The Private Wealth & Private Client Review

Seventh Edition

Editor
John Riches

The Law Reviews

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THE PRIVATE WEALTH & PRIVATE CLIENT REVIEW

Seventh Edition

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This article was first published in September 2018
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THE LAWREVIEWS

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning editorial content should be directed
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ISBN 978-1-912228-54-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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PREFACE

I INTRODUCTION

As I reflect on the developments of the last 12 months, the overriding theme is that of continuing regulatory change in the private wealth arena. A sense of increasing pace and convergence in particular stand out in comparison with earlier years.

The pace component is best seen in the introduction of new regimes or the updating of existing rules. The theme of convergence is based upon how centrally significant the concept of 'beneficial ownership' is becoming to many of the initiatives. A third strand is an increasing divergence between the European Union and the United States in this arena: the European Union continues to force the pace on transparency, while the United States proceeds at a much more leisurely speed and gives greater weight to privacy concerns than its European neighbours.

Clients whose assets are fully declared and are in compliance with their tax obligations are becoming increasingly sensitive to the massive complexity and increased regulatory burden that falls upon service providers and the attendant costs that they are obliged to meet. This is leading to a mindset in which additional elements of complexity in asset-holding structures are being viewed with a greater degree of scepticism. In some cases, it is also leading to a review as to whether existing structures, whether trusts or holding companies, are still the best means of achieving the family's objectives and warrant additional cost and regulation.

While these compliant families fully understand the need for transparency to tax and regulatory authorities, there is growing concern about the pressure for public disclosure in the context of beneficial ownership registers when the disclosure relates not to businesses that trade and engage with the public at large, but to family asset-holding structures.

A review of the preamble to the EU's Fifth Anti-Money Laundering Directive (5 AMLD) shows that, while apparent lip service is paid to respecting an individual's right to privacy, the argument that greater public or quasi-public access to information with respect to many private asset-holding structures is required to combat the fight against terrorism and money laundering appears to hold sway. The fact that any private asset-holding structure of this type will be obliged to provide comprehensive and detailed beneficial ownership information to regulated service providers such as banks, trust and corporate service providers, legal advisers and accountants is not regarded as sufficient by EU policymakers.

5 AMLD also exemplifies a mindset in which those whose family structures (such as trusts and foundations) are managed outside the EU are subjected to a greater degree of transparency than for EU-managed structures. The rationale for this approach is that, as non-EU jurisdictions have not embraced the same degree of transparency for corporate

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registers, it is necessary to render the entities that hold assets with an EU connection, such as real estate, or those with an ongoing EU 'business relationship', to public scrutiny. I deal with this in greater depth below.

Tax authorities have been swift to fasten onto the increased scope of these measures. While fighting terrorism and drug-smuggling was their original purpose, they have enabled tax authorities to widen the net of information that is collected and reported on citizens who are neither terrorists nor drug barons but who hold significant wealth in complex asset-holding structures.

In the rest of this foreword, I will consider two specific areas:

a the Organisation for Economic Co-operation and Development (OECD)'s revised Common Reporting Standard (CRS) Commentary with a focus on trust guidance; and

b the wide-reaching implications of the EU's 5 AMLD and the meaning of 'control' in a trust context with regard to UK and Maltese trust registers.

i CRS Revised Handbook (April 2018) with a focus on the amendments to trust guidance

CRS applies to trusts when:

a a trust is a reporting financial institution (RFI); or

b a trust is a passive non-financial entity (NFE) that maintains an account with an RFI.

One of the key issues under discussion under the CRS and the first version of the CRS Commentary was the status of 'protectors'.

The CRS framework provides for reporting in the context of trustees who are RFIs to be made of persons who are treated as having an 'equity interest' in the trust fund. In this context, Section VIII.C.4 of the CRS states that an equity interest is held 'by any person treated as a settlor or a beneficiary of all or a portion of the trust or any other natural person exercising ultimate effective control over the trust'.

By contrast, in relation to a trust that is a passive NFE, it is necessary to identify controlling persons in relation to the trust. In the CRS, Section VIII D.6 defines 'controlling person' on the basis that the expression is intended to correspond to the term 'beneficial owner' as described in Recommendation 10 and the interpretative note on Recommendation 10 of the Financial Action Task Force (FATF) guidance as adopted in February 2012. In the case of a trust, controlling persons means 'settlor, the trustees, the protector (if any), the beneficiary or class of beneficiaries and any other natural person exercising ultimate effective control over the trust'.

In its FAQ issued in June 2016, the OECD took the position that, where a trust is an RFI, a protector 'must be treated as an account holder irrespective of whether it has effective control over the trust'. This response does not address the clear distinction in the CRS itself between the holders of equity interests in a trust that is an RFI (which only includes protectors if they actually exercise ultimate effective control; see above) when contrasted with the 'controlling persons' definition of a trust that is a passive NFE (which includes protectors regardless of the powers they hold; see above).

The Secretariat of the OECD previously confirmed that it is their intention that protectors of trusts that are RFIs should be reported, and the FAQ was discussed in and approved by the relevant working party of the OECD.

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The second version of the Commentary has amended Paragraph 253 to read:

The Equity Interests are held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. The reference to any other natural person exercising ultimate effective control over the trust, at a minimum, will include the trustee ***and the protector*** *as an Equity Interest Holder.*[1]

Until the legal basis for this is made clear in the CRS treaty itself, it is considered that there is a reasonable basis for forming the opposite conclusion.

