, unless a lower addend produces a result for the banking permanent establishment that is more in line with the arm's length principle.

(3) A foreign credit institution may refrain from applying subsections (1) and (2) to its domestic banking permanent establishment if

1. the sum of asset items in the auxiliary and ancillary accounts of the domestic banking permanent establishment amounts to less than €1 billion and

2. free capital amounting to at least 3 percent of the sum of asset items in the auxiliary and ancillary accounts and at least €5 million is reported for the domestic banking permanent establishment.

(4) Subsection (1) applies to a domestic banking permanent establishment of a foreign credit institution with its registered office in a state of the European Union or of the European Economic Area in which a credit institution can apply a provision corresponding to section 2a of the Banking Act only if the foreign credit institution

1. does not actually apply this provision or
2. proves that its equity capital would be sufficient under applicable rules of banking supervisory law even if it did not apply this provision.

If the foreign credit institution applies the foreign provision and no proof is provided under sentence 1 no. 2, then subsection (1) applies *mutatis mutandis* when determining the free capital that must be attributed to the domestic banking permanent establishment, subject to the proviso that

1. the determination of equity capital to be used for the calculation is based on the tier 1 capital under banking supervisory law of such foreign credit institution group which, if it were a domestic group of institutions, would fulfil the requirements of section 10a(1) of the Banking Act in conjunction with Article 92 et seqq. of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 646/2012 (OJ L 176 27.6.2013, p. 1, L 208 2.8.2013, p. 68, L 321 30.11.2013, p. 6) as amended and
2. when determining the domestic banking permanent establishment's portion of the foreign credit institution group's tier 1 capital, the sum of the banking permanent establishment's risk-weighted exposure amounts must be calculated as a proportion of the sum of the credit institution group's risk-weighted exposure amounts, without taking into account the group's internal risk-weighted exposure amounts.

(5) ¹Section 12(6) must be applied subject to the proviso that the amount of free capital that must be attributed to the domestic banking permanent establishment must also be adjusted if this is required under domestic banking supervisory law. ²The remaining provisions of section 12 apply *mutatis mutandis*.

(6) Subsections (1) to (5) do not apply to domestic permanent establishments of foreign financial services institutions that are not subject to equity capital requirements under banking supervisory law.

**Section 21 – Free capital of foreign permanent establishments of domestic credit institutions,
banking supervision law**

(1) ¹A foreign banking permanent establishment of a domestic credit institution is attributed an amount of free capital in accordance with section 13(1), unless applicable provisions under foreign banking supervisory law contain mandatory minimum capital requirements that the foreign banking permanent establishment would be required to fulfil if it were an independent foreign credit institution (minimum capital method for banking permanent establishments). ²The domestic credit institution must substantiate the reasons for applying an amount of free capital exceeding that provided for in section 13(1).

(2) ¹The domestic credit institution may attribute to the foreign banking permanent establishment an amount of free capital exceeding that provided for in subsection (1) only if this higher amount produces a result for the foreign banking permanent establishment that is more in line with the arm's length principle based on the assets attributed to it and the opportunities and risk attributed to it. ²If the requirements of sentence 1 are fulfilled, the maximum amount of free capital is the amount that results from the application of the capital allocation method for banking permanent establishments under section 20(1).

(3) ¹An amount of free capital exceeding that provided for in subsection (2) may be attributed to the foreign banking permanent establishment only if this is required for foreign independent credit institutions by applicable provisions under foreign banking supervisory law and if the domestic credit institution applies the relevant provisions to its foreign banking permanent establishment. ²Sentence 1 is applicable only if the amount of capital that remains for the rest of the enterprise in arithmetic terms is at least as high as the amount that would be required under domestic banking supervisory law.

(4) If a domestic credit institution

1. is part of a domestic group of institutions to which section 2a of the Banking Act is applicable or
2. is part of a foreign group of institutions to which a provision of another state of the European Union or of the European Economic Area is applicable which is similar to Article 7 of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 646/2012 (OJ L 176 27.6.2013, p. 1),

and if the amount of this domestic credit institution's tier 1 capital is less than that required under banking supervisory law in respect of the sum of risk-weighted exposure amounts without applying section 2a of the Banking Act or the provision of another state of the European Economic Area

which is similar to Article 7 of Regulation (EU) No 575/2013, minimum free capital under subsection (1) can be attributed to a foreign banking permanent establishment of this credit institution only if the amount of tier 1 capital remaining for the rest of the enterprise is equivalent to the amount that would be required under banking supervisory law in respect of the sum of risk-weighted exposure amounts of the rest of the enterprise.

