ICLG

The International Comparative Legal Guide to:

Private Client 2018

7th Edition

A practical cross-border insight into private client work

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Country Question and Answer Chapters:

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Private Client.*

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of private client work.

It is divided into two main sections:

Nine general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting private client work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in private client laws and regulations in 28 jurisdictions.

All chapters are written by leading private client lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Jonathan Conder and Robin Vos of Macfarlanes LLP for their invaluable assistance and STEP for their continued and valued participation in the guide.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Connection Factors

1.1 To what extent is domicile or habitual residence relevant in determining liability to taxation in your jurisdiction?

There is no concept of domicile in Austria. Liability to Austrian tax is determined by residence.

1.2 If domicile or habitual residence is relevant, how is it defined for taxation purposes?

For taxation purposes, individuals have their habitual abode or habitual residence in Austria, if they stay in Austria not only temporarily (vacation, business trip, family visit, etc.) but for a longer period of time. After a six-month stay they in any case become, retroactively, subject to Austrian unlimited tax liability.

1.3 To what extent is residence relevant in determining liability to taxation in your jurisdiction?

Austrian resident individuals are taxable on their worldwide income, whether received in cash or in kind. Non-resident individuals pay tax on their Austrian-source income.

1.4 If residence is relevant, how is it defined for taxation purposes?

Any individual with a permanent home or habitual abode in Austria is deemed to be an Austrian resident. Individuals have a permanent home in Austria, if they have a dwelling at their disposal, which they (are going to) use as a residence. The dwelling does not have to be the primary residence but it must be suitable for living considering the individual's personal circumstances. 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.

1.5 To what extent is nationality relevant in determining liability to taxation in your jurisdiction?

Nationality is irrelevant for Austrian tax purposes.

1.6 If nationality is relevant, how is it defined for taxation purposes?

Please see question 1.5 above.

1.7 What other connecting factors (if any) are relevant in determining a person's liability to tax in your jurisdiction?

Residence is the only connecting factor in determining a person's tax liability in Austria. A person without a residence in Austria is generally subject to Austrian tax on his or her Austrian source income.

2 General Taxation Regime

2.1 What gift or estate taxes apply that are relevant to persons becoming established in your jurisdiction?

Austria levies currently neither gift nor inheritance tax.

2.2 How and to what extent are persons who become established in your jurisdiction liable to income and capital gains tax?

Persons, who become Austrian residents for taxation purposes are subject to Austrian income tax on their worldwide income from seven sources:

- agriculture and forestry;
- self-employment;
- trade and business;
- employment;
- investment;
- rent, lease payments and royalties; and
- 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 in Austria.

Austria taxes a person's income at a progressive tax rate, currently ranging from 25% to 55%. Investment income drawn in Austria is generally subject to a special withholding flat tax of 27.5%; interest from savings accounts and current accounts is taxed at 25%. Income from a sale of private real property is subject to 30% property gains tax.

2.3 What other direct taxes (if any) apply to persons who become established in your jurisdiction?

Owners of Austrian real property are subject to property tax based on the property's historically-assessed uniform value, which is generally substantially below its actual fair value. The property tax is levied at a basic federal rate of 0.2% multiplied by a municipal coefficient of up to 500%.

2.4 What indirect taxes (sales taxes/VAT and customs & excise duties) apply to persons becoming established in your jurisdiction?

The standard VAT rate in Austria is 20%. A reduced rate of 10% applies in particular to food, books and newspapers, as well as to rent and lease payments for residential purposes, while VAT of 13% is levied on deliveries, private consumption and imports of, *inter alia*, art and antiquities. Excise duties are levied on certain goods, such as fuel or alcohol.

Customs duty and/or import VAT may generally be payable when goods are brought to Austria from outside of the European Union. Certain exemptions apply to goods for private use and enjoyment brought to Austria by the individual traveller in his/her personal luggage. Austrian law further provides for certain reliefs from import duties, for example, if the individual moves his/her primary residence to Austria. Exports from Austria to non-EU countries are generally tax-free.

