

Ordinance on the Type, Content and Scope of the Records as Referred to in Section 90 Subsection (3) of the Fiscal Code (Ordinance on the Documentation of Profit Allocations)¹

Date of signature: 12 July 2017

Enacting clause

On the basis of section 90 subsection (3), eleventh sentence, of the Fiscal Code², as reformulated by Article 1 number 2 of the Act of 20 December 2016 (Federal Law Gazette I, p. 3000), the Federal Ministry of Finance orders as follows:

Section 1 – Principles of the obligation to keep records

(1) Taxpayers must, in the records that are to be kept on business relations as defined in section 1 subsection (4) of the External Tax Relations Act³, provide all the facts that are of fiscal importance in relation to the agreement of terms for transactions, particularly transfer prices. The obligation to keep records is not limited to relations under civil law. The obligation to keep records also applies to transactions that do not have an exchange of services as their object, such as agreements on the posting of workers. Records that are essentially of no use (section 162 subsections (3) and (4) of the Fiscal Code) are to be treated as if they had not been kept.

(2) For the documentation of facts pursuant to section 90 subsection 3, second sentence, of the Fiscal Code, it is necessary to have records on the type, scope and execution of the transactions as well as the transactions' economic and legal frameworks.

(3) For the documentation of commensurateness pursuant to section 90 subsection (3), second sentence, of the Fiscal Code, taxpayers must, for each transaction corresponding to the transfer pricing method that they have chosen, keep records and refer to comparative data, to the extent that this data is available to the taxpayers, or to parties related to such taxpayers, at the time of the agreement of the respective business transaction or if the taxpayer is able to obtain such data from freely accessible sources without undue effort. The comparative data referred to in the first sentence above includes, in particular, data on comparable business transactions that the taxpayer or a party

¹ This working translation of the *Verordnung zu Art, Inhalt und Umfang von Aufzeichnungen im Sinne des § 90 Absatz 3 der Abgabenordnung (Gewinnabgrenzungsaufzeichnungs-Verordnung)* is provided by the Language Service of the Federal Ministry of Finance. Only the German text of this Ordinance is authentic.

² *Abgabenordnung*

³ *Außensteuergesetz*

related to the taxpayer has concluded with unrelated third parties and on comparable business transactions between unrelated third parties, for example prices and business conditions, cost breakdowns, profit mark-ups, gross margins, net margins, and profit distributions. In addition, records must be kept on internal company data that enable the plausibility of the transfer prices agreed by the taxpayer to be checked, such as, for example, projections and data on turnover, profit and cost planning. If the taxpayer has weighted, in terms of significance for a business transaction, the functions performed by the taxpayer and by parties related to the taxpayer, the risks assumed and the main assets used, then this weighting must be consistent; in such cases, the exercised functions, the scope of the actual risks assumed and the amount of the main assets actually deployed must be shown for each participant in the transaction in a manner that is quantitatively transparent.

Section 2 – Type, content and scope of the records

(1) Records on business relations may be kept in paper or electronic form. They must be kept and retained in an orderly fashion. They must demonstrate that the taxpayer is making a serious effort to organise the taxpayer's business relations on the basis of the arm's length principle. The records must therefore make it possible for a competent third party to determine, within a reasonable period of time, what circumstances taxpayers have established in connection with their business relations and whether, and to what extent, they have followed the arm's length principle in the process.

(2) The type, content and scope of the records to be kept depend on the individual case, in particular on the transfer pricing method chosen by the taxpayer. The taxpayer is not obliged to keep records for more than one suitable transfer pricing method.

(3) Records are generally to be kept on a transaction-related basis. Business transactions that are economically comparable in terms of functions and risks may be aggregated into groups for the purpose of keeping records, if

1. the groups were created according to previously determined and transparent rules and the business transactions are of the same type or same value or
2. aggregating transactions is also standard in the case of business transactions between unrelated third parties.

Aggregating transactions is also permissible in the case of business transactions that are connected in terms of their causes, and in the case of partial performances that form part of an overall business activity, if, in terms of evaluating the commensurateness, the individual transactions are less important than the assessment of the overall business activity. If records are kept for groups of transactions, the rules for the execution of the transactions and the criteria used when creating the

group of transactions must be shown. If internal transfer pricing guidelines exist for a group of associated enterprises that satisfy the arm's length principle and that specify for the individual companies a suitable transfer pricing method or multiple suitable transfer pricing methods, then these transfer pricing guidelines may be included as part of the records. If such transfer pricing guidelines govern the process of determining prices and are actually followed, then the transaction-based individual records referred to in the first sentence above may be dispensed with.