The new Commentary also provides further clarity on what reporting is required when an account is closed or a beneficiary removed:

*Where an account is closed during the year, the fact of closure is reported (****in addition to any distributions made prior to closure****). A debt or Equity Interest in a trust could be considered to be closed, for example, where the debt is retired, or where a beneficiary is* ***definitely*** *removed.*[2]

The other main amendments to the Commentary relate to the obligation to look through equity interest holders and controlling persons, which are themselves entities. Paragraph 256 has been amended to read:

Where an Equity Interest (such as the interest held by a settlor, beneficiary ***or any other natural person exercising ultimate effective control over the trust****) is held by an Entity, the Equity Interest holder will instead be the Controlling Persons of that Entity. As such, the trust will be required to look through a settlor,* ***trustee, protector*** *or beneficiary that is an Entity to locate the relevant Controlling Person. This look through obligation should correspond to the obligation to identify the beneficial owner of a trust under* ***domestic*** *AML / KYC procedures.*[3]

The new Commentary notes that, in looking through entities,

The Controlling Persons of Passive NFE are defined in the CRS as natural persons exercising control over the Entity. The CRS definition of the term Controlling Person corresponds to the term beneficial owner as set out in Recommendation 10 and the accompanying Interpretative Note of the 2012 FATF Recommendations.

The identity of beneficial owner of a legal person is defined as any natural person who ultimately has controlling ownership interest which is usually defined on the basis of a threshold. Footnote 30 to the Interpretative Note to Recommendation 10 of the 2012 FATF Recommendations (as printed in March 2012) gives an exemplary ownership threshold of 25%.

1 Emphasis added.
2 Emphasis added.
3 Emphasis added.

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Although, earlier in the Commentary it notes that:

> *It is important to point out that the ownership threshold for legal persons of 25% that is specified in footnote 30 in the Interpretative Note to Recommendation 10 of the 2012 FATF Recommendations (as printed in March 2012) is only indicative.*
>
> *Should the ownership structure analysis result in doubt as to whether the person(s) with the controlling ownership interest are the beneficial owners or where no natural person exercises control through ownership interest the analysis shall proceed to identifying any other natural person(s) exercising control of the legal person through other means. As a last resort, if none of the previously mentioned tests result in identification of the beneficial owner(s), the senior managing official(s) will be treated as the beneficial owner(s).*

Various examples are given on how to look through entities. Unfortunately, the new Commentary does not cover more complex structures that had previously been raised with the OECD, such as where a purpose trust owns a private trust company.

ii Trust registers: implications of 5 AMLD and the meaning of 'control'

The key text for 5 AMLD was published in December 2017 and endorsed by a legislative resolution of the European Parliament on 19 April 2018. It was then adopted by the EU Council on 14 May 2018. On 19 June 2018, the text for 5 AMLD was then published in the Official Journal of the European Union. EU Member States must transpose 5 AMLD into their national law by 10 January 2020.

Enlarged scope of registration

4 AMLD limits the scope of trusts requiring registration on a domestic trust register in the relevant EU Member State to those that generate tax consequences; 5 AMLD widens this scope to all trusts that 'reside or are established' in the Member State concerned. It also applies to *fiducie*, *treuhand* or *fideicomiso* as well as to foundations (which fall within the concept of legal arrangements). In practice, in the case of trusts, this will be the place where the trustee resides and not referenced to the governing law of the trust itself.

Non-EU resident trusts: registration

There is a requirement for non-EU resident trusts to register in two instances. The proposed new Article 31(3a) of 5 AMLD, for a trust established or residing outside the European Union, reads:

> *Member States shall require that the beneficial ownership information of express trust and other types of legal arrangements when having a structure or functions similar to trusts shall be held in a central beneficial ownership register set up by the Member State where the trustee of the trust or similar legal arrangement is established or resides.*

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> *Where the place of establishment or residence of the trustee of the trust or similar legal arrangement is outside the Union, the information referred to in paragraph 1 shall be held in a central register set up by the Member State where the trustee enters into a* ***business relationship*** *or* ***acquires real estate*** *in the name of the trust or similar legal arrangement.*[4]

On business relationships, the existing text of Article 3(13) of 4 AMLD, which is not amended by draft 5 AMLD, states: 'a business relationship means a business, professional or commercial relationship that is connected with the professional activities of an obliged entity and which is expected, at the time when the contact is established, to have an element of duration.'

It is unclear what these words mean in practice. In the broader sense, they could be taken to include sourcing professional advice from a counterparty in an EU Member State. It is understood that the intent at the time 4 AMLD was finalised was to focus on 'business trusts'. The European Union was informed at the time by STEP and other commentators that this expression did not have any well-established meaning given that the vast majority of business activity conducted in a trust context would, for reasons of liability protection, be conducted through the mechanism of underlying companies. It remains to be seen what sort of guidance will be provided on this topic. If given a wide meaning, it could mean any use of professional advisers for legal, tax accounting or investment advice within the EU could trigger a requirement to register.

So far as the acquisition of real estate is concerned, it would seem this is confined to situations of EU real estate held at the trust level alone and not where such real estate is held via an underlying entity.

