In the middle of the current legislative period, the governing coalition of conservatives and social democrats plans to address a few small and medium-size tax policy projects in the remainder of 2015.

**Base Erosion and Profit Shifting**

BEPS clearly is a major tax policy issue also in Germany. However, although social democrats and state governments have been pushing for a proactive BEPS package particularly with a focus on hybrids since late 2014, Germany will likely conduct the bulk of its BEPS implementation in 2016 after the project has been finalized on the OECD level.

State governments have considerable influence on tax policy in Germany. Based on an agreement between the Federal Government and state governments of December 2014, a special working group was created to discuss BEPS implementation and prepare a potential bill in 2015. But in May 2015, state governments revealed that there had only been one working group meeting since January. Therefore, given the complex nature of BEPS-related tax legislation, far-reaching aligned initiatives at federal and state level have become unlikely for the next few months, leaving not much time to complete legislative activities in the second half of 2015. In this context, we do not expect more than first steps towards BEPS implementation by the end of this year.
Legislation

Bill regarding amendments to various tax laws („ProtokollerklärungsG“)
In February 2015, the legislative process regarding a bill on amendments to tax laws („Protokollerklärungsge setz“) was commenced. The bill was introduced by the Federal Government and contains several changes to different tax laws such as corporate income tax, personal income tax, reorganization tax, VAT and others, many of them being rather technical. The proposed government bill covers a list of state demands of late 2014. Main points of the bill are:

- a taxpayer-friendly revision of the so-called “group exemption” from the German change-in-ownership rule
- a limitation regarding non-share considerations that a receiving entity (transferee) can provide to the transferor in certain group reorganizations
- a change to the real estate transfer tax act, whereby (contrary to recent case law) any 95% or greater change in the indirect corporate ownership chain above a real estate-owning partnership triggers the tax, regardless whether the ultimate ownership changes or not.

Since the specific government proposals concerning these points have not been questioned by the states in their official statement to the bill, an implementation without significant changes can be expected. Interestingly, this also applies to the above mentioned real estate transfer tax proposal though it does not contain a retroactive application clause as previously demanded by states.

In addition, further state demands will be discussed in parliament:

- Local trade tax: Profit distributions from subsidiaries to tax-group subsidiaries are 100% trade tax exempt according to a recent ruling by the Federal Tax Court (see below), contradicting the opinion of the financial administration. The Upper House of the German parliament (Bundesrat) demands a change in legislation which deems 5% of dividends as trade taxable also in cases where such dividends are received by tax group subsidiaries.
- VAT: Clarifications regarding international chain transactions and the application of the reverse charge mechanism on specific construction works.

Legislative process is expected to finish in Q3 after the parliamentary summer recess.

Investment tax reform
A draft bill regarding the investment tax law is expected for late June, the legislative process to be finished by first half of 2016. Besides reforming the investment tax act and implementing a new taxation regime for UCITS funds, this bill shall also deal with the tax treatment of capital gains from portfolio (<10%) holdings. In March, the Federal Ministry of Finance presented a paper setting out the cornerstones of the investment tax reform, but failing to elaborate on the tax treatment of these capital gains. The states urge for the same tax treatment that portfolio dividends receive, which are fully taxed. Exemptions for start-ups and “Business Angels” are to be included. It is unclear how the amendment can be realized in accordance with EU law. It is also unclear what transitional rules will apply, especially with regard to how existing built-in gains will be considered.

Implementation of the Accounting Directive 2013/34/EU
In addition to several changes in German commercial law as given by the EU Accounting Directive 2013/34/EU, there is currently a debate between federal coalition partners to attach a regulation to change the discount rate for provisions (sec. 243 para. 2 HBG). The outcome in this specific matter is unclear, but might lead to a significant increase in the discount rate that is currently calculated as a seven-year average. It should be noted that these changes would not affect calculation of provisions for tax purposes. Completion of the whole implementation process is expected this summer.