Upon first registration of private cars and motorcycles in Austria, car registration tax of up to 20% for motorcycles, and up to 32% for cars, falls due. It is based on the motorcycle's cubic capacity or the car's CO_2 emission values. Electric cars are exempt.

2.5 Are there any anti-avoidance taxation provisions that apply to the offshore arrangements of persons who have become established in your jurisdiction?

Persons who have become established in Austria are subject to the general anti-abuse taxation provisions (see question 2.6).

2.6 Is there any general anti-avoidance or anti-abuse rule to counteract tax advantages?

The Austrian General Fiscal Code (*Bundesabgabenordnung*, '*BAO*') contains a general anti-abuse provision incorporating the substance-over-form principle into Austrian tax law. It allows Austrian tax authorities to disregard transactions or structures, which have been implemented solely for the purpose of avoiding or reducing the tax burden.

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

2.7 Are there any arrangements in place in your jurisdiction for the disclosure of aggressive tax planning schemes?

There are no specific disclosure requirements for aggressive tax planning schemes.

3 Pre-entry Tax Planning

3.1 In your jurisdiction, what pre-entry estate and gift tax planning can be undertaken?

Austria levies currently neither gift nor inheritance tax.

3.2 In your jurisdiction, what pre-entry income and capital gains tax planning can be undertaken?

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

3.3 In your jurisdiction, can pre-entry planning be undertaken for any other taxes?

It is not necessary to undertake pre-entry tax planning for persons who intend to become established in Austria.

4 Taxation Issues on Inward Investment

4.1 What liabilities are there to tax on the acquisition, holding or disposal of, or receipt of income from investments in your jurisdiction?

Income from capital and capital gains drawn in Austria are generally subject to a special withholding flat tax of 27.5%; interest income from savings accounts and current accounts is taxed at 25%. It is possible to apply for taxation at the person's individual income tax rate if it is lower than the flat tax.

4.2 What taxes are there on the importation of assets into your jurisdiction, including excise taxes?

Please see question 2.4 above.

4.3 Are there any particular tax issues in relation to the purchase of residential properties?

Austria levies real estate transfer tax on (i) transfers of real property located in Austria, and (ii) transfers of, or the consolidation of, a substantial shareholding (at least 95%) in a company owning real property in Austria. Real estate transfer tax is generally charged based on the consideration. The tax rate amounts to 3.5% of the consideration. In addition, a 1.1% fee falls due for the registration of a new owner in the Austrian land register.

5 Taxation of Corporate Vehicles

5.1 What is the test for a corporation to be taxable in your jurisdiction?

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.

5.2 What are the main tax liabilities payable by a corporation which is subject to tax in your jurisdiction?

Corporate income tax at a rate of 25% is payable by a corporation subject to tax in Austria.

5.3 How are branches of foreign corporations taxed in your jurisdiction?

An Austrian branch of a foreign corporation is subject to Austrian corporate income tax if it qualifies as a permanent establishment. The foreign corporation thus becomes subject to Austrian corporate income tax with all income attributable to its permanent establishment in Austria.

6 Tax Treaties

6.1 Has your jurisdiction entered into income tax and capital gains tax treaties and, if so, what is their impact?

Austria has entered into about 90 income tax and capital gains tax treaties, including treaties with the UK and USA. They incentivise business and avoid double taxation between Austria and its treaty partners.

6.2 Do the income tax and capital gains tax treaties generally follow the OECD or another model?

The Austrian treaties generally follow the OECD Model except for some of the older treaties, such as the ones with Brazil, France or Japan, which significantly deviate from the OECD Model.

6.3 Has your jurisdiction entered into estate and gift tax treaties and, if so, what is their impact?

Before Austria abolished its estate and gift taxes in 2008, it has entered into very few estate and gift tax treaties, which generally follow the OECD Model Estate and Gift Tax Treaty, among them a treaty with the USA.

6.4 Do the estate or gift tax treaties generally follow the OECD or another model?

Please see question 6.3 above.

7 Succession Planning

7.1 What are the relevant private international law (conflict of law) rules on succession and wills, including tests of essential validity and formal validity in your jurisdiction?