(5) ¹Section 13(5) is applicable subject to the proviso that the amount of free capital that must be attributed to the foreign banking permanent establishment must also be adjusted if this is required under the provisions of foreign banking supervisory law. ²The remaining provisions of section 13 apply *mutatis mutandis*.

(6) Subsections (1) to (5) do not apply to a foreign banking permanent establishment of a domestic financial services institution that is not subject to equity capital requirements under banking supervisory law.

Section 22 – Global trading in financial instruments

(1) ¹Financial instruments as described in section 1(11) sentence 1 of the Banking Act that are traded by financial institutions on markets globally and around the clock (global trading in financial instruments) must be attributed in accordance with section 19. ²Global trading in financial instruments includes, in particular,

1. the global issue and global marketing of financial instruments,
2. activities as a market maker as described in section 23(4) of the Securities Trading Act (*Wertpapierhandelsgesetz*) for physical securities,
3. activities on stock and commodities exchanges,
4. the development of new financial instruments.

(2) ¹If, in global trading in financial instruments, the commercial risk-taking function is performed in multiple banking permanent establishments, and if a clear attribution of individual financial instruments is not possible or would involve unreasonable effort, the results from these financial instruments, both realised and not realised for tax purposes, must be allocated to the banking permanent establishments involved in global trading using an appropriate allocation formula. ²If the opportunities and risks resulting from financial instruments are taken into account on a *pro rata* basis in accordance with sentence 1 for the purpose of determining the free capital under sections 20 and 21, financial instruments can be attributed by way of derogation from sentence 1 if

1. this is shown in the auxiliary and ancillary accounts under section 3 and
2. the results of the banking permanent establishments involved in global trading are not affected.

(3) The transaction-based remaining profit allocation method must be applied to dealings that relate to the commercial risk-taking function in global trading in financial instruments, unless, in the specific case in question, applying a different method produces a result that is more in line with the arm's length principle.

Part 3 – Special provisions for insurance permanent establishments

Section 23 – General

A permanent establishment

1. which is part of an insurance enterprise as defined in section 1(1) no. 1 of the Insurance Supervision Act (*Versicherungsaufsichtsgesetz*) or part of an insurance enterprise for the purposes of foreign insurance supervisory law and
2. which conducts insurance business

is an insurance permanent establishment to which sections 1 to 17 apply unless provided otherwise in this Part of this ordinance.

Section 24 – Special attribution rules

(1) ¹An asset that is created through the conclusion of an insurance contract must be attributed to an insurance permanent establishment if the commercial risk-taking function is performed in this insurance permanent establishment. ²The commercial risk-taking function of insurance enterprises is the people function of the underwriting process whose performance results in the opportunities and risks relating to the insurance contract, in particular the underwriting risk resulting from the insurance contract, being assumed by the insurance enterprise. ³The underwriting process consists of

1. determining the underwriting policy,
2. risk classification and risk selection,
3. pricing,
4. risk transfer analysis and
5. acceptance of insured risks.

(2) The performance of the commercial risk-taking function determines not only the attribution of an insurance contract to an insurance permanent establishment, but also the attribution of assets related to the insurance contract, the operating income and operating expenses relating thereto and the opportunities and risks relating thereto.

(3) ¹If people functions of the underwriting process are performed in multiple insurance permanent establishments, an asset created through the conclusion of an insurance contract must be attributed to

the insurance permanent establishment whose people function is most important prior to the conclusion of the insurance contract. ²This people function is deemed to be the commercial risk-taking function. ³The attribution of an insurance contract is determined on the basis of the people functions performed prior to the conclusion of the insurance contract.

(4) In reinsurance business, there is a rebuttable presumption that, in the underwriting process, risk classification and risk selection are the most important people function and therefore the commercial risk-taking function for the conclusion of a reinsurance contract.