The regulations make provision to allow a trust to provide evidence of registration in one Member State through a 'certificate of proof of registration or an excerpt . . . of the register' to avoid the need for duplicated registration.

Public access

5 AMLD allows for a modified form of public access to the trust register by 'persons who are able to demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud'.

At present, there is no clearly understood meaning as to what constitutes 'legitimate interest'. The implications of the 5 AMLD preamble are, however, that NGOs and investigative journalists with anti-corruption profiles should normally be seen as being able to assert a legitimate interest. This may well be a matter where different EU jurisdictions take a variety of approaches.

There is also a requirement to interlink the various EU registers by 2021, and a requirement to provide mechanisms for the verification of data. The absence of any verification mechanism to date has been seen as a major limiting factor in the utility of beneficial ownership registers. How this verification will be policed is unclear.

The qualified public access on the basis of legitimate interest needs to be contrasted with circumstances where full public access is proposed. This is in the case of use of a non-EU holding company by a trust that either resides in an EU Member State or, it would seem, becomes registrable as a result of an EU business relationship or holding of EU real estate as noted above.

4 Emphasis added.

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Article 31(4) of 5 AMLD considers the situation for trusts owning a controlling interest in a non-EU company:

> *The central register shall ensure timely and unrestricted access by competent authorities and FIUs, without alerting the parties to the trust concerned. It may also allow timely access by obliged entities, within the framework of customer due diligence in accordance with Chapter II. Member States shall notify to the Commission the characteristics of those national mechanisms to ensure that the information on the beneficial ownership of a trust or a similar legal arrangement is accessible in all cases to:*
>
> *a. competent authorities and FIUs, without any restriction;*
>
> *b. obliged entities, within the framework of customer due diligence in accordance with Chapter II;*
>
> *c. any person or organisation that can demonstrate a legitimate interest;*
>
> *d.* ***any person that files a written request in relation to a trust or similar legal arrangement which holds or owns a controlling interest in any corporate or other legal entity other than those referred to in Article 30(1), through direct or indirect ownership, including through bearer shareholdings, or through control via other means.***[5]

Article 30(1) is the requirement for EU companies to maintain a public register of beneficial owners. Thus, for all non-EU companies, any person can, on written request, obtain information on an EU-resident trust that controls it. It is understood at this stage that privacy may be afforded to EEA-resident companies that maintain a public register. This would mean Liechtenstein companies may not fall within the scope of sub-paragraph (d) as it is an EEA member.

It is not clear how an individual would in the first instance learn of the existence of a trust in these circumstances. There is also no recognition in these rules that non-EU companies may be subject to any form of public beneficial ownership register in their own jurisdiction (given the UK's recent proposals to extend public registers of corporate entities to its overseas territories).

iii The UK's position: Brexit transition

A recent UK parliamentary report stated:

> *Although these dates all fall after the UK's projected exit from the EU in March 2019, it now appears likely the Government will agree to a post-Brexit transitional period during which EU law would continue to apply in the UK as if it were still a Member State. In those circumstances, the new AMLD would have to be implemented if its transposition dates occur within that period (which, considering the Prime Minister has said the transition is likely to be "around two years", is likely to be the case for all three types of register).*

It is therefore anticipated, given the imminent application of 5 AMLD, that the United Kingdom will be obliged to comply with it, at least during the transitional period. Given that the United Kingdom has also been within the vanguard of transparency initiatives with its European neighbours, it would be unsurprising if it continued to apply 5 AMLD in some

5 Emphasis added.

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form once the Brexit transition has concluded. Whether the public access component for trusts would be watered down remains to be seen. It is understood that the Labour Party advocates full public access to the UK trust register.

It is also unclear whether UK companies will be regarded as 'non-EU' for this purpose post-Brexit, but it is assumed they will be regarded as equivalent.

iv Meaning of 'control' in the context of EU trust registers

FATF 2012 Recommendations: Recommendations 10, 24 and 25 require trustees and financial institutions to identify 'the ownership and control structure of the customer'. I now turn to the two examples of trust registers in the EU that have been implemented under 4 AMLD, the forerunner to 5 AMLD. This throws an interesting light upon the extraordinary width of whom should be regarded as a beneficial owner in the context of a trust.

Section 5(2) of the UK's Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, which came into force on 26 June 2017, require that trustees register:

a a settlor;
b trustees;
c named beneficiaries;
d beneficiaries who have received a distribution from the trust; and
e anyone who exercises 'ultimate control' over the management of the trust.

Section 2(1)(e) Malta's Trusts and Trustees Act (Register of Beneficial Owners) Regulations (the RBO Regulations), which came into force on 1 January 2018, require that trustees register:

a a settlor;
b trustees;
c named beneficiaries;
d a protector; and
e anyone exercising 'ultimate and effective control over the trust by any means', including any other person:
  - whose consent is to be obtained; or
  - whose direction is binding in terms of the terms of the trust instrument or of any other instrument in writing, for material actions to be taken by the trustee.

FATF 2012 Recommendation 10: financial institutions must identify 'any other natural person exercising ultimate effective control over the trust'.

In the context of the EU's 4 AMLD and the trust register, Her Majesty's Revenue and Customs have stated that 'control' means a power (whether exercisable alone, jointly with another person or with the consent of another person) under the trust instrument or by law to:

a dispose of, advance, lend, invest, pay or apply trust property;
b approve proposed trust distributions;
c vary or terminate the trust;
d add or remove a person as a beneficiary or to or from a class of beneficiaries;
e appoint or remove trustees or give another individual control over the trust; and
f direct, withhold consent to or veto the exercise of a power mentioned above.