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

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

- of the place where the testator made it;
- of 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;
- of 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
- so far as immovables are concerned, of the place where they are situated.

7.2 Are there particular rules that apply to real estate held in your jurisdiction or elsewhere?

Succession to real estate is subject to the same regime as movable property.

8 Trusts and Foundations

8.1 Are trusts recognised in your jurisdiction?

There are no trusts under Austrian law. Austria has neither ratified the HCCH Hague Convention on the Law Applicable to Trusts and on their Recognition (Hague Trust Convention). Whether foreign trusts are recognised as separate legal entity depends on whether the income of the trust can be directly attributed to the beneficiaries according to the general principles of Austrian income tax law.

Under these principles, income is generally directly attributed to the beneficiary if he or she actually influences the generation of trust income, e.g. by making investment decisions or deciding on distributions.

8.2 How are trusts taxed in your jurisdiction?

If a trust is recognised, the income of the trust itself is not taxed in Austria, only distributions to an Austrian resident beneficiary.

8.3 How are trusts affected by succession and forced heirship rules in your jurisdiction?

Trusts set up, or contributions of assets to a trust, within the last two years before the settlor's death can be successfully challenged in pursuit of succession and forced heirship rights.

8.4 Are foundations recognised in your jurisdiction?

An Austrian private foundation is 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. Its founders can be individuals or legal entities; the minimum capital is EUR 70,000. Beneficiaries are not on public record but must be disclosed to the tax authorities. 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 body of the private

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

Foreign private foundations are recognised under the same principles as foreign trusts (please see question 8.1 above).

8.5 How are foundations taxed in your jurisdiction?

Contributions to Private Foundations

Contributions to Austrian private foundations and comparable foreign entities are subject to 2.5% foundation entry tax on the fair market value of the assets contributed. 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%. Contributions of Austrian real property to a private foundation are subject to real estate transfer tax (see above) plus a 2.5% foundation entry tax equivalent and land register fees of 1.1% based on the property's land value.

Income Taxation

Austrian private foundations pay 25% interim tax on interest income and capital gains as well as income from private property sales. This interim tax is credited towards distributions which are subject to the special 27.5% withholding flat tax on investment income. A private foundation's income not covered by the interim tax regime is generally subject to 25% corporate income tax; exemptions apply in particular for dividend income.

Distributions to Beneficiaries

Generally, a private foundation must withhold 27.5% withholding tax on distributions to beneficiaries. If the beneficiary is not an Austrian resident for tax purposes, depending on the applicable double tax treaty, the withholding tax is reduced to 0%.

8.6 How are foundations affected by succession and forced heirship rules in your jurisdiction?

Contributions to private foundations within the last two years before the founder's death can be successfully challenged in pursuit of succession and forced heirship rights.

9 Matrimonial Issues

9.1 Are civil partnerships/same-sex marriages permitted/recognised in your jurisdiction?

Austrian law recognises same-sex civil partnerships. It provides equal rights in labour, immigration, pension, tax, and civil law to same-sex couples as marriage does to opposite-sex couples. It also allows same-sex partners to change their surname to match their partner's and take a family surname. Same-sex civil partnerships, like civil marriages, are formed at the municipal civil registration office. Austrian law allows joint adoption by same-sex couples.

9.2 What matrimonial property regimes are permitted/recognised in your jurisdiction?

Austrian law provides for separation of property. It is, however, permitted to deviate from this rule by entering into a marriage contract.

9.3 Are pre-/post-marital agreements/marriage contracts permitted/recognised in your jurisdiction?

In Austria, spouses rarely enter into pre-nuptial agreements. Pre- and post-nuptial agreements can be entered into to determine either the legal consequences of marriage, maintenance and contributions to earnings in the event of one spouse's death, or the distribution of marital property and other arrangements in the event of a separation or divorce.

Only spouses or fiancées, under the condition that they enter into marriage, may conclude pre- and post-nuptial agreements.

Austria recognises foreign pre- or post-marital agreements and marriage contracts if they comply with the formal requirements of the jurisdiction, where they have been entered into.

