Asset Protection – How to structure assets in an anonymous way, while meeting the international transparency requirements.

Commission(s) in charge of the Session/Workshop:
Private Clients Commission
Tax Law Commission

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National Report of Austria

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1. Private Clients

1.1. Asset Protection – structuring possibilities and other means of asset protection

1.1.1. Does your jurisdiction recognize domestic or foreign trusts? If yes, what types of domestic trusts are there and what type of trusts is usually used for asset protections purposes? Are there any restrictions in your jurisdiction as to the possibility of the settlor to be a beneficiary at the same time?

The Austrian jurisdiction does not recognize an independent legal construct, which is designed as "trust". There are, however, foundations – depending on the interpretation of the term "trust" – explained in item 1.1.2 below.

1.1.2. Does your country recognize private foundations (domestic or foreign), which are suitable for asset protection purposes (such as family foundations or similar)? If yes, what are the main characteristics of such domestic private foundation and are there any restrictions in your jurisdiction as to the possibility of the founder/donor to be a beneficiary at the same time?

Pursuant to general legal philosophy of civil law, foundations are so-called special purpose funds, which have no members or shareholders as compared to, for example, partnerships or corporations, but only usufructuaries or beneficiaries ("*Destinatäre*").

The Austrian law recognizes a number of different types of foundations, yet there is no legal definition of the term "*Stiftung*" (foundation). § 646 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) in this context only provides that "the provisions regarding foundations are included in the political decrees". As can be read from the wording of § 646 ABGB, the former legislator had avoided to define kinds or types of foundations in any detail. Yet it should allow a flexible design of the law of foundations – considering the respective facts. The Austrian legislator used this "general authorization" by creating various types of foundations.

In practice, nearly exclusively so-called private foundations ("*Privatstiftungen*") are used in Austria which are legally based on the Law on Private Foundations 1993 (*Privatstiftungsgesetz 1993*, PSG). Recognizing the by far most important practical importance of the Austrian private foundation and considering the limited scope of this report, it is only referred to this specific type in the following. The PSG recognizes both, the establishment of private foundations as legal instrument *inter vivos* as well as the so-called "private foundation by reason of death" ("*Privatstiftung von Todes wegen*", § 8 PSG). The private foundation inter vivos is founded by a unilateral declaration of

foundation, whereas the private foundation by reason of death is a disposition on death. Additional to the provisions of the PSG, the (formal) requirements for dispositions on death (will, contract of inheritance, etc.) for an establishment of a private foundation by reason of death are to be observed.

A private foundation is established by a declaration of foundation of the founder. The PSG allows to have the declaration of foundation to be executed in two separate documents, namely the deed of foundation and the additional deed of foundation, whereby the latter may only be executed if it is expressively referred to it in the deed of foundation. Furthermore, the registration with the Austrian companies' register is required to legally effect the establishment. Only upon registration a foundation becomes into existence and gets full legal personality. Founders may be both, individuals as well as legal entities. Yet, only individuals may reserve the right to revocation of the foundation.

A private foundation may, if necessary, also be established by a trustee. It is, however, to be observed that such trustee acts (from a civil law perspective) in his/her own name and therefore is to be considered the founder in the meaning of the PSG. The trustee is therefore not able to assign the (strictly personal) position of the founder, but may only act on the basis of an obligatory legal relationship within the foundation. Workarounds may be indirect trustor constructions by inserting other legal entities (e.g. stock corporations or limited liability companies). Basically it is true that a private foundation may be established for any purpose, as long such purpose is allowed. The private foundation may therefore pursue any purpose, unless such purpose offends against a legal prohibition or is *contra bonos mores* in the meaning of § 879 ABGB. The law includes – irrespective some individual provisions in the PSG – no limitations in this respect. Even economically unreasonable or even foolish, unusable or bizarre purposes are admissible. A founder may promote the general public as well as a certain person or persons chosen – on the basis of arbitrary criteria (e.g. age, education, sex). Based on the type of purpose of the foundation (idealistic or economic) it is differed between charitable and non-charitable foundations in the law. This differentiation is of special importance in connection with taxation issues.

Obligatory bodies of private foundations are the board of directors, the auditor and the, if required, obligatory supervisory board. The founder may also implement further bodies "for the observation of the foundation's purpose" (e.g. a "family management board" ("*Familienbeirat*")). The board of the foundation manages the foundation and externally represents the foundation. The board of directors shall comprise at least three individuals. Beneficiaries of the private foundation, their spouses and persons which are neither related

in the direct line nor in the collateral line until the third degree. If the beneficiary of the private foundation is a legal entity in which an individual holds the majority or has dominant control also such individual, his/her spouse as well as persons which are related to the shareholding individual in direct line or in the collateral line until the third degree are not entitled to act as members of the board of directors of the foundation.

1.1.3. Are there any other asset protection vehicles which are commonly used in your jurisdiction? What are their specific characteristics?