Inheritance tax
Top priority among German policy makers currently is the reform of the inheritance tax law. The Federal Constitutional Court deemed the privilege for businesses in inheritance cases unconstitutional. The Federal Government now has to correct this matter by mid-2016. A draft bill was presented on 2 June 2015 after earlier key points presented by the Government had been heavily criticized by conservative MPs and family businesses. It remains to be seen if the government proposal meets the requirements of both the court decision and family businesses. If so, the bill could be passed by the end of the year.
Legislation

New double tax treaty Netherlands-Germany: Ratification law passed by Dutch parliament

On 19 May 2015, the Dutch parliament passed the ratification law for the new double tax treaty (DTT) Netherlands-Germany. The treaty was signed in 2012 and has already been ratified by Germany. The new DTT will replace the existing agreement of 1959 including its amending protocols. The main features of the treaty are:

- In principle, a 15% withholding tax applies on dividends. The rate is 5% if the receiving corporation owns directly at least 10% of the capital of the company paying the dividend (the EU-Parent Subsidiaries Directive may in these cases provide for a 0% rate). If the recipient is a partnership, the 5% rate does not apply.
- 0% on interest
- 0% on royalties
- Capital gains from the sale of shares are taxable in the shareholder’s country of residence. Where the assets of an entity consist of immovable property situated in the other contracting state (which are not housing the corporation's business or the business of its shareholders) making up more than 75% of the value of the entire assets, the country in which the immovable property is situated may tax the capital gains from the alienation of the shares.

For income derived through a permanent establishment in the Netherlands, Germany provides for the exemption method. Under a switch-over clause, Germany applies the credit method if the taxpayer cannot demonstrate that the income from the permanent establishment income is active income as defined under the German CFC rules. Further, the income needs to be “effectively taxed” in the Netherlands for being eligible for the exemption method. The new treaty provides for an arbitration procedure in cases where the contracting states do not apply the treaty provisions in a uniform manner. A taxpayer can apply for an arbitration procedure if the dissent is not resolved in a mutual agreement procedure.

If the necessary exchange of the instruments of ratification between the Netherlands and Germany takes place prior to 31 October 2015, the treaty will enter into force as of 1 January 2016.

Other double taxation treaties

The work on several double taxation treaties (DTTs) is proceeding well. Implementation acts regarding the signed treaties with Israel, the United Kingdom and Uzbekistan have recently been started. For all three treaties, application as of 2016 is still possible provided that all countries complete the ratification process by the end of this year.

Main issue of the amending protocol to the treaty with the UK is the implementation of the “Authorized OECD Approach - AOA” for earnings from permanent establishments. Noteworthy in the treaty with Israel is a reduced withholding tax rate for dividends and interest of 5% and no withholding tax for royalties as well as the abolishment of the opportunity to credit Israeli notional withholding tax in Germany.

Meanwhile chances are decreasing that the amending protocol to the DTT with France signed in March 2015 and the new DTT with China (already signed in March 2014) will be ratified in time to ensure application as of January 2016.
E-balance sheet

Background
In Sec. 5b EStG (German Income Tax Act), the German government introduced a regulation requiring the electronic filing of tax balance sheets/reconciliation statements and income statements (e-balance sheets) for fiscal years beginning after 31 December 2011. In a letter issued by the Federal Ministry of Finance on 19 January 2010 (ref. IV C 6 - S 2133-b/0), the tax authorities threatened to impose administrative fines in case of non-compliance.

In order to comply with the e-balance sheet requirements, the taxonomy prescribed by the tax authorities is to be used and data have to be presented in a pre-defined format. As the e-balance sheet taxonomy is fairly detailed, existing charts of accounts had to be examined for conformity with the taxonomy and often had to be amended in order to comply with tax law. Thus, the electronic filing obligation resulted in many cases in a need for substantial technical and organizational changes.

Some of the filing requirements have been deferred, e.g. capital accounts of a German partnership or for permanent establishments of foreign taxpayers.

Update regarding German operations of foreign entities
In June 2014, the German Federal Ministry of Finance (BMF) released an update of its regulations concerning the e-balance sheet - Taxonomy 5.3.

This update is particularly important for domestic permanent establishments maintained by foreign entities. As part of the new taxonomy, domestic permanent establishments of foreign entities are now required to transfer a separate electronic balance sheet to the fiscal authorities for fiscal years beginning after 31 December 2014.

According to the decree of the BMF dated 28 September 2011, a foreign entity with a permanent domestic establishment is required to prepare and transmit an electronic balance sheet if there is a legal obligation to keep records (accounting, financial statements) according to Sec. 4 (1), Sec. 5 or Sec. 5a EStG respectively Sec. 140 or Sec. 141 AO (German Fiscal Code). The electronic tax balance sheet has to refer only to the domestic permanent establishment as a dependent part of the legal entity. However the use of mapping simplifications, such as fallback positions, is not allowed.

