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PREFACE

In my foreword this year, I will focus on the continuing interest that is being devoted to the position of wealthy families and the markedly different approaches that prevail in Western Europe and the United States in terms of tax information exchange and anti-money laundering policy.

While public beneficial registers for companies will be introduced in the EU in the first quarter of 2020, the United States continues to pursue its own agenda where the primary focus of its anti-money laundering policy continues to be around financial institutions.

In broad terms, it is still accurate to say that the principal impetus for ongoing policy initiatives in this area is being driven by the EU, OECD and the Financial Action Task Force (FATF). This has been underlined by two important events in the past week or so as I finalise this foreword. Firstly, the decision of the UK Crown Dependencies[1] to voluntarily adopt public registers of beneficial ownership by 2023. Secondly, FATF's publication of its 2019 guidance for trust and corporate service providers (TCSPs) (the last version was published in 2008). I will return to both of these topics below but, in general terms, they underscore the sense of the 'transparency juggernaut' maintaining its momentum.

I will first deal with EU developments. The focus of activity here is the measures being introduced at Member State level to implement the Fourth and Fifth Anti-money Laundering Directives (4AMLD and 5AMLD, respectively). With some notable exceptions (including the UK, Malta Germany, Luxembourg, Portugal and Ireland), Member States have been quite slow to implement 4AMLD. In practice, implementation in other jurisdictions looks like it will be subsumed into the widened scope of 5AMLD.

So far as corporate registers are concerned, these are due to become public in the EU and wider EEA in early 2020 under 5AMLD (in the UK, the register was public from inception so the change here will be less marked). In the arena of trust registers, the scope of trusts that are within scope has been substantially expanded from those that generate tax consequences and those that are administered in the relevant jurisdiction. The Directive makes reference to 'express' trusts. There is significant uncertainty as to how this term will be construed as, on an expansive reading, it would require, in a UK context or co-ownership of land and joint bank accounts, to be reported. As a general proposition, trust registers are private and it would only be possible to gain access to the information on the beneficial owners of a trust where the applicant can demonstrate a legitimate interest.

It seems likely, from a consultation that has recently been launched by the UK government, that those seeking access to the trust register will have to demonstrate some

1 Jersey, Guernsey and the Isle of Man.

specific evidence of money laundering or terrorist financing activity to justify this. In essence, general 'fishing' expeditions by investigative journalists into the affairs of the wealthy will, hopefully, be discouraged.

Some curious features of the directive implementing 5AMLD have potentially wide-ranging consequences for trusts that are not regarded as resident in the EU or EEA. On a literal reading of the directive, it could be argued that such trusts will be required to register in circumstances where they have a business relationship with an obliged entity – this includes not only financial institutions but lawyers, accountants and other equivalent professionals. We will have to await the detailed regulations to see the final policy stance taken on this issue.

One other area where 5AMLD leads to a surprising outcome is in circumstances where a trust is deemed to control any company that is not incorporated within the EU or EEA. In these circumstances, the directive makes provision for public access to information about the trust; the logic here is that if the relevant company does not open up its information to public scrutiny then the trust that owns it should be disclosed instead. What is completely unclear at this stage is whether this will provide de facto public access to information about trusts that control non-EU or non-EEA companies or whether it will only afford such access in circumstances where the applicant already has detailed information about the relevant company or trust.

Another interesting issue that arises in Luxembourg, where a trust is the ultimate beneficial owner of a Luxembourg company, is that information about the settlor, beneficiaries, protectors and any other natural person exercising effective control will be publicly available on the corporate Register of Beneficial Owners from 31 August 2019. This is markedly different from the position under the UK Corporate register in the case of a trustee owner where the persons with significant control or 'PSC' rules look to those who control the trustee decisions alone rather than those who are beneficiaries of a trust.

The general scope of trust registers in the EU under 4AMLD is starting to become clearer. Following on from the UK and Malta, Ireland recently published its regulations at the end of January 2019. These regulations will, as noted, be potentially subject to material expansion once 5AMLD is implemented.

One general concept within 5AMLD is the proposal that trusts can be effectively passported; in other words, once the trust can evidence registration on one EU or EEA register, this will avoid the need for duplicate registrations. Whether this will result in any practical compliance gains or advantages remains to be seen. In terms of its scope, the information being provided on trusts in the centralised Beneficial Ownership Register will be restricted to information about individuals and will not address (as is the case with Common Reporting Standard (CRS)) asset values.

There are clear signs that the EU is intent upon exporting its concept of centralised trusts and corporate beneficial ownership registers to the rest of the world. Recent commentaries have suggested a move to a global standard in this regard by 2023. NGOs active in the transparency arena have started to advocate the creation of an overarching integrated global asset register for wealthy families although it is difficult to gauge policymakers' enthusiasm for such a radical step.

The position of the UK if Brexit finally happens is also interesting. The UK seems intent upon implementing 5AMLD and has shown no signs of losing its enthusiasm for expanding measures in this area along with its European neighbours. The UK has also been putting pressure on both its crown dependencies (CDs) and overseas territories (OTs)[2] to adopt the EU's position on public beneficial ownership registers for companies.

Before the CD's announcement on 19 June 2019,[3] it seemed that the OTs were more likely to agree to the EU's position because of their constitutional status where the UK has a stronger formal say in how they make policy. What is interesting about the CD's position is, in the statement issued by the three Island Governments on 19 June, they describe a three-stage process as follows:

> *1. the interconnection of the islands' registers of beneficial ownership of companies with those within the EU for access by law enforcement authorities and Financial Intelligence Units;*
> *2. access for financial service businesses and certain other prescribed businesses for corporate due diligence purposes;*
> *3. public access aligned to the approach taken in the EU Directive.*

It seems obvious that the CD's collective approach here is to forestall criticism from the EU in particular by being seen to take the lead in moving to public access in a phased manner. The fact that public access is the last stage of this process is revealing. The willingness in interim stages to share information with the EU and obliged entities in the regulated sector may well be a model that other jurisdictions will consider following.