(5) ¹If a foreign insurance enterprise has set up a branch as described in sections 106, 110a, 121h or 121i of the Insurance Supervision Act which is a domestic insurance permanent establishment, it is presumed that, in respect of an insurance contract for whose conclusion the general representative appointed for this branch in accordance with section 106(3) sentence 3 of the Insurance Supervision Act is deemed authorised, the commercial risk-taking function as described in subsections (1) to (4) is performed in this branch. ¹This presumption can be rebutted only if the foreign insurance enterprise proves that

1. the commercial risk-taking function in respect of the insurance contract referred to in sentence 1 is not performed in the domestic insurance permanent establishment and
2. the facts of the case were notified consistently to the German insurance supervision authority and the insurance supervision authority responsible for the foreign insurance enterprise.

(6) ¹An insurance contract must be attributed to a domestic insurance enterprise's foreign insurance permanent establishment that is subject to prudential supervision similar to German insurance supervision and for which a general representative under section 13b(1) sentence 1 no. 3 of the Insurance Supervision Act was appointed or for which another authorised representative similar to a general representative as described in section 106(3) of the Insurance Supervision Act was appointed under corresponding requirements of foreign insurance supervisory law only if the commercial risk-taking function as described in subsections (1) to (4) is actually performed in this foreign insurance permanent establishment. ²If only the people functions of the underwriting process that are directly related to the acceptance of the insured risk are performed in the foreign insurance permanent establishment, the insurance contract must be attributed to the foreign insurance permanent establishment only if

1. any of the following people functions which are not part of the underwriting process are additionally performed in it:
 - a) product management and product development,
 - b) sales and marketing or

c) risk management and reinsurance and

2. if the importance of the people functions performed in the foreign insurance permanent establishment is greater.

(7) Section 19(5) applies *mutatis mutandis*.

Section 25 – Free capital of domestic permanent establishments of foreign insurance enterprises, insurance supervision law

(1) ¹When determining the free capital of domestic insurance permanent establishments of foreign insurance enterprises, the first step is to attribute a portion of the foreign insurance enterprise's assets that are used to cover the foreign insurance enterprise's insurance-related reserves and equity capital to the insurance permanent establishment. ²The insurance permanent establishment's portion is determined on the basis of the ratio between the insurance-related reserves for insurance contracts that must be attributed to the domestic insurance permanent establishment and the total insurance-related reserves reported in the foreign insurance enterprise's balance sheet.

(2) ¹The second step is to deduct the insurance-related reserves and the liabilities and accruals and deferrals resulting from insurance relationships from the assets attributed under subsection (1); these reserves and liabilities and accruals must be determined in accordance with sections 341e to 341h of the Commercial Code (*Handelsgesetzbuch*) and in accordance with the Insurance Companies Accounting Ordinance (*Versicherungsunternehmens-Rechnungslegungsverordnung*) of 8 November 1994 (Federal Law Gazette I p. 3378), last amended by Article 27(9) of the Act dated 4 July 2013 (Federal Law Gazette I p. 1981), as amended. ²The result is the free capital that must be attributed to the domestic insurance permanent establishment (modified capital allocation method for insurance permanent establishments).

(3) ¹The foreign insurance enterprise may attribute to the domestic insurance permanent establishment an amount of free capital lower than that provided for in subsection (2) only if this produces a result for the domestic insurance permanent establishment that, in relation to the rest of the enterprise, is more in line the arm's length principle based on the assets attributed to it and the opportunities and risks attributed to it. ²The domestic insurance permanent establishment must report at least the amount of free capital it would be required to report as equity capital in accordance with insurance supervisory law if it were a legally independent insurance enterprise (minimum capital method for insurance permanent establishments).

(4) If the free capital attributed by the foreign insurance enterprise to a domestic insurance permanent establishment differs from the free capital that must be attributed under subsection (2), the assets that

must be attributed under subsection (1) must be adjusted to the free capital in accordance with subsection (2).

(5) ¹Section 12 (6) must be applied subject to the proviso that the amount of free capital that must be attributed must also be adjusted if this is required under domestic insurance supervisory law. ²The remaining provisions of section 12 apply *mutatis mutandis*.

Section 26 – Free capital of foreign permanent establishments of domestic insurance enterprises, insurance supervision law

(1) ¹An amount of free capital in accordance with section 13(1) must be attributed to a foreign insurance permanent establishment of a domestic insurance enterprise unless applicable provisions under foreign insurance supervisory law contain mandatory minimum capital requirements that the foreign insurance permanent establishment would be required to fulfil if it were an independent foreign insurance enterprise (minimum capital method for insurance permanent establishments). ²The domestic insurance enterprise must substantiate the reasons for applying an amount of free capital exceeding that provided for in section 13(1).