Furthermore, an electronic balance sheet is also required for specific entities with limited tax liability due to German-source income which have neither a German permanent establishment nor a permanent representative in Germany. In this regard, the decree of the BMF dated 28 September 2011 refers to the decree of 16 May 2011 about income from rent and lease in accordance with Sec. 49 (1) Nr. 2 f) aa) No. 6 EStG. This decree stipulates that also current income from rent and lease of specific foreign entities without domestic permanent establishments qualifies as business income. Thus, an obligation to file e-balance sheets might arise.

How can EY assist?
We can assist with examining whether an obligation to submit an e-balance sheet exists and we can provide a view on whether and, if so, how the ERP system or the general ledger have to be adjusted. This includes a check of the chart of accounts to establish its compliance with the taxonomy and a discussion of how one can align with the e-balance sheet requirements in the most efficient manner. We can also support our non-audit clients in installing the necessary technology and in establishing the processes needed to transfer the e-balance sheet.

This may also be an opportunity to analyze and improve the existing tax accounting and tax reporting systems.
Federal Tax Court: No 5% trade tax leakage on dividends received through a subsidiary in an Organschaft

Under certain conditions, dividends received by a German corporation from a subsidiary corporation are subject to a participation exemption. Though the conditions vary with respect to the minimum holding amount, timing aspects and activity requirements, this participation exemption generally applies to corporate tax and trade tax, and it applies to dividends received from German as well as foreign subsidiaries. However, the law stipulates that 5% of any qualifying dividends earned by a German corporation are deemed as non-deductible expenses and are, therefore, added back to the taxable income. Consequently, this add-back effectively leads to only a 95% exemption at the level of the corporate recipient.

In 3-tier structures, this 5% tax “leakage” for corporate tax purposes also applies to dividends that are received by a corporation which itself is a subsidiary in a so-called Organschaft (German fiscal unity). In accordance with the gross method that is part of the Organschaft rules, the participation exemption (and the 5% add-back) are disallowed at the level of the Organschaft subsidiary and are only applied at the level of the Organschaft parent (provided that the parent qualifies for the participation exemption accordingly). While for corporate tax this treatment is not questioned, it has been subject to intense discussions whether the 5% add-back is also applied for trade tax purposes in Organschaft groups.

With its decision dated 17 December 2014 (I R 39/14), the German federal tax court (BFH) has now ruled in favor of the taxpayer: If the dividend recipient itself is a subsidiary in an Organschaft, the 5% tax leakage does not apply for trade tax purposes. Consequently, provided that the other requirements are met, any dividends received through a subsidiary in an Organschaft are 100% trade tax exempt. The court bases its result on a stringent interpretation of the wording of the trade tax law and the Organschaft rules, which stipulate that for trade tax purposes qualifying dividends are at a first step fully deducted at the level of the subsidiary, hence not included in the income which is attributed to the Organschaft parent in a second step, and therefore no 5% add-back on any – already eliminated – dividends occurs (neither at the level of the subsidiary nor at the level of the Organschaft parent).

This court decision can generally be applied both to an Organschaft headed by a corporation as well as an Organschaft headed by a partnership, and on dividends derived by the Organschaft subsidiary from German as well as from foreign third-tier subsidiaries. However, the 5% trade tax leakage on capital gains resulting from the sale of shares in a subsidiary is not affected by this decision.

This position held by the court may be favorable for taxpayers that have a German Organschaft in place and intend to repatriate dividends from, e.g., foreign subsidiaries to Germany. Nevertheless, it should be noted that the German government has already indicated that it considers a change of the trade tax law to legislate the contrary view of the tax authorities.

Federal Tax Court: Imputed passive income of controlled foreign corporation (CFC) not subject to German trade tax at the level of German shareholder

German resident taxpayers may be subject to imputation of income earned by foreign corporations, in which they hold direct or indirect ownership interests. The imputation occurs in particular where:

- certain ownership thresholds are reached (although they can be very low where the CFC has mainly financing income),
- passive income is earned by the CFC (i.e. broadly everything that is not production or sale (with local substance)),
- income is low-taxed. Low taxation is deemed to exist where the effective tax rate (as measured under German income computation rules) is below 25%, and
- no EU case is given, which could satisfy the substance-based exemption introduced in Germany after the ECJ case “Cadbury Schweppes”.

