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Home Office after the OECD Commentary changes

Comparison OECD-Germany

Paris, April 2026



Changes under the OECD Model Commentary 2025

OECD Model Commentary 2017/2021 on Article 5 of the OECD Model Tax Convention

- **Key overarching criterion:**
 - Existence of a **fixed place of business**
 - over which there is **control**.
- **Specific requirements** (para. 18):
 - Continuous use over a prolonged period
 - The employer requires the employee to use a home office or effectively forces them to do so (e.g., no access to a regular office, even though the job requires an office)
- **Negative definition** (para.19):
 - No permanent establishment if a home office is used, even though an office is provided in the other country and the company did not require the use of the home office
- **No preparatory or ancillary activities**
- Possible different implications for individuals operating sole proprietorships (para 19)

OECD Model Tax Commentary 2025 on Article 5 of the OECD Model Tax Convention

- **Key overarching criterion:**
 - Existence of a **permanent business establishment**
 - **Power** of disposal exists
- **Power of disposal is presumed**
- **Focus on the duration** of the HO activity for the question of establishment of a permanent establishment ("**working hours** indicator"):
 - HO activities **<50%**: no permanent establishment (in the OECD's view, no exceptions conceivable, "safe harbor")
 - **HO** activities **≥50%**: Permanent establishment only if, from the company's perspective, there is a *commercial reason* because the person's physical presence **facilitates** the conduct of the company's business in that country or geographic region (a close connection between the company and the other country)
- **No preparatory or auxiliary activities**
- In some cases, different implications may apply to individuals who operate sole proprietorships as well as to key personnel in corporate management (para 44.20)

Changes under the OECD Model Commentary 2025

- The criterion of companies “requiring” the activity under the HO is no longer relevant
- **Working time indicator** provides legal certainty and is intended to facilitate tax compliance
 - Calculation of the threshold ($\geq 50\%$ of total working hours for the company) for assessing HO activities
 - OECD Model Tax Convention 2025, para. 44.8: “[...] over the course of any twelve-month period commencing or ending in the fiscal year concerned.”
 - Consideration of the rolling 12-month period based on the identical wording in this regard, following the calculation of the 183-day period in Article 15 of the OECD Model Tax Convention
 - However, the exact calculation of time spent working from home remains unclear (a daily approach would likely yield inconsistent results)
 - The individual’s actual behavior (rather than contractual provisions, if contradictory) determines the calculation of working hours (OECD Model 2025, para. 44.9)
- Assessment of whether there is a *commercial reason* for working in the home office country
 - Economic reasons, e.g., when **physical contact** (on behalf of the company) with customers, suppliers, affiliated companies, or other individuals is facilitated by the person’s presence in the host country; **building a new customer base**; identifying new suppliers (or maintaining relationships with/monitoring existing suppliers), **physical presence required** for the provision of services (e.g., real-time interaction with customers/suppliers in different time zones), maintaining **customer relationships**, access to **business-relevant expertise** (e.g., meetings with employees of a research institution), **Interaction** with employees and other personnel of the company or affiliated companies
 - No economic reasons, e.g., in cases of **occasional or random customer contact, employee recruitment or retention, or considerations regarding cost reduction** (lower labor costs, lower costs for office infrastructure)

Relevance from a German perspective – Comparison of the establishment of a permanent establishment

- German Federal Ministry of Finance - **BMF** (regarding § 12 AEAO, note 4): An employee's work from a home office generally **does not** constitute **permanent establishment** for the employer, even
 - if the employer covers **the costs** of the home office and its equipment;
 - **when an employment contract is entered** into between the employer (tenant) and the employee (landlord) regarding the employee's private living quarters, unless the employer is, in the specific case, actually authorized to use the premises for other purposes (such as the right to send other employees to the premises or the right to enter the premises for purposes other than occupational safety inspections);
 - in cases where the employer does **not** provide the employee with **an alternative workplace**.
- The reason for this is that the employer typically does **not** have **sufficient control** over the employee's home premises. This may not apply if an **employee holds a managerial position and exercises the company's control over the premises**.
- **Comparison with the new regulations under the 2025 OECD Model Convention:**
 - **HO activities <50%:** no permanent establishment in accordance with the BMF's view;
 - **HO activities >50% with an economic rationale:** contradicts the BMF's position;
 - **HO activities >50% without economic justification:** no permanent establishment in accordance with the BMF's view.

Relevance from a German Perspective – Application of the OECD Model Convention

BMF
(previous position
pursuant to
BMF dated April 19,
2023,
BStBl I 2023, 630)

- The OECD Model Tax Convention serves as a guideline for interpretation, unless a letter from the Federal Ministry of Finance (BMF) states otherwise for the specific case.
- Dynamic application of the OECD Model Convention; in particular regarding additions and clarifications

BMF
(new position pursuant to
BMF dated December 24,
2025
- IV B 2 –
S 1301/01508/004/038)

- The OECD Model Convention serves as a guide for interpretation, provided that a Federal Ministry of Finance (BMF) letter does not state otherwise for the specific case and the wording of the DTA corresponds to the OECD Model Convention. It does not serve as a guide if the provision is not at least “comparable.”
- Dynamic application of the OECD Model Convention, insofar as it involves clarifications and specifications.
- Publication of the Federal Fiscal Court (BFH) ruling of December 5, 2023, I R 42/20, in the Federal Tax Gazette (BStBl.): Recognition of the static application of the OECD Model Tax Convention (as an indicative effect), with the result that, depending on the double taxation treaty, an earlier version than the 2017 OECD Model Tax Convention may also be applicable.