(2) ¹The domestic insurance enterprise may attribute to the foreign insurance permanent establishment an amount of free capital exceeding the minimum capital required under insurance supervisory law in accordance with subsection (1) only if this produces a result for the foreign insurance permanent establishment that is more in line with the arm's length principle based on the assets attributed to it and the opportunities and risks attributed to it. ²However, the free capital must not exceed the amount that results from the application of the modified capital allocation method for insurance permanent establishments under section 25 (1) and (2).

(3) ¹An amount of free capital exceeding that provided for in subsection (2) may be attributed to the foreign insurance permanent establishment only if this is required by foreign insurance supervisory law and the domestic insurance enterprise applies the relevant provisions to its foreign insurance permanent establishment. ²Sentence 1 is applicable only if the amount of capital that remains for the rest of the enterprise in arithmetic terms is at least as high as the amount that would be required under domestic insurance supervisory law.

(4) ¹Section 13 (5) must be applied subject to the proviso that the amount of free capital that must be attributed must also be adjusted if this is required under foreign insurance supervisory law. ²The remaining provisions of section 13 apply *mutatis mutandis*.

Section 27 – Attribution of income from assets

(1) Income from assets must be attributed to an insurance permanent establishment if these assets serve at least one of the following purposes:

1. covering the insurance-related reserves of the insurance permanent establishment,
 2. covering the liabilities and the accruals and deferrals of the insurance permanent establishment that have arisen from insurance relationships or
 3. covering the free capital of the insurance permanent establishment.
- (4) If a direct attribution of assets and income is not possible, income must be attributed to an insurance permanent establishment according to the insurance enterprise's average investment return.

Section 28 – Reinsurance within an enterprise

The underwriting risk attributed to an insurance permanent establishment based on the correct attribution of an insurance contract must not be attributed to the rest of the enterprise on the basis of a dealing that is comparable to a reinsurance contract between legally independent insurance enterprises.

Section 29 – Pension funds and special purpose insurance vehicles

Sections 23 to 28 apply *mutatis mutandis* to a permanent establishment that conducts business comparable to insurance business and

1. is part of a pension fund as described in section 112 of the Insurance Supervision Act or of similar foreign supervisory law or
2. is part of an insurance special purpose vehicle as described in section 121g of the Insurance Supervision Act or of similar foreign supervisory law.

Part 4 – Special provisions for construction and assembly permanent establishments

Section 30 – General

¹A permanent establishment that carries out construction or assembly work and is terminated after completion of the construction or assembly work (construction and assembly permanent establishment) is subject to sections 1 to 17 unless provided otherwise in this Part of this ordinance.

²An enterprise to which a construction or assembly permanent establishment belongs is a construction and assembly enterprise.

Section 31 – Special attribution rules

(1) ¹A tangible asset that is used in a construction and assembly permanent establishment must be attributed to this permanent establishment under section 5(1) sentence 1 only if, in addition to such use, people functions are also performed there that are related to the acquisition, the production, the sale or the utilisation of the tangible asset. ²Attribution under sentence 1 requires that the importance of said people functions that are performed in the construction and assembly permanent establishment in respect of the tangible asset is clearly greater than that of the people functions of the rest of the enterprise that are performed in this respect.

(2) If a tangible asset as described in subsection (1) is not to be attributed to the construction and assembly permanent establishment, it must be attributed to the rest of the enterprise and is deemed to have been provided to the construction and assembly permanent establishment free of charge.

(3) Subsections (1) and (2) apply *mutatis mutandis* to the attribution of assets under sections 6 to 8.

(4) ¹The construction or assembly contract with the principal is a transaction as described in section 9 that must be attributed to the rest of the enterprise. ²This attribution is to be changed, subject to the legal consequences of section 16, only if

1. the people functions performed in the construction and assembly permanent establishment in relation to the contract are clearly the most important, with the preparation and conclusion of the contract, the provision of necessary assets and the fulfilment of obligations under the contract being taken into particular consideration or
2. it must be assumed for functional reasons that the construction and assembly permanent establishment, if it were an independent third party, would have assumed the construction or assembly contract with the principal from the rest of the enterprise.