(4) If, in the case of an ongoing set of circumstances, there is a change in the circumstances that is of significant importance with regard to the commensurateness of the agreed prices, the taxpayer must, even if the transaction has already been concluded, collect and record information that will allow a revenue authority to evaluate whether, and as of which point in time, unrelated third parties would have agreed an amendment of the terms and conditions for subsequent transactions. This applies in particular if tax losses that an unrelated third party would not have accepted become apparent in a business unit, or if price adjustments are carried out to the detriment of the taxpayer.

(5) Records are generally to be kept in German. The revenue authorities may allow exceptions to this rule upon application by the taxpayer. The application may be made before the records are prepared, but at the latest it must be made immediately after the records have been requested by the revenue authorities. Any translations of contracts and similar documents as referred to in sections 4 and 5 that are required are deemed to be part of the records. Section 87 subsection (2) of the Fiscal Code remains unaffected.

(6) The records should as a rule only be requested for the purpose of carrying out a field audit. The request should identify the taxpayer's business units and business relations that are to be the subject of the field audit. In the request, the type and the scope of the requested records should also be defined in sufficiently precise terms. The request may be issued together with the audit order and may be subsequently issued, expanded or amended at any time (section 90 subsection (3), tenth sentence, of the Fiscal Code).

Section 3 – Prompt preparation of records in the case of exceptional business transactions

(1) Records on exceptional business transactions as referred to in section 90 subsection (3), eighth sentence, of the Fiscal Code are considered to have been promptly prepared if there is a close chronological proximity between the business transaction and the preparation of records. They are still regarded as promptly prepared if they are prepared within a period of six months following the end of the fiscal year in which the transaction has occurred.

(2) In particular, the following transactions are regarded as exceptional:

1. the conclusion and the amendment of long-term contracts that have a significant impact on the amount of income that taxpayers receive from their business relations,
2. asset transfers within the course of restructuring measures,
3. the transfer and ceding of assets in connection with major changes of functions and risks in companies,
4. business transactions in connection with changes in business strategy that are of significance for the determination of transfer prices, and
5. the conclusion of contribution arrangements.

Section 4 – Country-specific company-related documentation⁴

(1) Taxpayers must keep, in accordance with sections 1 to 3 above, the following records, to the extent that they are of relevance for taxation with regard to the evaluation of the taxpayers' business relations as referred to in section 90 subsection (3), first and second sentence, of the Fiscal Code:

1. general information about the ownership structure, the business operations and the organisational structure:
 - a) a representation of the ownership structures between the taxpayer and related parties as referred to in section 1 subsection (2) numbers 1 and 2 of the External Tax Relations Act with whom the taxpayer maintains direct business relations or business relations via intermediaries at the beginning of the audit period and a representation of changes to these ownership structures during the audit period,
 - b) a representation of other circumstances that may justify classification as a related party as referred to in section 1 subsection (2) number 3 of the External Tax Relations Act,
 - c) a representation of the organisational and operational structure of the group, including permanent establishments and holdings in partnerships, at the beginning of the audit period and a representation of changes to the group structure during the audit period,
 - d) a description of the management structure and the organisational structure of the taxpayer's domestic company,
 - e) a description of the taxpayer's areas of activity and the business strategy at the beginning of the audit period and a description of changes to the areas of activity and the business

⁴ Known as the "local file" in the context of the OECD/G20 Base Erosion and Profit Shifting Project

strategy during the audit period.