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In the context of the 4 AMLD and the beneficial ownership register for trusts, Malta's RBO Regulations have stated that 'control' means anyone exercising 'ultimate and effective control over the trust by any means', including any other person whose consent is to be obtained; or whose direction is binding in terms of the terms of the trust instrument or of any other instrument in writing, for material actions to be taken by the trustee.

The definition of 'material actions' means the following actions or any other actions achieving the same result:

a the amendment of the trust instrument;
b the addition or removal of any beneficiary, or any person from a class of beneficiaries, or any action affecting the entitlement of a beneficiary;
c the appointment or removal of trustees or protectors or to give another individual control over the trust;
d the acceptance of an additional settlor as may be applicable in terms of the terms of the trust instrument;
e the change of the proper law of the trust; and
f the assignment or transfer of all or most of the assets of the trust or the termination or revocation of the trust.

CRS imports into the concept of 'controlling persons' a direct link to the FATF defined terms of 'beneficial owners'. The CRS Commentary states at Paragraph 132:

> *Subparagraph D (6) sets forth the definition of the term 'Controlling Persons'. This term corresponds to the term 'beneficial owner' as described in Recommendation 10 and the Interpretative Note on Recommendation 10 of the Financial Action Task Force Recommendations (as adopted in February 2012),* ***and must be interpreted in a manner consistent with such Recommendations, with the aim of protecting the international financial system from misuse including with respect to tax crimes.***[6]

On this basis, it is highly likely that the expanded definition of control that is implicit in the UK and Maltese trust registers in an anti-money laundering context that flows from the FATF 2012 framework will, over time, result in more significant disclosure being required in a CRS tax information exchange context. This is an example of the aforementioned convergence theme (see Section I).

As a separate matter, the FATF has recently been reviewing the 2008 Guidance to Trust and Corporate Service Providers. It is possible that the amended text will also give more detailed guidance on the meaning of a 'natural person exercising effective control' in a trust context. This will have a direct impact on CRS reporting for trusts in the light of the linkage mentioned above in the CRS model treaty.

The significant extensions are most likely to impact influence exercised:

a by committees where, to date, it has been argued that no one individual can personally decide upon a course of action;
b in an indirect manner by a family individual who does not serve as a protector as such but instead has a power to appoint or remove protectors; and
c by those with negative 'veto' powers but without positive powers to decide upon specific matters that impact the relevant trust.

6 Emphasis added.

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It could be timely, therefore, for advisers to consider whether current governance arrangements for the oversight of trusts are still 'fit for purpose' or not.

II CONCLUSION

What can be said at this stage is that advisers must continue to keep themselves informed on the important changes to the regulatory and transparency arena. There is no sign that the pace of reform is slowing at this point, quite the opposite.

In the longer term, it remains to be seen whether the degree of transparency and attendant public disclosure that the EU has embraced will be adopted more widely in the rest of the developed world. It is clear that the United States has been much slower to adopt measures that override privacy in such a sweeping manner.

John Riches
RMW Law LLP
London
August 2018

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Chapter 7

AUSTRIA

Paul Doralt and Katharina Binder[1]

I INTRODUCTION

Austria is a small but wealthy jurisdiction in the middle of Europe. As a member of the European Union, the Schengen Area and the Eurozone, it provides an attractive environment for wealthy people from Austria and abroad.

According to a recent analysis by the Austrian Chamber of Commerce, more than 50 per cent of Austrian businesses are organised as family businesses under the EU definition. They account for almost two-thirds of all Austrian employees and 57 per cent of sales in Austria. Many of these families developed their Austrian local businesses into international players and continue to look for suitable solutions, not only for further evolving their business, but also for passing their wealth or enterprises on to the next generation.

High net worth individuals from abroad are mainly attracted by Austria's natural beauty and cultural richness. In the Mercer Quality of Living Ranking, Austria's capital city, Vienna, has been ranked number one for nine consecutive years and its political stability and security appeal to people from abroad. In addition, Austria has introduced a citizenship and residency by investment scheme, which further entices non-Austrians looking to relocate.

The challenge of the rather high personal income tax rates requires structuring and planning on the part of advisers. Austrian structures often include an Austrian private foundation, which in particular caters to the individual's wish for predictability and stability in relation to asset management and succession.

II TAX

i Personal income tax

General

Any individual having a permanent home or his or her habitual abode in Austria is deemed to be an Austrian tax resident.[2] There is no concept of domicile in Austria.

Individuals have a permanent home in Austria if they have a dwelling at their disposal that they (are going to) use as a residence.[3] The dwelling does not have to be the primary residence but it must be suitable for living considering the individual's personal circumstances.

1 Paul Doralt is a partner and Katharina Binder is an associate at DORDA.
2 Section 1(2) of the Austrian Income Tax Act.
3 Section 26(1) of the Austrian Federal Fiscal Procedures Act.

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It does not have to be continuously used but at least recurrently to establish a permanent home for Austrian taxation purposes. Exemptions apply for individuals with vacation homes if they do not use them for more than two months per year.[4]

Individuals have their habitual abode or habitual residence in Austria, if they stay in Austria not only temporarily (e.g., holiday, business trip, family visit) but for a longer period of time. In any case, after a six-month stay, they become retroactively resident for Austrian income tax purposes.