In a somewhat surprising decision dated 11 March 2015 (I R 10/14), the Federal Tax Court (BFH) held that the imputation amounts resulting from low-taxed, passive income earned by a foreign entity controlled by German residents should not be subject to German trade tax at the German shareholder level, but only to corporate income tax. The court based its decision on the fact...
German court decisions

that German trade tax law allowed an exemption of income earned “through a foreign permanent establishment”, and that the wording of this exemption did not require the foreign permanent establishment to be one of the German trade-taxable person. Hence, as the passive CFC income was indeed earned in a foreign permanent establishment (of the CFC), it could be exempt from trade tax.

A law change as a reaction to this case law can be expected, possibly also addressing other necessary amendments of the German CFC rules.

Antitrust Law: Restructuring measures as means of defence in antitrust proceedings

Intercompany restructuring measures may be a suitable instrument to avoid fines imposed by the German Federal Cartel Office for the infringement of antitrust laws.

In July 2014, the German Federal Cartel Office imposed fines amounting to approximately 338 million Euros on 21 sausage manufacturers for alleged price-fixing agreements (the so-called sausage cartel). The total amount of the fine is among the highest ever imposed by the Federal Cartel Office. About one half of the sausage manufacturers appealed against their fines; among these were two subsidiaries of one of the biggest German meat producers, who were facing fines of approximately 120 million Euros.

Before the competent Düsseldorf Higher Regional Court could decide on the appeal, the meat producer carried out a restructuring and the two subsidiaries were deleted from the commercial register. Due to this deletion, it is unlikely that the fines imposed on the two subsidiaries can still be collected.

Incomplete amendment of the Act Against Restraints of Competition (GWB)

Under German Law, a fine of the Federal Cartel Office must be addressed to the legal entity which has violated the antitrust law, and under German law – in contrast to fines imposed by the EU commission – there is no group liability for a fine. Before the 8th amendment of the GWB in 2013, there was not even a provision in German law to regulate the liability of legal successors for fines imposed in antitrust proceedings. Therefore, it was possible to delete a company in the commercial register by e.g. merging it or demerging it and thereby avoiding the payment of fines. According to the case law of the Federal Supreme Court, the legal successor could be held liable only under very narrow conditions.

In 2013, the German legislator created an explicit legal basis for determining fines to be imposed on legal successors by amending the German Regulatory Offences Act (OwIG). The relevant provision of the OwIG now states that fines can be imposed on legal successors when succeeded by way of universal succession, e.g. by a merger or demerger according to the German Transformation Act. However, the fine imposed on the legal successor may not exceed the value of the assets taken over or the amount of the fine that would have been imposed on the legal predecessor.

The amendment of the OwIG could apparently not close all existing loopholes, in particular because the relevant provision does not apply to forms of succession other than “universal succession”, e.g. it does not apply to the transfer of assets by singular succession.

Automatic deletion

The meat producer obviously took advantage of these loopholes. After the appeal against the fines in the amount of approx. 120 million Euros had been filed by the two subsidiaries, various intercompany restructuring measures were carried out with the main objective of transferring all assets of the two subsidiaries to other group companies by way of an asset deal. These measures were supplemented by a change of the legal form of the subsidiaries resulting in the automatic deletion of the subsidiaries in the commercial register without the need to carry out liquidation proceedings and with one individual as remaining (former) shareholder of the subsidiaries taking over the remaining assets of the subsidiaries.

The provision of the OwIG does not apply to the individual taking over the assets so that such individual cannot be held liable for the fine. The provision is also not applicable to the other group companies because they acquired the assets by way of an asset deal and not by universal succession. Accordingly, in the case at hand, any liability for the fine elapsed upon the deletion of the subsidiaries from the commercial register because the correct addressee for the fine did no longer exist.

Although it can be assumed that the Federal Cartel Office will try to collect the fine anyway, there is a rather low chance of success. In addition, it is to be expected that the Federal Cartel Office will call upon the German legislator to further amend the OwIG in order to close the above mentioned loopholes.
German roll-over relief not in line with Freedom of Establishment