Besides foundations, in particular private foundations, there are no vehicles which specifically serve the purpose of protection of assets. Yet, of course, corporations or other legal entities may have certain protection function – depending on the purpose of the protection of assets.

1.1.4. Is your jurisdiction asset protection-friendly? E.g. does your jurisdiction typically respect asset protection structures or does it recognize principles such as "sham" or "piercing the corporate veil"? If yes, what are the prerequisites for a court/other administrative body to apply such principles? What is the right balance between settlor control and asset protection?

The question of effective asset protection is closely related to the purpose of such protection, hence, what of the assets shall be protected. It is therefore not possible to give a general answer whether Austria is asset-protection friendly or not. For example, the protection of assets against the attachment of creditors or in case of insolvency is loosened by a number of special provisions. Also assets acquired by acts subject to criminal law are usually not protected.

1.1.5. Are there any other characteristics in your jurisdiction that make it particularly asset protection friendly, e.g. political stability, banking or other secrecy rules, favorable civil procedural rules (e.g. in relation to the (non-) recognition of foreign judgments) and have there been any changes to these principles recently?

Austria is a stable business location with a secure framework, boasts a dynamic research and development scene and is renowned for its high quality of life. However, as a member of the European Union and the OECD Austria adheres to international transparency principles and is bound by international agreements. The Austrian banking secrecy, a discussion point for many years, has been weakened over the last few years. The latest Austrian tax reform 2015/2016 led to further changes in this respect.

1.1.6. Has there been any recent case law particularly relevant with regard to asset protection structures and what was it about?

Austrian courts regularly publish decision that are more or less relevant with regard to asset protection structure.

For example in 2014 the Austrian Supreme Court (*Oberster Gerichtshof*) had to decide whether benefits from private foundations paid to individuals liable for child or wife support payments have to be included in these individuals' assessment basis for the payments. In this case the husband, who was the debtor, received an indexed sum of money from a private foundation once a year, the amount was set forth in the foundation charter. In its Ruling the Supreme Court decreed that this type of benefit received from a private foundation must be included in the assessment basis for child and wife support payments, if the person liable to pay holds a legal title, for instance because these benefits are provided for in the Foundation charter.

1.1.7. What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed? How is the transfer of assets to trusts/foundation or other asset-holding vehicles taxed in your jurisdiction?

The Austrian tax law is a complex system including several fiscal special provisions for foundations, in particular for private foundations. In the following, it is only possible to give a rough overview of the tax system applicable to private foundations:

a) Taxation of endowments to private foundations

Gratuitous endowments to a private foundation are basically subject to the initial endowment tax (*Stiftungseingangssteuer*) of a fixed tax rate of 2.5%. The assessment basis is the fair market value (mainly the current market value), for securities or shares in corporations the market value is to be used, if such value exists. The tax rate may be increased to 25%, for example in connection with foreign foundations which violated disclosure duties vis-à-vis the financial authorities or which are not registered in the companies' register. To endow a private foundation against payment (the consideration is at least 50% of the market value of the transferred assets) are considered a sale which is why there is no initial endowment tax due.

Taxes relating to endowments of real property are no longer laid down in the Initial Endowment Tax Act (*Stiftungseingangssteuergesetz*), but in the Land Acquisition Tax Act (*Grunderwerbsteuergesetz*) since 1 January 2012. The Austrian Constitutional Court abrogated the initial provision according to which the endowment of a private foundation with real property had been subject to 2.5% initial endowment tax and 3.5% equivalent land acquisition tax – calculated from the threefold standard value (a special tax value for real properties) – as unconstitutional in 2011. Endowing private foundations with real

property have been since laid down in the Land Acquisition Tax Act and no longer subject to initial endowment tax. As from 1 January 2012, endowments with real property were subject to a 3.5% land acquisition tax and a 2.5% equivalent initial endowment tax, each calculated from the threefold standard value. Since 1 June 2014 the land acquisition tax payable for endowments with real property to and by private foundations is no longer based on the threefold standard value, but the current market value of the real property. Therefore, the land acquisition tax is 6% (3.5% land acquisition tax and 2.5% equivalent initial endowment tax) from the current market value.

As a consequence of tax reform 2015/2016 gratuitous transfer of real property was changed as of 1 January 2016 in two aspects which are also to be observed for endowments to private foundations with real properties. The assessment basis is no longer the market value, but a "real property value" which must be calculated separately . The real property value shall either be calculated from the sum of the threefold land value plus the value of the building or from a suitable real property price comparison list. Only if the real property value is higher than the market value, the latter may be used. Changes also became effective for the tax rate: The hitherto applicable tax rate of 3.5% only applies to real property values of more than € 400,001. Up to a real property value of €250,000 the tax rate is 0.5%, between € 250,000 and € 400,000 the tax rate is 2%. Irrespective of the tax reform, transfer of real property is further subject to a 1.1% registration fee for the land register (calculated from the fair market value).