Austrian-resident individuals are subject to national federal income tax. No local income taxes are levied. They are taxable on their worldwide income, whether received in cash or in kind.[5] Non-resident individuals pay tax on their Austrian-source income.[6]

Income tax is levied on an individual's income from seven sources:[7]

a agriculture and forestry;
b self-employment;
c trade and business;
d employment;
e investment;
f rent, lease payments and royalties; and
g other specified income, such as certain annuities and capital gains upon the disposal of certain privately held assets, in particular real property.

Income not covered by these categories is not taxable.

Austria generally taxes income at a progressive tax rate, ranging from 25 per cent to 50 per cent (55 per cent for income exceeding €1 million in the calendar years 2016 to 2020).[8] Investment income (i.e., interest from bonds, dividends on stocks, capital gains from securities and income from derivatives) drawn in Austria is generally subject to a special flat rate tax of 27.5 per cent;[9] interest from savings accounts and current accounts is taxed at a flat rate of 25 per cent. Income from a sale of private real property is subject to 30 per cent property gains tax.[10]

ii Cross-border structuring

Double taxation treaties

Austria has entered into about 90 income tax and capital gains tax treaties, including treaties with the UK and the US. They generally follow the Organisation for Economic Co-operation and Development (OECD) model, except for some of the older agreements, such as the ones with Brazil, France or Japan, which substantially deviate from the OECD model.

Before Austria abolished its gift and inheritance taxes in 2008, it entered into very few inheritance and gift double taxation treaties, which generally follow the OECD Model Estate and Gift Tax Treaty, among them an agreement with the US.

4 Austrian Secondary Residence Regulation.
5 Unlimited tax liability, Section 1(2) of the Austrian Income Tax Act.
6 Limited tax liability, Section 1(3) of the Austrian Income Tax Act.
7 Section 2(3) of the Austrian Income Tax Act.
8 Section 33(1) of the Austrian Income Tax Act.
9 Section 27a of the Austrian Income Tax Act.
10 Section 30a(1) of the Austrian Income Tax Act.

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Pre-entry tax planning

Pre-entry income and capital gains tax planning is generally not required. Financial assets held by a newly established Austrian tax resident receive a step-up in basis to the fair market value at the time such individual becomes tax resident in Austria.[11] Any Austrian capital gains tax payable in the event of a disposal will be based on the step-up basis.[12] It is, therefore, advisable to keep a record of the assets' fair market value at the time of entry into Austrian tax residence.

In addition, Austria implemented a preferential tax regime for artists, scientists, and sportsmen, whose relocation to Austria is in the public interest of Austria.[13]

Exit tax

If an individual ceases to be an Austrian tax resident, Austria taxes any increases in value of the individual's assets accrued during such individual's tax residency in Austria.[14] As long as the individual moves to a country with which Austria has agreed on a comprehensive exchange of information, it may apply for a non-imposition of this tax liability until its actual disposal of the assets.[15] If the new country of residence has no exchange of information agreement with Austria, the tax liability may be paid in even instalments over the next seven years.[16]

iii Gift and succession taxes

Austria currently levies neither gift nor inheritance tax. There are, however, notification obligations for certain gifts if the donor or the donee has their permanent home or habitual abode in Austria.[17]

Gratuitous transfers of real property located in Austria or transfers of, or the consolidation of, a substantial shareholding (at least 95 per cent) in a company owning real property in Austria (whether *inter vivos* or *mortis causa*) are subject to real estate transfer tax based on the property's land value.[18] A property's land value being the lowest of (1) three times the value of the land as assessed under the Austrian Land Valuation Regulation plus the value of the building; (2) the property's standardised value based on average property values published by Statistics Austria; or (3) the property's fair market value.[19] Austrian real estate transfer tax is levied on gratuitous transfers in tiers: the first €250,000 of land value is taxed at 0.5 per cent, the subsequent €150,000 at 2 per cent and any exceeding land value at 3.5 per cent. Special provisions apply for only partially gratuitous transfers.[20] In addition, a 1.1 per cent fee falls due for the registration of a new owner in the Austrian land register.[21]

11 Section 27(6)1e) of the Austrian Income Tax Act.
12 Section 27a(3)b) of the Austrian Income Tax Act.
13 Section 103 of the Austrian Income Tax Act.
14 Section 27a(3)b) of the Austrian Income Tax Act.
15 Section 27(6)1a) of the Austrian Income Tax Act.
16 Section (6)(6) of the Austrian Income Tax Act.
17 Austrian Gift Notification Act.
18 Sections 1 and 4 of the Austrian Real Estate Transfer Tax Act.
19 Section 4(1) of the Austrian Real Estate Transfer Tax Act.
20 Section 7(1)(2)a) of the Austrian Real Estate Transfer Tax Act.
21 Fee Item 9(b) of the Austrian Court Fees Act.