The German roll-over relief rule on replacement of certain types of assets requires the replacement asset to belong to a domestic permanent establishment. In its decision of 16 April 2015 (case reference: C-591/13), the European Court of Justice (ECJ) considered this rule not to be in line with the Freedom of Establishment of the Treaty on the Functioning of the European Union and the Agreement on the European Economic Area. The rules provide for certain assets (mainly land, buildings, inland navigation vessels, but also shareholdings held by individuals). According to the ECJ, the rule in essence provided for the deferral of the taxation of the built-in gains in the replaced asset. Hence, Member States are under the Freedom of Establishment not allowed to restrict such a benefit to domestic reinvestments. The ECJ confirmed former case law that Member States are not obliged to allow for a transfer of domestic built-in gains to abroad. In the ECJ's view, Member States must grant deferral also where a reinvestment in an EU/EEA Member State occurs. However, the ECJ did not elaborate on the exact way to resolve the infringement issue. The German legislator may now consider mirroring the domestic situation by granting in each individual case a deferral of the tax until realization of the capital gains in the (foreign) replacement asset takes place. Alternatively, the legislator could consider recapturing capital gains in equal rates over a specific period, following the approach applied for exit taxation. In exit tax cases, Germany neutralizes – upon application by the taxpayer – the capital gain which is deemed to occur e.g. upon a transfer of an asset to a foreign permanent establishment, but adds the profit over a period of 5 years to the tax base of the taxpayer (see also the notice on the ECJ decision Verder LabTec).

ECJ approves former German exit tax rule spreading capital gains in transferred assets over 10 years under freedom of establishment

In its decision of 21 May 2015 (case reference C-657/13, Verder LabTec), the European Court of Justice (ECJ) upheld the former German practice of distributing the capital gains from a deemed realization of built-in gains upon an “exit” of an asset over 10 years. According to the ECJ, picking up the capital gains over a period of 10 years is in line with the “freedom of establishment” under Article 49 of the Treaty on the Functioning of the European Union (TFEU).

The case at hand concerned German exit tax rules establishing tax liability upon the loss of its taxing right caused by the transfer of an asset to a foreign permanent establishment. In the respective year the taxpayer was allowed, according to longstanding administrative practice, to distribute the capital gains from the transfer of such assets to abroad according to the useful life of that asset, but no more than 10 years. Verder LabTec, a limited partnership under German law, transferred in 2005 various intellectual property rights from its permanent establishment in Germany to its permanent establishment in the Netherlands. The tax authorities treated this event as a realization of the hidden reserves of the transferred assets and, applying administrative practice, increased the tax base by 1/10 of the built-in gains.

The ECJ held that Member States may, in attempting to eliminate the discriminatory effects of (immediate) exit taxation, take into account the risk of non-recovery of the tax, which increases with the passage of time, and therefore are allowed to distribute capital gains over a specific period of time resulting in levying the exit tax in installments. In the given case, the 10-year period was considered proportionate, particularly in light of the reasoning in the DMC decision, where the ECJ upheld a (former) rule providing for a five-year period in reorganization tax cases.

Although the administrative practice of spreading the profit from the deemed realization of the built-in gains over 10 years was replaced in 2006 by a formal law shortening this period to only 5 years, the reasoning of the ECJ might still be of relevance. The ECJ endorsed the method that Germany applies to safeguard its taxing right in case of the transfer of an asset to a foreign permanent establishment, within the EU resulting in a loss of the German taxation right. It seems to follow that the ECJ’s reference to its decision in the DMC case (where the ECJ accepted a rule applying only in specific reorganization cases the taxation of built-in gains over 5 years) means the ECJ would not challenge Germany’s current general approach to apply a 5-year period.
On 26 March 2015, the European Court of Justice (ECJ) released the opinion of the Advocate General (AG) in the joined cases of Beteiligungsgesellschaft Larentia + Minerva GmbH & Co. KG (C-108/14) and Marenave Schiffahrts AG (C-109/14). The cases presented two questions to the ECJ which concern two significant issues in respect of

- VAT recovery by holding companies and
- VAT grouping

**VAT recovery by holding companies**

The recovery of VAT by holding companies has been much discussed in Germany. In line with established ECJ case law, German fiscal authorities consider companies whose exclusive business is to acquire and hold shares in subsidiaries (so-called “pure holding companies”) as being non-taxable persons for VAT purposes. This means that such holding companies are not entitled to deduct any VAT incurred. However, holding companies rendering taxable services to their subsidiaries for a fee (e.g. management and/or administrative services against consideration) perform business activities and hence are considered taxable persons for VAT purposes (so called “mixed holding companies”). As a general rule, a taxable person is entitled to deduct input VAT to the extent such VAT is incurred in relation to its taxable business activities.

In the aforementioned cases, both claimants incurred VAT on fees relating to the raising of capital by the issue of shares respectively from investors to fund the acquisition of shares in subsidiary entities. However, both entities intended to provide management services to their subsidiaries.

German fiscal authorities sought to restrict a proportion of input VAT on the basis that this proportion was attributable to the company’s non-business/ non-economic activities of acquiring and holding shares (the so-called “pro rata” method). The German Federal Tax Court (BFH) requested the ECJ to provide guidance on which calculation method needs to be applied in order to calculate a holding company’s input.