9.4 What are the main principles which will apply in your jurisdiction in relation to financial provision on divorce?

Austrian law generally leaves it to the divorcing spouses to consent on the distribution of their marital assets and maintenance. Each of the spouses may, however, apply for a court-ordered distribution within one year after the divorce became final.

The courts aim at an equitable division of assets acquired by the spouses during their marriage taking into account the spouses' contributions to the acquisition, the best interest of the children and any existing debt. Household work, care giving and the upbringing of children are generally considered equivalent to the financial contributions of the income generating spouse.

All matrimonial savings, matrimonial assets, and items of daily use must be distributed. These include all movable and immovable property used by both spouses during their marriage, including the matrimonial home. Assets, which one spouse brought to the marriage, inherited or received as a gift, assets for the sole use of one spouse, and assets for the sole exercise of an occupation are not subject to distribution. Austrian law further exempts company assets and participation interests from the distribution, except when they are held solely for investment purposes.

The entitlement to and computation of maintenance mainly depends on the kind of divorce (fault, mutual, other reasons) as well as on the ability of each spouse to provide for him/herself.

10 Immigration Issues

10.1 What restrictions or qualifications does your jurisdiction impose for entry into the country?

Generally, third-country nationals must obtain a Schengen Visa to enter Austria for tourist or for business purposes (such as meetings) for up to 90 days in a 180-day period.

Third-country nationals who appear in the Schengen Information System, pose a risk to public order, security and health, against whom an entry ban has been issued (for one of those reasons) by a Schengen State Party, or who are suspected of links to a criminal or terrorist organisation, may not obtain a Schengen Visa.

To obtain a Schengen Visa, third-country nationals must demonstrate that they have: (i) sufficient finances to fund their stay in Austria; (ii) comprehensive health insurance; and (iii) access to accommodation. They must also demonstrate that they will leave the Schengen area before their visa expires.

Some third-country nationals may enter Austria for up to 90 days visa-free. EU/EWR nationals may enter Austria for up to three months provided they possess a valid passport or identification card.

Third-country nationals may also obtain a so-called Visa D to enter Austria for longer than 90 days and generally up to a maximum of six months. In some cases, the maximum duration of a Visa D can be 12 months. A Visa D can, for example, be issued to persons seeking to undertake temporary employment in Austria (including self-employment) or to highly qualified individuals wishing to seek employment.

Generally, third-country nationals wishing to remain in Austria for longer than six months must obtain a residence permit. Residence permits are divided into various categories (such as "high qualified employee"). Most residence permits, but not all, are subject to general obligatory requirements such as: (i) to learn German; (ii) to have access to suitable accommodation; (iii) to possess comprehensive health insurance; and (iv) to earn or possess sufficient funds so as to have no recourse to public funds. Applications for residence permits will be denied, for example, where a third-country national is subject to an entry ban.

10.2 Does your jurisdiction have any investor and/or other special categories for entry?

An investor residence permit is available in Austria for key self-employed persons. This requires the investment of capital of at least EUR 100,000 and/or the prospect of securing or creating jobs. The applicant must submit a business plan and the business activity must bring a macro-economic benefit to the Austrian province in which it is located.

10.3 What are the requirements in your jurisdiction in order to qualify for nationality?

There are two main routes to obtaining citizenship in Austria. The first is a privileged route which enables a third-country national to obtain citizenship after six years of residence in Austria. The second is citizenship after 10 years of residence in Austria. The former can be obtained, for example, where a foreign national has obtained upper-intermediate knowledge of German.

In the case of both routes, it is a general requirement that the applicant has earned sufficient income for at least 36 months in the six years preceding the filing of the citizenship application. At least six of those months must lie immediately before the date the application is filed.

In addition, third-country nationals must have spent no more than 20% of the applicable residence period outside of Austria and must pass a language and nationality test. Furthermore, third-country nationals who accept Austrian nationality are generally required to relinquish their previous nationality or nationalities.

10.4 Are there any taxation implications in obtaining nationality in your jurisdiction?

No. Tax regulation in Austria and the liability to tax is based on residence and not on nationality.

10.5 Are there any special tax/immigration/citizenship programmes designed to attract foreigners to become resident in your jurisdiction?