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iv Wealth tax

Austria does not levy general wealth tax. Owners of Austrian real property are subject to property tax based on the property's historically assessed uniform value,[22] which is generally substantially lower than its actual fair value. The property tax is levied by the local municipality at a basic federal rate of 0.2 per cent multiplied by a municipal coefficient of up to 500 per cent.[23]

v Issues impacting entrepreneurs as holders of active business interests

General

In relation to interests held by Austrian or foreign individuals in Austrian enterprises, Austrian tax law differentiates between transparent and opaque business structures. Enterprises in the form of partnerships are generally regarded as transparent and Austria looks at the individual partners when it comes to assessing the applicable tax liability. By contrast, corporations are regarded as opaque and a corporation is subject to Austrian corporate income tax on its worldwide income if it has either its statutory seat or its place of effective management in Austria.[24]

An Austrian branch of a foreign corporation is subject to Austrian corporate income tax if it qualifies as a permanent establishment. If the individual held its business interest in Austria via a foreign corporation, that foreign corporation would thus become subject to Austrian corporate income tax with all income attributable to the permanent establishment in Austria.

Corporate income tax is levied at a rate of 25 per cent.[25]

Register of Beneficial Owners

Implementing the Fourth EU Anti-Money Laundering Directive, Austria also established a Register of Beneficial Owners. Austrian legal entities, including private foundations, are obliged to disclose and submit the details of their (ultimate) beneficial owners to this register and keep it updated at any time.[26] The Austrian Register of Beneficial Owners is not of public record. Apart from the (tax) authorities, it is accessible by duly authorised legal, financial and tax advisers as well as the concerned entity itself.

vi Regulatory

There are no specific disclosure requirements for aggressive tax planning schemes in Austria. The Austrian Federal Fiscal Procedures Act contains a general anti-abuse provision incorporating the substance-over-form principle into Austrian tax law.[27] It allows Austrian tax

22 Section 12 of the Austrian Property Tax Act.
23 Sections 19ff of the Austrian Property Tax Act.
24 Section 1 of the Austrian Corporate Income Tax Act.
25 Section 22 of the Austrian Corporate Income Tax Act.
26 Sections 1 and 3(3) of the Austrian Beneficial Ownership Register Act
27 Section 22 of the Austrian Federal Fiscal Procedures Act.

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authorities to disregard transactions or structures, which have been mainly implemented for the purpose of avoiding or reducing the tax burden and appear unreasonable, contrary to the goal and purpose of the tax provision concerned.[28]

In addition, Austrian law provides for several more specific anti-abuse provisions, such as the 'actual place of management' test for corporate taxation, controlled foreign corporation (CFC) rules, or substance requirements in the context of the participation exemption regime.[29]

III SUCCESSION

i Introduction to the Austrian succession regime

Testamentary freedom and its limits

Under Austrian law, the principle of testamentary freedom applies and an individual is generally not restricted in his or her disposition over his or her estate during their lifetime. An individual's estate for succession thereby comprises all of his or her rights and obligations at the time of his or her death, whether in his or her sole name or in a co-ownership.

The most important limit to the testamentary freedom is the Austrian forced heirship regime (see below). In addition, if a married couple enters into a testamentary contract, or if an individual makes a gift on death, a quarter of the individual's estate must by law remain clear of any such dispositions as well as claims of forced heirship.[30]

Forced heirship

Under the Austrian forced heirship rules, the individual's children, spouse and registered civil partner are entitled to forced heirship claims amounting to half of their statutory share in the estate.[31] The forced heirship claim is generally a cash claim[32] against the testamentary heirs, which is calculated on the basis of the total fair value of the deceased's assets[33] and due one year after the individual's death.[34] Gifts made by the individual to family members entitled to claims of forced heirship prior to his or her death are taken into account for the calculation of forced heirship claims and may also result in clawbacks of lifetime gifts.[35]

Statutory inheritance rules

If an individual dies intestate, family members of the deceased individual share the estate based on a modified per capita system.[36] Under these rules, the spouse or registered civil partner is entitled to one-third of the estate's value, while all of the individual's children share two-thirds of the estate's value.[37] If the deceased leaves no children behind, the spouse or registered civil partner is entitled to two-thirds of the estate if the parents of the deceased

28 Section 22 of the Austrian Federal Fiscal Procedures Act as will be implemented under the Austrian Annual Tax Act 2018.
29 Sections 10 and 11 of the Austrian Corporate Income Tax Act and Section 94 of the Austrian Income Tax Act.
30 Section 1253 of the Austrian General Civil Law Code.
31 Sections 757 and 759 of the Austrian General Civil Law Code.
32 Section 763 of the Austrian General Civil Law Code.
33 Sections 778 and 779 of the Austrian General Civil Law Code.
34 Section 765(2) of the Austrian General Civil Law Code.
35 Sections 780ff of the Austrian General Civil Law Code.
36 Sections 727ff of the Austrian General Civil Law Code.
37 Section 744(1) of the Austrian General Civil Law Code.

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individual are still alive.[38] If one or both parents are already deceased at the time of the individual's death, their share in the remaining third of the estate is also passed to the spouse or registered civil partner.[39]

If the individual leaves neither valid instructions for the disposition of his or her estate nor statutory heirs, the estate passes to the individual's life companion, provided that the life companion lived with the deceased in a shared household for three years prior to the deceased individual's death.[40]

Austrian law bestows the same statutory inheritance rights on illegitimate and adoptive children to their adoptive parents' estates as on natural legitimate children.[41] In addition, adoptive children keep their statutory inheritance rights to the estates of their natural parents.[42] Adoptive children, however, have no statutory inheritance rights to the estate of other members of their adoptive family.