The AG opined that where a holding company is actively involved in the management of the subsidiary and it incurs costs in relation to capital transactions connected to that subsidiary, input VAT on this expenditure can be recovered in full. Input VAT does not need to be apportioned into a deductible and a non-deductible amount.

**VAT grouping**

The cases are also of high relevance as inter alia the question has been raised whether a partnership can act as a VAT group subsidiary in Germany.

According to German national VAT law, a partnership is not eligible to form part of a VAT group. From the AG’s opinion it becomes apparent that the conditions for VAT grouping as set by the German VAT Code are too tight compared to the EU VAT guidelines and that also partnerships may be included in VAT groups as VAT group subsidiaries. A VAT group may especially be of benefit for entities with a limited input VAT recovery right, e.g. due to VAT exempt leasing or intra-group financing activities.

The AG’s opinion is not binding on the ECJ when it releases the final decision later this year. It hence remains to be seen whether the ECJ will follow the AG’s opinion.
EU law

Energy audits – challenge for companies in 2015

According to the European Energy Efficiency Directive (Directive of 25 October 2012, 2012/27/EU) ("EED"), large enterprises in all EU Member States have to carry out energy audits by 5 December 2015. The EED also states various measures to improve energy efficiency for enterprises. The EU Member States were obliged to transform the EED into national law by 5 June 2014, but this has not yet happened in all Member States.

In Germany, the Act on Partial Implementation of the European Energy Efficiency Directive ("EDL-G"), which is applicable to all companies having their seat or facilities in Germany, entered into force on 21 April 2015. In March 2015, the Federal Office of Economics and Exports published a leaflet containing detailed information on how to carry out energy audits and providing guidance on practical issues such as energy audits in companies with many (non-operative) facilities.

Who needs to perform energy audits?
All large enterprises irrespective of their actual energy consumption or industrial sector are required to carry out energy audits. Which companies qualify as "large enterprise" is in general subject to the respective domestic law where the company has its seat or facility. Based on the EU Commission’s recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (“SME definition”), which many EU Member States including Germany used as the basis to define large enterprises, the energy audit obligation applies to all enterprises with more than 250 employees and an annual turnover of more than 50 million Euros or a balance sheet total of more than 43 million Euros.

Smaller companies may also be required to carry out energy audits if they are part of a group. Due to the corporate group clause contained in the EED, turnovers and employees of affiliated companies (shares of 25 % or more) have to be considered in total.

Additionally, all enterprises with a minimum share of 25 % owned directly or indirectly by the public sector (federal government or state or municipalities with more than 5,000 inhabitants) also have to perform the energy audit.

However, some Member States (such as Austria) do not apply the SME definition as the basis for determining which entities and groups qualify. This makes it quite difficult to determine which subsidiaries or affiliates are concerned, in particular if enterprises or facilities in different countries of the EU are involved.

What has to be done?
The energy audits have to be performed by 5 December 2015 at the latest for the first time and then to be repeated at least every four years. The EED sets out the minimum standard for the energy audits and explicitly lists EN ISO 50001 and EN 16247-1 as sufficient existing standards. EN ISO 14000 may be acceptable if an energy audit is included.

The national implementations may call for even stricter rules for the energy audits. For Germany, however, only the EED basics apply.

Are there any exceptions?
According to the EED, enterprises with existing certified energy or environmental management systems are not required to perform additional energy audits. Based on the current information, many EU Member States accept the energy management system EN ISO 50001. Nevertheless, Member States are allowed to implement their own restrictions and standards and some of them have not yet implemented the EED at all. Therefore, the further development remains to be seen.

The German provisions according to EDL-G differ from the EED with regard to enterprises with several facilities. If the facilities are inspected between 5 December 2015 and 31 December 2016, they only need to prove that they have already started the energy audit system. In this regard the enterprises have to have fulfilled at least step 4.4.3 lit. a) of DIN EN ISO 50001 for an energy management system. In case of an environmental management system, the used energy carriers have to be recorded and analyzed, the energy flows have to be registered and important core criteria have to be identified.
EU law

Practical consequences
The energy audit obligation presents a major challenge for nearly all enterprises operating in the EU. Even if sole enterprises are not concerned due to their small or medium-sized businesses, they may still be affected because of the corporate group clause. In particular, enterprises with facilities in several EU Member States have to carefully check the different national implementations of the EED.