Whether the voluntary adoption of public registers of beneficial ownership for companies in the CDs will stimulate other jurisdictions to follow suit remains to be seen. There have been some indications that the UK and EU stance here is to promote a new global standard of public registers for companies by 2023 mentioned above. Given the UK's pronouncements here, it seems inevitable that the OTs will be forced to adopt equivalent measures to the CDs. It will be interesting to see whether other major offshore jurisdictions such as Switzerland and the Bahamas will react to these events.

As a different matter, the separate subject of establishing centralised trust registers outside the EU is bound to be raised as a parallel issue. This may take longer to surface than pressure to establish corporate registers, but seems bound to raise its head at some stage.

From a wider FATF perspective, the key development in 2019 is the publication in late June 2019 of updated guidance to non-financial services professionals. Three sets of parallel guidance to lawyers, accountants and TCSPs[4] have been issued. There has been a significant time gap since the previous edition, which was published in 2008.

One area where the new guidance will have an important impact in the context of TCSPs is in defining 'beneficial ownership'. In this regard, the new guidance follows an expansive view of what constitutes 'control' for the purpose of beneficial ownership akin to the approach taken in the UK Trust Register. This will be potentially significant going forward in considering who needs to be disclosed in the context of trust structures in governance terms. In particular, holding powers as a minority member of a group or a veto power with respect not only to the appointment and removal of trustees but also to the addition and removal of beneficiaries, for example, will be enough to render an individual as being characterised as a 'natural person exercising effective control'. This is potentially very significant because there

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2 A wider group that includes Bermuda, British Virgin Isles ,the Cayman Islands and Gibraltar.
3 https://www.gov.je/News/2019/Pages/BeneficialOwnership.aspx.
4 https://www.fatf-gafi.org/publications/fatfgeneral/documents/public-consultation-guidance-tcsp.html.

has been no guidance offered by FATF since it published its 2012 recommendations on how to interpret this expression.

It is still very early to try and discern what the impact of the information flows triggered under CRS has been. For compliant structures, the provision of CRS information should only confirm what has already been disclosed by a taxpayer to domestic tax authorities. However, given the growing concerns being expressed by politicians on the 'inequality' theme, the assembling of information about asset holding positions of wealthy individuals may be the tool that is deployed in assessing the potential impact of future wealth or inheritance taxes where these are not currently employed.

There is also a potentially significant crossover from the FATF domain into CRS reporting. In particular, a broader concept of who may be regarded as a 'controller' in the anti-money laundering context is likely to be applied for CRS purposes in due course, given the express linkage that exists in CRS that directly imports FATF definitions of beneficial ownership into the concept of who may be reportable in a trust context as a 'controlling person'.[5] This could, in particular, lead specifically to the disclosure of family members who have more subtle or 'indirect' means of influence over a family trust structure.

One development in an aligned field worth mentioning is the rules on substance for entities incorporated in offshore jurisdictions. These substance rules have taken on an increased significance recently.

The EU Council has created a code of conduct for business taxation to limit the impact of low tax regimes. In 2017, it established a code of conduct group tasked with considering the measures on business tax within a number of non-EU jurisdictions.

In response to assessments undertaken by the EU, the affected jurisdictions (which include a number of the CDs and OTs) have introduced new rules requiring economic substance that will take effect in 2019.

These rules impact companies carrying on 'relevant activities'. The substance requirements have three principal components. These are to demonstrate, that within the jurisdiction, the company:

a is directed and managed;
b undertakes core income-generating activities; and
c has physical presence.

While these measures are primarily relevant in a base erosion and profit shifting (BEPS) context, they are indicative of wider trends in terms of being able to demonstrate the overall substance of these measures that are operated in offshore jurisdictions. This is of potentially greater significance to private wealth structures that may be seen as more passive than active.

There are nine relevant activities that cover banking, insurance, fund management and financing. One specific area includes the role of pure equity holding companies (PEHs). While supposedly aimed at private equity structures, it could conceivably impact a conventional holding company holding varied investments for a family trust.

At this early stage, there is no clear guidance that delineates the boundaries of what constitutes a PEH; what can be said is that family structures could find themselves impacted if the guidance is couched in wide terms.

5 See page 59 of OECD publication in commenting on meaning of 'controlling person' for CRS purposes.

There is no doubt that the increased cost and complexity of regulation is driving trends towards simpler structures with fewer layers and involving fewer jurisdictions. There appears to be a greater reluctance on the part of corporate service providers to offer a purely passive role as a registered office without any detailed understanding of the operation of the underlying entities themselves. This appears to be coupled with a trend towards re-domiciling entities into jurisdictions where substance can be demonstrated.

At the same time, an increasing awareness as to the implications of disclosure of beneficial ownership is also generating a more reflective view on the retention of control either by settlors or by beneficiaries or connected family members.

In summary, therefore, the theme of ever-greater levels of transparency and increased complexity of overlapping regulation continues. The dichotomy between Western Europe and the United States, in terms of their different approach to these issues, also remains very apparent to observers.

John Riches
RMW Law LLP
London
August 2019

Chapter 8

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. The information in this chapter was accurate as at August 2018.

2 Section 1(2) of the Austrian Income Tax Act.

3 Section 26(1) of the Austrian Federal Fiscal Procedures Act.

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.

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.

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.

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

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.

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 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

37 Section 744(1) of the Austrian General Civil Law Code.
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.

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 body

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.

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.

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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