Third-country nationals who can demonstrate extraordinary achievements or who are expected to attain extraordinary achievements can be offered privileged citizenship if it is in the special interests of the Austrian Republic. In this case, the following usual citizenship requirements are waived: (i) a 10-year residency period; (ii) knowledge of German; (iii) a citizenship test; (iv) proof of sufficient finances; and (v) relinquishing previous citizenship.

This route to citizenship is generally offered to persons who demonstrate (or will demonstrate) extraordinary achievements in the area of science, business, sport and art, culture or music.

11 Reporting Requirements/Privacy

11.1 What automatic exchange of information agreements has your jurisdiction entered into with other countries?

Austria has entered into several agreements for an automatic exchange of information. Cross-border exchange of information for taxation purposes is generally based on the particular double tax treaty, the 2011 EU Council Directive on Administrative Cooperation in the Field of Taxation, the 2003 EU Council Directive on Taxation of Savings Income in the Form of Interest Payments, and special bilateral treaties, such as the US Foreign Account Tax Compliance Act, treaties on the cooperation in tax matters with Switzerland and Liechtenstein, or treaties for the purpose of exchange of information for taxation purposes with countries, which have no double tax treaty with Austria.

Austria is party to the multilateral OECD Convention on Mutual Administrative Assistance in Tax Matters.

11.2 What reporting requirements are imposed by domestic law in your jurisdiction in respect of structures outside your jurisdiction with which a person in your jurisdiction is involved?

When Austria abolished estate and gift taxes it implemented a Gift Disclosure Act. It provides for a disclosure obligation if the donor or the donee at the time of the gift has a permanent home or his/her habitual abode in Austria. Only *inter vivos* gifts of:

- cash;
- receivables of capital (e.g. savings books, bonds, loan receivables);
- participation interests in companies, also as a silent partner;
- (a separable part of) business operations for the purpose of generating income from agriculture and forestry, self-employment, or trade and business; and
- movable and intangible assets,

must be disclosed. If the gift is not disclosed to the tax office within three months, a penalty payment of up to 10% of the gift's value might be imposed by the tax auditor.

The Austrian Gift Disclosure Act does not affect gifts of immovables or inheritances. In addition, there is a general exemption for gifts between family members of up to EUR 50,000 per year and gifts between unrelated persons of up to EUR 15,000 (combined within five years).

11.3 Are there any public registers of owners/beneficial owners/trustees/board members of, or of other persons with significant control or influence over companies, foundations or trusts established or resident in your jurisdiction?

The public Austrian Register of Companies (*Firmenbuch*) provides

names and dates of birth of shareholders and board members (executive management and supervisory board) of companies as well as of board members of an Austrian Private Foundation.

Effective 15 January 2018, Austria will also have a register of beneficial ownership under the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

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Paul Doralt draws on extensive experience in tax matters (corporate tax, mergers & acquisitions, 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 advisor. He graduated from the University of Vienna (*Dr. iur.* 1996) and from the University of London, King's College (LL.M. 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).

He is the author of numerous publications on tax law and private trusts. Paul Doralt is a member of the IFA (International Fiscal Association) and of the Austrian Chamber of Professional Accountants. He is also a member of the IBA.

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Katharina Binder has more than seven 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 (LL.M. *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 LL.M. degree in International Business and Trade Law. She re-joined 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 cross-border corporate restructurings and Austrian private foundations.

DORDA

DORDA is a leading Austrian law firm committed to delivering clarity to clients on any legal issue they face. DORDA's approx. 90 lawyers are active in all areas of business law, including in particular corporate and tax law, real estate, M&A and restructuring, banking and capital markets, antitrust law public law as well as IT and IP. Our strengths are precision, innovation and flexibility.

DORDA's Trust and Estates experts provide customized solutions for corporate succession, securing personal assets and providing for future descendents. Structuring of family assets requires careful legal organisation and planning across several generations. In order to achieve these goals, the establishment of an Austrian private foundation has proved invaluable. We have set up a great number of such foundations for our clients with considerable success and provide them with ongoing support and advice.

Current titles in the ICLG series include:

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