Companies with implemented energy or environmental management systems have to check if the system is sufficient to comply with the EED and possibly stricter national implementation acts. Moreover, it has to be ensured that all group companies are adequately included if necessary.

In order to implement the required audits in time, i.e. before 5 December 2015, the respective measures have to be launched as soon as possible. In case an enterprise decides to implement a complete energy or environmental management system, timely management of all necessary activities across the group is essential.

Enterprises failing to comply face a maximum fine of 50,000 Euros in addition to possible reputational damages.

Focus

German real estate transfer tax – latest tax rates

The transfer of real estate located in Germany by way of an asset deal is generally subject to German real estate transfer tax (RETT). RETT will be triggered by the conclusion of a purchase agreement or, for example, a transaction that gives the right to another party to claim for a transfer of the real estate.

RETT can also be triggered in case of a direct or indirect transfer of at least 95% of the interest in a partnership or of shares in a company which owns real estate located in Germany.

The RETT rate depends on the federal state in which the real estate is located and ranges from 3.5% to up to 6.5% of the purchase price or, if there is no consideration, of the real estate’s value calculated under the provisions of the German Valuation Act:

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<td>Berlin</td>
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<td>Brandenburg</td>
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Business travelers: material compliance risks
A growing number of employees are being deployed around the globe by their employers. The most traditional and common types of international mobility are long-term or short-term assignments, where employees are typically assigned to a foreign entity for a period of three months up to a maximum five years. However, use is increasingly being made of alternative forms of international mobility, specifically business travel.

Business travelers create a risk group within companies which is increasingly attracting attention. Why? Business travel is often defined at short notice by specialist departments and in many times bypasses HR. Getting these business travelers “on the radar” is a fundamental challenge. Some employees record their travel activities on a voluntary basis; others are instructed to do so by their supervisors or by HR. However, based on EY’s 2013 Global Mobility Effectiveness Survey, only 30% of companies have a centralized system in place to track business travelers.

This gives rise to numerous risks for the companies involved and their employees who “fly under the radar”, most notably potential failure to comply with immigration, tax and social security regulations. Potential additional consequences are reputational damage, management prosecutions and unhappy employees due to unforeseen immigration, tax and social security exposure.

The tax perspective: 183-day rule
Countries justify their right to taxation based on the fact that work is performed in their territory. In order to avoid double taxation in the home and the host country, the Double Taxation Treaty (DTT) generally contains a regulation based on Art. 15 of the OECD model convention. This article defines that the right to taxation only reverts to the country of residence if all of the following criteria are met:

1. The employee does not spend more than 183 days in the host country within a given 12-month period as defined in the applicable DTT and,
2. Remuneration is paid by or on the behalf of an employer that is not a resident of the host country, and,
3. The remuneration is not borne by a permanent establishment of the employer in the host country.

Many people incorrectly look at the 183-day threshold only and do not review the other two aspects. However, this can have costly consequences: If the employer or a permanent establishment is located in the host country (i.e., criteria 2 and/or 3 are not met), the employee will be liable for tax on income from employment from the first day in the host country.

More stringent regulations
Many countries are imposing stricter regulations for foreign professionals and have now begun to examine business travelers more closely in order to ensure they receive their fair share of tax and social security revenue. Exchange of data between immigration and tax authorities is also increasing. One good example is the United Kingdom. The UK tax office (HMRC) now tracks exactly who enters the United Kingdom in order to work, even if only on a short-term basis. Above all, they want to know whether business travelers pay their taxes in the UK or in their home country. This means that home companies must implement systems and processes in order to monitor their employees’ travel to the UK and to manage withholding obligations correctly. Other countries also have increasingly strict requirements in this regard, which leads to challenges for all multinational organizations.

The path to compliance
The path to compliance requires raising internal stakeholder awareness, defining inter-organisational responsibilities, considering data sources and quality and defining internal guidelines and processes. Achieving compliance goes beyond understanding the tax rules only.
Spotlight

This journey should consider such practical points as:

- Which employees are covered? (This may be based on defined thresholds, e.g., all employees anticipated to travel for 30 days to a specific country)
- How is this data captured? (e.g., by the employees themselves, via a central travel booking office, or by use of a central tracking system such as EY TRAC)
- Who conveys which information to whom and when?

Business traveler compliance is today key. Achieving this compliance requires multiple steps and stakeholder inclusion as described above. Only based on this inclusive and transitional journey can multinational organizations achieve compliance around this new mobile population.

