

New BMF Draft on the Permanent Establishment Concept and its Implications for Transfer Pricing

On February 13, 2026, the German Federal Ministry of Finance (BMF) published a new draft revising the administrative principles on the definition of a permanent establishment (PE). This draft is particularly relevant from a transfer pricing perspective, as any newly created PE automatically triggers profit allocation requirements under the Authorized OECD Approach (AOA).



Why is the draft so important for transfer pricing?

Under the AOA, PEs are treated as if they were separate and independent entities. This is explicitly set out in the relevant AOA guidance, meaning that, already in the context of profit attribution, the functional and risk analysis, the attribution of assets and personnel functions, as well as the arm's length valuation of intra-group dealings must be carefully assessed.

In Germany, this approach is implemented through the Ordinance on the Attribution of Profits to Permanent Establishments (BsGaV), which provides detailed rules on:

- the allocation of functions, risks, assets and capital,
- as well as
- the arm's length pricing of all internal supplies of goods and services.

As a result, each additional PE gives rise to significant transfer pricing obligations, including documentation requirements, functional and risk analyses, and ongoing profit allocation.

Broader PE definition – increase in transfer pricing cases

The new draft replaces the guidelines in force since 1999 and incorporates extensive German Federal Fiscal Court (BFH) case law.

The central feature of the new framework is a refined conceptual approach: going forward, the existence of a PE will no longer be determined by reference to individual criteria. Instead, it will be based on a holistic assessment of all relevant facts and circumstances of each individual case.

The relevant criteria (fixed place of business, duration, right of disposal, and degree of integration) will in future be assessed within the framework of a so-called typological approach. This is expected to increase the number of potential PEs of internationally operating companies – and, consequently, the number of cases requiring profit attribution and transfer pricing documentation, as well as the integration of PEs into existing transfer pricing frameworks.

Specific PE risks with transfer pricing relevance

Activities performed at the premises of customers or other independent third parties may lead to the threshold for creating a PE being met at an earlier stage, in particular where:

- business activities are carried out on-site at the customer,
- employees have access to facilities for personal use (e.g., desk, locker), or
- effective control arises through ongoing supervisory activities or managerial functions.

The latter, in particular, has already been confirmed by BFH case law.

From a transfer pricing perspective, the key consequence is that, once a PE exists, internal dealings between the head office and the PE must be remunerated on an arm's length basis. This also requires the preparation of a functional and risk analysis covering the PE.

Management functions and sales activities

While the activities performed by employees from a home office will generally not give rise to a PE, the activities performed by senior management personnel from a home office may give rise to a place of the effective management PE. In such cases, the management functions performed from the home office must be attributed to the relevant PE for transfer pricing purposes, together with the corresponding attribution of free capital.

Even sales activities may give rise to a dependent agent PE. The BMF draft clarifies that a PE may arise where employees:

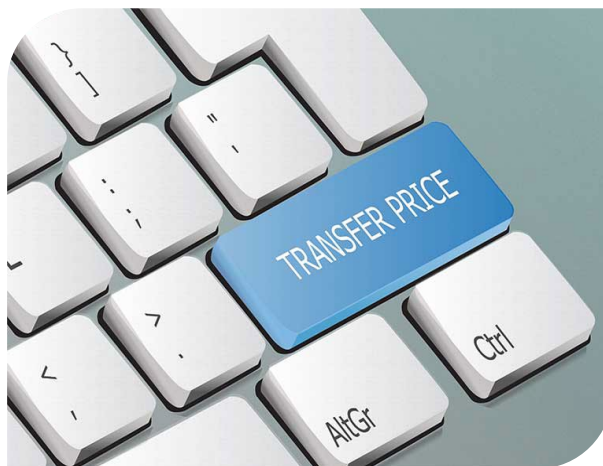
- habitually conclude contracts on behalf of the head office, or
- play the principal role leading to the conclusion of contracts.

Furthermore, so-called functionless PEs (e.g., wind or solar parks, servers), or pure asset PEs, may require a profit attribution between the head office and the PE and thus give rise to transfer pricing risks. As already clarified by the BMF in 2019, even in the absence of personnel, assets, capital and risks must be separately attributed and remunerated on an arm's length basis (e.g., via a capital charge).

Increased compliance requirements driven by international tax audits

Experience from international tax audits shows that tax authorities are placing increased scrutiny on PE risks and transfer pricing – particularly from 2025 onwards, driven by more stringent documentation requirements.

As a result, companies face significantly higher documentation and compliance obligations at both the head office level and, for example, in respect of their German PEs.



Recommendations for businesses

We therefore recommend reviewing domestic and cross-border business structures for increased PE risks. Particular attention should be paid to on-site project work, the use of third-party premises, home office arrangements of senior management personnel, sales and agency structures, as well as construction and installation projects.

In addition, transfer pricing analyses should be carried out at an early stage to assess the functional and risk profile of potential PEs, the attribution of assets and free capital, and the arm's length nature of intra-group supplies of goods and services – before these aspects are scrutinized in a tax audit.

Do you have questions on this topic?

Do you require further support? Please feel free to contact our experts, Henning Straeter or Nick Freiberger, who will be happy to assist you.

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