2. records on the taxpayer's business relations:

- a) a representation of the taxpayer's business relations, overview of the type and scope of these business relations, for example goods purchases, services, loan arrangements and other transfers of usage rights, and cost contribution arrangements, and an overview of the contracts upon which the business relations are based and any changes to these contracts during the audit period,
- b) a list of the main intangible assets that belong to the taxpayer and that the taxpayer uses, or transfers for the purpose of being used, in the context of the taxpayer's business relations;

3. functional analysis and risk analysis:

- a) information about
 - aa) the functions performed within the scope of the business relations and the risks assumed at the beginning of the audit period, as well as any changes to these functions and risks during the audit period,
 - bb) the main assets used,
 - cc) the agreed contractual conditions,
 - dd) the chosen business strategies and
 - ee) any market and competition-related circumstances that are of relevance for taxation,
- b) description of the value chain and representation of the taxpayer's contribution to the value chain; section 1 subsection (3), fourth sentence, must be observed;

4. transfer pricing analysis:

- a) time of determination of transfer prices,
- b) a record of any information that was available at the time of determination of transfer prices and was used to determine the prices, which is of relevance for taxation,
- c) a representation of the transfer pricing method used,
- d) justification for the choice of the transfer pricing method used and its suitability,

- e) documentation about the calculations used when applying the chosen transfer pricing method,
- f) a list and description of comparable internal or external business transactions that have been used.

(2) The records specified in subsection (1) above include the following additional records depending on the circumstances of the individual case:

1. information about special circumstances such as measures to set-off benefits, insofar as they may influence the determination of the taxpayer's transfer prices;
2. where contribution arrangements are involved, the contracts, if necessary accompanied by the attachments, annexes, and additional agreements, documentation about the application of the allocation formula and about the expected benefits for all participants, as well as documentation about the type and scope of invoice verification, adjustments to changed circumstances, the right to access the documents of the company supplying the services and the allocation of usage rights;
3. information about applied-for or concluded mutual agreement procedures or arbitration procedures with other countries and about unilateral transfer pricing commitments and other tax rulings from foreign tax administrations that affect the taxpayer's business relations;
4. records on price adjustments on the part of the taxpayer, even if these adjustments are the result of transfer pricing corrections or rulings by foreign revenue administrations with regard to parties related to the taxpayer;
5. records on the causes of losses and on precautions by the taxpayer or parties related to the taxpayer to eliminate loss-making situations, if the taxpayer posts a tax loss from business relations in more than three consecutive fiscal years;
6. in cases involving changes of functions and risks as referred to in section 3 subsection (2) above, records on research projects and ongoing research activities that could be related to a change in function and which took place or were concluded during the three years before the implementation of the change in function; the records must contain, as a minimum, details of the specific subject of the research and the total costs attributable to the research. This only applies if the taxpayer carries out research and development and keeps documentation on these research and development activities from which the above-mentioned records may be derived.

(3) If taxpayers use databases to determine their transfer prices, they must provide comprehensive

information on the search strategies used, the search criteria used, the search results and any additional selection processes used outside the scope of the database (search process). The taxpayer's entire search process must be transparent and verifiable at the time of the field audit. The configuration of the database which is used to perform the specific search process must be documented in full. Section 147 subsection (6) of the Fiscal Code applies *mutatis mutandis*.

Section 5 – Master file

(1) Taxpayers who are obliged under section 90 subsection (3), third and fourth sentences, of the Fiscal Code to keep a master file must keep the records listed in the Annex to this Ordinance and submit the relevant documents so that the revenue authorities are able to obtain an overview of the type of global business activity of the company group and of the system of determining transfer pricing that the group uses. The taxpayer may also use records that have been prepared by a different company in the same group. If necessary, these records are to be supplemented with further information in accordance with the Annex to this Ordinance. Section 2 subsection (5) remains unaffected.

(2) With regard to the keeping of the master file, the taxpayer should proceed on the basis of reasonable commercial judgment in order to achieve the goals associated with the master file using a reasonable amount of resources.

Section 6 – Application rules for smaller companies and for taxpayers with income that is not income from profits

(1) For taxpayers who generate income other than income from profits from business relations, and for smaller companies, the recording obligations set out in section 90 subsection (3), first to fourth sentences and eighth sentence, of the Fiscal Code and the recording obligations set out in this Ordinance are deemed to be met, subject to the second sentence below, if the information that must be provided to the revenue authorities fulfils the requirements of section 2 subsection (1) above and is substantiated by the submission of available documents upon request by the tax office. The deadlines specified in section 90 subsection (3), seventh and eighth sentences, of the Fiscal Code must be complied with.