Section 32 – Dealings that must be considered services

(1) ¹There is a rebuttable presumption that the involvement of a construction and assembly permanent establishment in the performance of the construction and assembly contract concluded by the construction and assembly enterprise constitutes a dealing which must be considered a service provided by the construction and assembly permanent establishment to the rest of the enterprise.

²The transfer price for the service must generally be determined in accordance with a cost-based transfer pricing method. ³The costs to the construction and assembly permanent establishment that must be taken into account in the application of this method include, in particular, all necessary personnel costs directly caused by the performance of people functions in the construction and

assembly permanent establishment.

(2) If the service provided by the construction and assembly permanent establishment to the rest of the enterprise consists of multiple service bundles, a single transfer price for these bundles must be applied

unless, in the specific case in question, applying separate transfer prices for each service bundle produces a result for the permanent establishment that is more in line with the arm's length principle.

(3) ¹The service the construction and assembly permanent establishment provides to the rest of the enterprise must be settled continuously according to services provided, irrespective of whether the construction and assembly enterprise's payment claim against the principal arises only upon acceptance or partial acceptance of the service owed. ²A different settlement between the construction and assembly permanent establishment and the rest of the enterprise must be made only if, in the specific case in question, this produces a result that is more in line with the arm's length principle.

(4) Services provided in the rest of the enterprise in relation to the construction and assembly enterprise are not deemed to be provided to the construction and assembly permanent establishment even if they are related to the services of the construction and assembly permanent establishment.

Section 33 – Dealings in special cases

(1) By way of derogation from section 32, the transfer price for the dealing between the construction and assembly permanent establishment and the rest of the enterprise must be determined according to a profit allocation method if

1. the people functions that are performed by both the construction and assembly permanent establishment and the rest of the enterprise in respect of the performance of the construction or assembly contract do not constitute routine activities and result in similar opportunities and risks having to be attributed in each case or
2. unique intangible assets are developed or acquired by both the construction and assembly permanent establishment and by the rest of the enterprise in respect of the performance of the construction or assembly contract.

3. ¹The allocation key to be used for the profit allocation method under subsection (1) is determined on the basis of the contributions made by the construction and assembly permanent establishment and by the rest of the enterprise in respect of the construction and assembly contract. ²The contributions made are calculated on the basis of the costs of the significant people functions that are performed by the construction and assembly permanent establishment and by the rest of the enterprise in respect of the construction and assembly contract. ³Account must also be taken of an appropriate portion of

1. research and development costs of intangible assets deployed and
2. acquisition costs incurred to no avail in respect of construction and assembly contracts not concluded.

⁴A different allocation key must be applied if, in the specific case in question, this produces a result for the construction and assembly permanent establishment that is more in line with the arm's length principle.

Section 34 – Transitional provisions for construction and assembly permanent establishments

(1) A construction and assembly enterprise may determine the income of a construction and assembly permanent establishment formed before 1 January 2013 in accordance with tax principles previously accepted by the tax authority, until the termination of the construction and assembly permanent establishment.

(2) Notwithstanding section 1(5) of the External Tax Relations Act, the construction and assembly enterprise may apply subsection (1) also to construction and assembly permanent establishments formed in 2013 or 2014 if

1. it proves that, in calculating its services, it assumed that the tax principles previously accepted by the tax authority would be applied and
2. it provides evidence that the provisions of this ordinance remove the basis of its calculation.

Part 5 – Special provisions for extraction permanent establishments

Section 35 – General

(1) ¹A permanent establishment that is formed for the extraction of natural resources and terminates after completion of the extraction (extraction permanent establishment) is subject to sections 1 to 17 unless provided otherwise in this Part of this ordinance. ²An enterprise to which an extraction permanent establishment belongs is a mining enterprise or an oil or gas enterprise.

(2) An exploration right is the right to search for and extract natural resources.

Section 36 – Special attribution rules

(1) ¹An exploration right that is used to perform people functions in an extraction permanent establishment of a mining enterprise or of an oil or gas enterprise must be attributed to this extraction permanent establishment only if, in addition,

1. the people functions relating to the acquisition or creation of the exploration right are also performed in this extraction permanent establishment or

2. the sale or utilisation of extracted natural resources is also carried out in this extraction permanent establishment.

²Attribution under sentence 1 requires that the importance of said people functions that are performed in the extraction permanent establishment in respect of the exploration right is clearly greater than that of the people functions of the rest of the enterprise that are performed in this respect.