Formal requirements of a last will and testament

Under Austrian law, an individual may make a valid will either in writing, orally or publicly.[43]

A valid will in writing can either be entirely handwritten and signed[44] or a printed document, where he or she, in front of three independent and simultaneously present witnesses, adds a handwritten solemn declaration that the document contains his or her last will and testament.[45] The witnesses must then also add their handwritten signatures indicating their personal details and position as witnesses.[46] Outside the court, an oral will can be validly made only in life-threatening situations. It requires two independent witnesses and is valid for three months.[47] A public will is validly made in front of the court or an Austrian public notary. Individuals between 14 and 18 years of age may only make public wills.[48]

Administration of the estate and transfer to the heirs

Under Austrian law, all heirs generally administer the estate jointly.[49] It is possible to appoint a special administrator or executor for the estate, usually either based on the testator's will or a respective joint application of the heirs.

The deceased's assets generally pass to the heirs and successors by universal succession and to the legatees by singular succession based on a respective decree issued by the probate court after the probate proceeding has been completed. An heir may accept his or her share in the estate either unconditionally, assuming liability for the deceased's debts regardless of

38 Section 744(1) of the Austrian General Civil Law Code.
39 Section 744(1) of the Austrian General Civil Law Code.
40 Section 748(1) of the Austrian General Civil Law Code.
41 Section 197 of the Austrian General Civil Law Code.
42 Section 199 of the Austrian General Civil Law Code.
43 Section 577 of the Austrian General Civil Law Code.
44 Section 578 of the Austrian General Civil Law Code.
45 Section 579(1) of the Austrian General Civil Law Code.
46 Section 579(2) of the Austrian General Civil Law Code.
47 Section 584 of the Austrian General Civil Law Code.
48 Section 569 of the Austrian General Civil Law Code.
49 Section 810(1) of the Austrian General Civil Law Code.

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the value of his or her inherited share in the estate,[50] or conditionally, assuming liability for the deceased's debts only up to the value of his or her inherited share in the estate based on an appraisal and inventory.[51]

ii Cross-border scenarios

EU Succession Regulation

Austria implemented the EU Succession Regulation, under which the distribution of a person's estate is generally governed by the law of the country, where the deceased had his or her last habitual abode, regardless of whether it is an EU country or not.[52] An individual may also validly opt for the application of the inheritance regime of his or her nationality in his or her last will.[53] The respectively applicable law governs the distribution of movable and immovable property.

Recognition of wills

In relation to wills, Austria adopted the Hague Testamentary Dispositions Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions 1961 (the HCCH Convention). Under its rules, a will is valid and thus recognised in Austria if its form complies with the internal law of:[54]

a the place where the testator made it;
b a nationality possessed by the testator, either at the time when he or she made the disposition, or at the time of his or her death;
c a place in which the testator had his or her permanent home either at the time when he or she made the disposition, or at the time of his or her death; or
d so far as immovables are concerned, the place where they are situated.

IV WEALTH STRUCTURING AND REGULATION

i Wealth structuring vehicles used in Austria

Austrian private foundation

The most commonly used vehicle for wealth structuring in Austria is the private foundation, a legal entity designed as managed property without an owner or a shareholder. It may be set up for charitable purposes or private purposes but it may not pursue commercial activities.[55]

The founders can be individuals or legal entities; the minimum capital is €70,000.[56] It is possible for the founder to be a beneficiary. A management board, consisting of at least three members, two of whom must have their habitual abode in the EEA, is the governing

50 Sections 800 and 801 of the Austrian General Civil Law Code.
51 Sections 800 and 802 of the Austrian General Civil Law Code.
52 Article 21 of the EU Succession Regulation.
53 Article 22(1) of the EU Succession Regulation.
54 Article 1 of the Hague Testamentary Dispositions Convention.
55 Section 1(2)(1) of the Austrian Private Foundation Act.
56 Section 4 of the Austrian Private Foundation Act.

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body of the private foundation.[57] Neither beneficiaries nor their close family members or personal advisers may be part of the managing board.[58] The private foundation's annual accounts are not publicly disclosed but must be audited by a CPA.[59]

A recent bill amending the Austrian Private Foundation Act introduced, *inter alia*, the possibility of a single member management board if the private foundation has installed a supervisory body of at least three members (2017 Private Foundation Bill). This Bill was set to enter into force by 1 November 2017 but it is still unclear when, and in what final form, the proposal will be enacted by the government.[60]

Trusts

There are no trusts under Austrian law. Austria has neither ratified the HCCH Convention or the Law Applicable to Trusts and on their Recognition (the Hague Trust Convention).

ii Legal and tax treatment

Taxation of an Austrian private foundation

Austria recognises private foundations as separate legal entities. Gratuitous contributions to Austrian private foundations and comparable foreign entities are subject to 2.5 per cent foundation contribution tax on the fair market value of the assets contributed.[61] If not all required information is disclosed to the tax authorities or certain other conditions are not met, the tax rate is increased to 25 per cent.[62] Contributions of Austrian real property are subject to real estate transfer tax (see above) plus a 2.5 per cent foundation contribution tax equivalent and land register fees of 1.1 per cent based on the property's land value.[63]

In relation to their income, Austrian private foundations are treated like corporations under the Austrian Corporate Income Tax Act and, therefore, subject to the common corporate income tax rate of 25 per cent on their worldwide income; dividends received by a private foundation are, however, usually tax-exempt.[64] A withholding tax of 27.5 per cent is generally levied on distributions to beneficiaries,[65] but double tax treaties typically grant relief if the beneficiary is a non-Austrian tax resident.