Impact of the OECD
Model Tax Convention
amendments:

- In principle, a different BMF regulation takes precedence over the OECD Model Convention
- In our view, the OECD Model Tax Convention amendments are not merely clarifying or specifying
- The new provisions of the OECD Model Tax Convention will not be applied; however, the BMF may take a different view (remains to be seen)

Examples

- **Example A:** An employee works for three months after a vacation from rented accommodation in the vacation destination.
 - **OECD:** No permanent establishment (lacks the element of permanence). The same applies if the stay is for other personal reasons (e.g., caring for a relative).
 - **Germany:** No permanent establishment under the German tax code, due to lack of control (exception: managerial function, if applicable; in which case, permanence must be discussed).
 - **Other Countries: ?**

Examples

- **Example B:** Employee working 1–2 days per week at the home office (approx. 30% of working hours)
 - **OECD:** No permanent establishment at the home office (proportion <50%)
 - **Germany:** No permanent establishment, due to lack of control.
 - **Other Countries: ?**

Examples

- **Example C:** An employee works 80% of the time at the home office. There, he regularly meets with customers and provides services to them.
 - **OECD:** Justification for a permanent establishment (at the home office; extent $\geq 50\%$ and business purpose)
 - **Germany:** No permanent establishment at the home office due to lack of authority (exception: managerial function, if applicable; in which case, permanence must be discussed).
 - **Other Countries: ?**

Examples

- **Example D:** An employee works approximately 60% of the time at the home office. He is exclusively customer-facing but works remotely. Meetings with customers generally do not take place in person. Only once a quarter does he visit a customer in the state where the home office is located for one day at a time.
- **OECD:** No permanent establishment (although the proportion is $\geq 50\%$, there is **no business rationale**, as physical contact with customers occurs only once per quarter and is therefore only occasional)
- **Germany:** No permanent establishment, due to lack of control (exception: managerial function, if applicable; in which case, permanence must be discussed).
- **Othe Countries: ?**

Examples

- **Example E:** An employee works almost exclusively from her home office in State S. She provides virtual services to clients in Country R or other time zones; her location in Country S enables real-time availability.
- **OECD:** Justification for a permanent establishment at the home office (extent $\geq 50\%$ and business-related reason)
- **Germany:** No permanent establishment due to lack of control (exception: managerial function, if applicable; in which case, the issue of permanence must be discussed).
- **Other Countries: ?**

Conclusions

- **Conclusion for Germany:** Different interpretations in cases C and E, where an HO permanent establishment would be assumed under OECD guidelines, but the German Federal Ministry of Finance would reject this due to a lack of control over the premises.
 - HO permanent establishments abroad: Double taxation arises because Germany denies the exemption for income from permanent establishments abroad.
 - HO permanent establishments in Germany: No German taxation of an HO permanent establishment and the taxing rights revert to right of taxation to the country of residence of the enterprise.
- **Conclusions for the other Countries: ?**

Disclaimer

Disclaimer

- The presentation is based on the legal status as of April 2026.
- This generic presentation is intended primarily as preliminary information and to establish the facts and is not legally binding in its draft form.
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Quelle: statista
GÜLTIG BIS: 11/25

Vita Dr. Peter Happe



StB Dr. rer. pol. **Peter Happe**, graduate in business administration, is a partner at GHM GmbH Steuerberatungsgesellschaft, Cologne. Dr. Happe is a member of the advisory board of the Frankfurt-based fund initiator HABONA. Previously, he was a member of the executive board and CFO of a real estate private equity fund in Zurich, a partner in the Frankfurt office of the US law firm Dewey Ballantine, and a tax advisor at the international law firm Clifford Chance, where he also worked as a CPA in New York. From 1993 to 1997, he was a research assistant to Prof. Dr. Dr. h.c. Baetge at the University of Münster. Dr. Happe is a permanent lecturer at IWW and has also lectured at the Federal Finance Academy, Euroforum, Management Circle, IIR, and as a lecturer at the Technical University of Dresden and Zeppelin University in Friedrichshafen.

- Exam in Business Administration in 1993 in Münster
- Doctorate (PhD. in business administration) in 1997 in Münster
- Tax advisor exam in 1998
- Certified Public Accountant (State of New York) in 2000
- Specialist advisor for international tax law (Federal Chamber of Tax Advisors) in 2010
- Specialist advisor for corporate succession (DStV) in 2011
- Specialist advisor for healthcare (DStV) 2016
- Specialist advisor for restructuring and M&A (IFU) 2025

His main areas of expertise include advising high net worth individuals and large and medium-sized companies and groups on all aspects of tax law, in particular international tax law and criminal tax law, accounting and group accounting issues in accordance with the German Commercial Code (HGB), IFRS, and US GAAP, but above all advising on national and international M&A transactions, corporate restructuring, structured financing, real estate investments, transfer pricing documentation, and succession planning.

Dr. Peter Happe is a native speaker of German and is fluent in business English.

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