(2) If an exploration right under subsection (1) is not attributable to the extraction permanent establishment, it must be attributed to the rest of the enterprise and is deemed to have been provided to the extraction permanent establishment free of charge.

(3) ¹By way of derogation from subsection (2), the exploration right must be attributed to the extraction permanent establishment at the time that extraction activities commence if the mining enterprise or the oil or gas enterprise proves that this attribution is also assumed by the state in which the extraction permanent establishment is located. ²This attribution must be maintained for as long as the state in which the extraction permanent establishment is located assumes that the exploration right is attributed in this manner.

(4) ¹In the cases covered by subsection (2), section 31(1) to (3) applies *mutatis mutandis* to the attribution of assets to an extraction permanent establishment. ²In the cases covered by subsection (3), sections 5 to 8 apply to the attribution of assets to an extraction permanent establishment.

Section 37 – Dealings

(1) ¹The activities of an extraction permanent establishment using an exploration right that was acquired by a mining enterprise or an oil or gas enterprise are carried out on the basis of a dealing (section 16) for which there is a rebuttable presumption that it must be considered a service provided by the extraction permanent establishment to the rest of the enterprise. ²The transfer price for the service must be determined using a cost-based transfer pricing method. ³The costs of the extraction permanent establishment that must be taken into account in the application of a cost-based transfer pricing method also include, in particular, all necessary personnel costs that are directly caused by the performance of people functions in the extraction permanent establishment.

(2) ¹If the application of section 36(3) results in a change to the attribution of the exploration right, a dealing as described in section 16(1) no. 1 exists between the rest of the enterprise and the extraction permanent establishment that is equivalent to a sale. ²An amount corresponding to section 16(2) sentence 1 must be applied in respect thereof.

(3) ¹However, by way of derogation from subsection (2) sentence 2, a mining enterprise or an oil or gas enterprise can state a price for the dealing as described in subsection (2) that is considered an

arm's length price even though it is below the amount applicable under section 16(2) sentence 1.

²This requires that the mining enterprise or the oil or gas enterprise

1. proves that this avoids double taxation and
2. applies an amount that is at least equivalent to the expenses incurred in the mining enterprise or in the oil or gas enterprise in respect of the exploration right prior to the change in attribution.

(4) ¹In cases covered by section 36(3), it must be taken into consideration, with regard to the functional and risk analysis for determining the extraction permanent establishment's income, that the exploration right must be attributed to the extraction permanent establishment. ²This applies for as long as the state in which the extraction permanent establishment is located assumes that the exploration right is attributed to the extraction permanent establishment.

Section 38 – Transitional provisions for extraction permanent establishments

- (1) The mining enterprise or the oil or gas enterprise may determine the income of an extraction permanent establishment formed before 1 January 2013 in accordance with tax principles previously accepted by the tax authority, until the termination of the extraction permanent establishment.
- (2) The mining enterprise or the oil or gas enterprise may, notwithstanding section 1(5) of the External Tax Relations Act, apply subsection (1) also to extraction permanent establishments for which the exploration right was acquired or created in 2013 or 2014 if
 1. it proves that, in its calculations, it assumed that the principles previously accepted by the tax authority would be applied and
 2. it provides evidence that the provisions of this ordinance remove the basis of its calculation.

Part 6 – Permanent representatives

Section 39 – Permanent representatives

- (1) This ordinance applies *mutatis mutandis* to permanent representatives as defined in section 13 of the Fiscal Code.
- (2) If a permanent representative is a legally independent enterprise with own personnel as defined in section 2(4), then, for the application *mutatis mutandis* in accordance with subsection (1), all people functions performed by the permanent representative's personnel for the represented party must, by way of derogation from section 2(3), be treated as own people functions of the represented party.

Part 7 – Final provisions

Section 40 – First application

¹This ordinance applies to fiscal years starting after 31 December 2014. ²Section 3 (3) in the version of Article 5 of the ordinance of 12 July 2017 (Federal Law Gazette I, p. 2360) is applicable for the first time to fiscal years starting after 31 December 2016.

Section 41 – Entry into force

This ordinance enters into force on the day following its promulgation.

Conclusion

The German Bundesrat has approved this ordinance.

Editorial note

The sentence numbers contained in this ordinance are not official.