As long as the private foundation complies with all applicable disclosure requirements concerning the Austrian tax authorities (i.e., beneficial ownership, statutes), Austria grants a relief from double taxation otherwise levied on the foundation's non-business income. To this end, Austria levies a 25 per cent 'interim tax' on the private foundation's investment income (interest and capital gains from securities) and income derived from the disposal of real property on a taxable basis effectively reduced by the amount distributed to the beneficiaries

57 Section 15(1) of the Austrian Private Foundation Act.

58 Section 15(2), (3) and (3a) of the Austrian Private Foundation Act.

59 Section 20 of the Austrian Private Foundation Act.

60 The current status of the bill can be monitored at https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00323/index.shtml#tab-Uebersicht.

61 Section 2 in connection with Section 1(5) of the Austrian Foundation Entry Tax Act.

62 Section 2 of the Austrian Foundation Contribution Tax Act.

63 Section 7(2) of the Real Estate Transfer Tax Act and Fee Item 9(b) of the Austrian Court Fees Act.

64 Sections. 1, 10 and 22 of the Austrian Corporate Income Tax Act.

65 Section 27(5)(7) of the Austrian Income Tax Act.

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in that tax year.[66] In addition, a rollover relief is granted for capital gains from the disposal of substantial participations if the private foundation acquires other substantial participations within 12 months.[67]

Taxation of trusts

Depending on their individual set-up, foreign trusts and comparable vehicles are taxed in Austria based on their qualification as either a transparent of opaque entity. To determine the applicable regime, the Austrian tax authorities look in particular to the settlor's and the beneficiary's controlling influence and rights in the trust and its assets.[68]

iii Advantages of an Austrian private foundation

Austrian private foundations are primarily established for purposes of succession planning, in particular if the founder's assets shall not be broken up between his or her heirs. This is especially of interest to a founder who is the owner of an active enterprise, which, in future, could be controlled by the private foundation as a common representative of the next generation. As the beneficiaries of the private foundation, the heirs would commonly form an advisory board that may guide the management board in its executive decisions.

In addition and on a more general note, a private foundation's beneficiaries are not on public record[69] and the private foundation's financial statements remain undisclosed to the public. The private foundation, therefore, grants the most possible privacy to the founder and the beneficiaries while still being a viable asset-pooling and -holding vehicle. These aspects will be further supplemented by the possibility of a sleeker management board as proposed by the 2017 Private Foundation Bill.

V OUTLOOK AND CONCLUSIONS

Austria is a wealthy and politically stable jurisdiction that will continue to appeal to people of sizeable wealth.

In the near future, it will implement the next steps proposed by the EU under the Anti-Tax Avoidance Directive and Base Erosion and Profit Shifting, and will introduce a CFC provision to the Austrian Corporate Income Tax Act applicable for financial years starting on or after 1 October 2018. This measure will also affect corporate holding structures held by private foundations and high net worth individuals, and, therefore, lead to a re-evaluation of current arrangements.

The upcoming months will also show how and when the recently elected conservative government will follow through with their announcement to introduce a more business-friendly tax regime, which should also attract inward investment more strongly.

66 Section 13 of the Austrian Corporate Income Tax Act.

67 Section 13(4)(4) of the Austrian Corporate Income Tax Act.

68 Austrian Supreme Administrative Court, 20 September 1988, 87/14/167; EAS 2378, EAS 2804.

69 An Austrian private foundation's beneficiaries must only be disclosed to the tax authorities and in the non-public Austrian Register of Beneficial Owners (Section 2(3) of the Austrian Beneficial Ownership Register Act).

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Appendix 1

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Paul Doralt draws on extensive experience in tax matters (corporate tax, mergers and acquisitions, and private client) and is also an expert in trusts and estates, corporate restructurings and structured finance. He is admitted to the Austrian Bar and is also a certified tax adviser. He graduated from the University of Vienna (Dr iur 1996) and from the University of London, King's College (LLM 1997).

Paul Doralt has been a partner at DORDA since 2006. Prior to joining the firm, he was head of the tax department at another leading, internationally active law firm in Austria. Prior to this he worked as a senior tax manager in corporate tax and was the head of the Austrian tax desk at KPMG in New York City (2001–2003) and a tax manager at KPMG in Vienna (1998–2001).

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Katharina Binder has almost 10 years of experience in corporate law, tax and private client matters and is an expert in trust and estates and international corporate restructurings. She graduated from the University of Vienna (Mag iur 2005) and from Fordham University School of Law (LLM *magna cum laude* 2011). She has been admitted to the New York Bar since 2012.

Katharina Binder first joined DORDA as an associate in 2007 before she went to NYC to pursue her LLM degree in International Business and Trade Law. She rejoined DORDA in 2014 after having worked at the tax desk of another leading, internationally renowned law firm in Vienna (2012–2014). Katharina Binder is a member of AIJA and the author of several publications on private foundations and cross-border corporate restructurings.

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ISBN 978-1-912228-54-6

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