EY publications and events

Please find pdf-versions of the EY publications listed below by clicking on the related picture. The free EY Global Tax Guides app provides access to our series of global tax guides. www.ey.com/GL/en/Services/Tax/Global-tax-guide-app

The worldwide corporate tax guide summarizes the corporate tax systems in 161 jurisdictions.

The worldwide personal tax guide summarizes the personal tax systems and immigration rules for individuals in more than 160 jurisdictions.

Worldwide VAT, GST and sales tax guide (2015 edition)
Inside this guide you will find extensive details of value-added tax, goods and service tax and sales tax systems of 114 jurisdictions.

Upcoming EY events

**Munich International Tax Seminar (MITS)**
- Plenaries and workshop presentations by international EY partners on current international tax and TP topics of interest to tax directors/international tax managers
- Optional visit of the Oktoberfest for the 2015 opening ceremony, as well as lunch/afternoon entertainment

Language: English  
Date: 18-19 September 2015  
Location: Munich  
Event contact: Admittance upon invitation. Please contact your EY tax contact person for details or Aleksandra Blachowska, aleksandra.blachowska@de.ey.com

**34th Annual International Tax Conference**
- Admittance upon invitation. Please contact your EY tax contact person for details

Language: English  
Date: 8-9 October 2015  
Location: New York  
Event contact: Admittance upon invitation. Please contact your EY tax contact person for details
EY German Tax & Legal Quarterly 2.15

EY German contacts
Cities in alphabetical order

Friedrichstraße 140
10117 Berlin
Phone  +49 30 25471 0
Telefax  +49 30 25471 550

Katharinenklosterhof 3
28195 Bremen
Phone  +49 421 33574 0
Telefax  +49 421 33574 550

Westfalenstraße 11
44141 Dortmund
Phone  +49 231 55011 0
Telefax  +49 231 55011 550

Forststraße 2a
01099 Dresden
Phone  +49 351 4840 0
Telefax  +49 351 4840 550

Graf-Adolf-Platz 15
40213 Düsseldorf
Phone  +49 211 9352 0
Telefax  +49 211 9352 550

Barbarossahof 18
99092 Erfurt
Phone  +49 361 6589 0
Telefax  +49 361 6589 550

Wittekindstraße 1a
45131 Essen
Phone  +49 201 2421 0
Telefax  +49 201 2421 550

Mergenthalerallee 3-5
65760 Eschborn/Frankfurt/M.
Phone  +49 6196 996 0
Telefax  +49 6196 996 550

Bismarckallee 15
79098 Freiburg
Phone  +49 761 1508 0
Telefax  +49 761 1508 23250

Rothenbaumchaussee 78
20148 Hamburg
Phone  +49 40 36132 0
Telefax  +49 40 36132 550

Landschaftstraße 8
30159 Hannover
Phone  +49 511 8508 0
Telefax  +49 511 8508 550

Titotstraße 8
74072 Heilbronn
Phone  +49 7131 9391 0
Telefax  +49 7131 9391 550

Börsenplatz 1
50667 Cologne
Phone  +49 221 2779 0
Telefax  +49 221 2779 550

Grimmaische Straße 25
04109 Leipzig
Phone  +49 341 2526 0
Telefax  +49 341 2526 550

Theodor-Heuss-Anlage 2
68165 Mannheim
Phone  +49 621 4208 0
Telefax  +49 621 4208 550

Arnulfstraße 59
80636 Munich
Phone  +49 89 14331 0
Telefax  +49 89 14331 17225

Forchheimer Straße 2
90425 Nuremberg
Phone  +49 911 3958 0
Telefax  +49 911 3958 550

Gartenstraße 86
88212 Ravensburg
Phone  +49 751 3551 0
Telefax  +49 751 3551 550

Heinrich-Böcking-Straße 6-8
66121 Saarbrücken
Phone  +49 681 2104 0
Telefax  +49 681 2104 42650

Maggistraße 5
78224 Singen
Phone  +49 7731 9970 10
Telefax  +49 7731 9970 11

Mittlerer Pfad 15
70499 Stuttgart
Phone  +49 711 9881 0
Telefax  +49 711 9881 550

Max-Planck-Straße 11
78052 Villingen-Schwenningen
Phone  +49 7721 801 0
Telefax  +49 7721 801 550

EY German Tax Desks

London
Phone +44 20 7951 4034

New York
Phone +1 212 773 8265

Shanghai
Phone +86 21 2228 6824

Tokyo
Phone +81 3 3506 2238
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