(2) Smaller companies as referred to in subsection (1) above are deemed to be companies with respect to which, in the current fiscal year,

1. the total fees for the supply of goods or products from business relations with related parties as referred to in section 1 subsection (2) of the External Tax Relations Act does not exceed 6 million euros and

2. total remuneration for services other than the supply of goods or products from business relations with related parties as referred to in section 1 subsection (2) of the External Tax Relations Act does not amount to more than 600,000 euros.

If the amounts specified in the first sentence above are exceeded in a fiscal year, then subsection (1) above is no longer applicable as of the following fiscal year. If a company that does not enjoy privileges pursuant to subsection (1) above does not exceed the specified amounts in a fiscal year, it is to be treated as a smaller company as defined in the first sentence above in the following fiscal year.

(3) Related domestic companies as referred to in sections 13, 18 and 19 of the Tax Audit Code⁵ of 15 March 2000 (Federal Tax Gazette I, p. 368), as amended, and domestic permanent establishments of parties related to the taxpayer are to be aggregated for the purpose of checking the limits pursuant to subsection (2) above.

Section 7 – Final provision

This Ordinance only applies to fiscal years that begin after 31 December 2016.

Section 8 – Entry into force, expiration

This Ordinance enters into force on the day after its promulgation. The Ordinance on the Documentation of Profit Allocations⁶ of 13 November 2003 (Federal Law Gazette I, p. 2296), last amended by Article 7 of the Act of 26 June 2013 (Federal Law Gazette I, p. 1809), expires at the same time.

Final clause

The German Bundesrat has approved this Ordinance.

Annex (to section 5)

Scope of the master file

The master file should contain the following information:

1. a visual representation of the organisational structure (legal and ownership structure) as well as of the geographical distribution of the companies and permanent establishments that are part of

⁵ *Betriebsprüfungsordnung*

⁶ *Gewinnabgrenzungsaufzeichnungsverordnung*

the company group as referred to in section 90 subsection (3) of the Fiscal Code;

2. an overview of the important drivers of the group's overall profit;
3. a description of the supply chains for the group's five products or services that generate the largest turnover (a meaningful chart or diagram is sufficient);
4. a description of the supply chains for any other products or services that individually account for more than 5 percent of group turnover (a meaningful chart or diagram is sufficient);
5. a list and brief description of important service arrangements between companies in the group (other than research and development services), including a description of the capabilities of the principal locations providing important services and transfer pricing policies for allocating services costs and determining prices to be paid for intra-group services;
6. a description of the main geographical markets for the group's products or services referred to in numbers 3 and 4 above;
7. a brief functional analysis describing the principal contributions to value creation by individual entities within the group, i.e. key functions performed, important risks assumed, and important assets used;
8. a brief description of important restructurings of the group's business activities occurring during the fiscal year, and a list and brief description of important acquisitions and divestitures of companies carried out by the group during the fiscal year;
9. a general description of the group's overall strategy for intangible assets (development, ownership, protection and exploitation), including a list of the locations of the principal research and development facilities and of the locations of research and development management;
10. a list of the group's intangible assets or groups of intangible assets that are important for the determination of transfer prices and a list of the entities that are the legal owners or holders of these intangible assets;
11. a list of important agreements between the group's companies with regard to intangible assets, including cost contribution arrangements, principal research service agreements and licence agreements;
12. a general description of the group's transfer pricing policies with regard to research and development and intangible assets;

13. a general description of any important transfers of interests in intangible assets among the companies of the group during the fiscal year concerned, including details on the entities, countries and compensation involved;
14. a general description of how the group is financed, including a representation of important financing arrangements with unrelated third parties;
15. details of any companies in the group that provide a central financing, cash management or asset management function, specifying under which country's law the entity is organised and specifying the place of effective management of the respective entity;
16. a general description of the group's transfer pricing strategy with regard to financing arrangements within the group;
17. the group's consolidated financial statement for the respective fiscal year, if one has been prepared;
18. a list and brief description of any existing unilateral advance pricing agreements relating to the group's transfer pricing approach and any other tax rulings relating to the allocation of income among countries.

Insofar as imprecise legal concepts are used in the first sentence above, the company is granted discretionary leeway under the condition that this discretionary leeway is used uniformly across countries, is used according to disclosed criteria and is used consistently after the respective fiscal year.