b) Regular taxation of a private foundation

The regular taxation of a private foundation can basically divided into three areas:

- **Interests from credits on bank accounts, interest gains from bonds, mortgage bonds, debt securities, income from realized increase in value of capital assets and income from derivatives as well as income from the sale of real property are subject to the interim tax in the amount of 25% (before 2011: 12.5%). This interim tax is credited again in connection with allocations to the beneficiaries, which are subject to a 27.5% capital gains tax (before 2016: 25%). From an economic perspective, the interim tax is therefore a pre-taxation of the later allocation tax of the beneficiaries. By the interim taxation the cumulative payment of corporate income tax and capital gains tax is avoided. No credit is made if a foreign beneficiary is credited the capital gains tax due to double tax agreements. Due to the Austrian**

Tax Code Amendment Act 2015 (*Abgabenänderungsgesetz 2015*) the credit is granted as from 1 January 2016 at least insofar as Austria has the right to withhold tax.

- **Income from trade or business (to the extent admissible by law for foundations), income from self-employment, income from agriculture and forestry, leasing and letting, income from capital assets, other income (e.g. speculative gains) and income from the sale of real property are subject to the (ordinary) corporate income tax in the amount of 25%**
- **Distributions of profits of corporations are exempt from corporate income tax on the level of the private foundation.**

c) Taxation of allocations to beneficiaries (taxation of allocations)

Allocations of the private foundation to beneficiaries are basically subject to the capital gains tax (*Kapitalerstragsteuer,* KESt) in the amount of 27.5% (before 2016: 25%) as income from capital assets. The KESt is withheld by the private foundation and paid to the financial authorities.

Until the abolishment of the inheritance tax and donation tax in 2008, private foundations faced the tax disadvantage of being subject to KESt both for allocations to beneficiaries from the substance of the assets as well as allocations from the profits realized with the foundation's assets ("*mousetrap effect*"). Since 1 August 2008, payouts from the substance have been exempt from tax under certain conditions.

1.2. National and international transparency requirements

1.2.1. What are the developments in your country with regard to the automatic exchange of information? Will your jurisdiction implement the OECD-CRS and if yes, when and how?

By the Act on Common Reporting Standards (*Gemeinsamer Meldestandard-Gesetz*; GMSG) published on 14 August 2015, the provisions of the Directive on the administrative cooperation in the field of taxation (Directive 2011/16/EU) amended by the Directive 2014/107/EU was implemented into national law of Austria. Therewith financial institutes (banks and insurances) are required to comply with a set of regulations similar to a FATCA Model 1 IGA for the automatic exchange of information regarding accounting information of their customers as from 1 October 2016 which have their seat with respect to taxes in a state participating in the Common Reporting Standard. The reporting duties vis-à-vis other EU Member States apply directly due

to the implementation of the EU Directive in the individual Member States (hence, in Austria, due to the GMSG) and there is no need to conclud additional so-called Competent Authority Agreements (CAA) with such states. At the same time, the GMSG provides also a legal basis for the automatic exchange of bank information with Non-Member States participating in the OECD Common Reporting Standard to which Austria committed itself in a multilateral agreement already on 29 October 2014 or will commit itself in bi- or multilateral agreements in the future. The standardization of the information exchange shall help tax authorities and financial institutions to implement such exchange system for different contractual states in a possibly identical way and therefore at low costs. The GMSG differs basically between new and existing accounts as well as accounts of legal entities (all legal entities which are no individuals) and individuals for the identification of accounts subject to reporting.

The duty of care of the financial institution, the term for the finalization of the first assessment as well as the first period of taxation which are subject to the reporting duties to the Austrian Ministry of Finance depend on the respective qualification. For new accounts which are accounts opened on or after 1 October 2016 financial institutions shall install a customer acceptance process which basically provides for a self-disclosure of the owner of an account regarding his/her tax residence. For existing accounts, which are accounts opened before 1 October 2016, financial institutions must process assessment procedures regarding the tax residence of the owner of an account within a certain period.

1.2.2. Has your country entered into a bilateral FATCA agreement? If yes, what are the main features of such agreement?

On 29 April 2014 Austria entered into an Agreement with the United States of America for Cooperation to Facilitate the Implementation of FATCA. As regards content, it is an agreement pursuant to model II which was chosen only by Switzerland, Japan, Chile and Bermuda in addition to Austria. Therefore, there is no automatic transmission of information from one authority to another. The reason why Austria chose the more complex model II was the protection of the banking secrecy which Austria feels obliged to comply with. Instead of the Ministry of Finance, the financial institutions are obliged to pass on the information about their clients.

1.2.3. FATF (Financial Action Task Force) recommendations and developments: What are the recent developments in your country and what are the specific due diligence obligations in your jurisdiction?

n/a

1.2.4. Will your country be subject to the Fourth EU Anti-Money Laundering Directive ("4AMLD") including UBO-register?

Yes, Austria will implement the Fourth EU Anti-Money Laundering Directive. Details are still elaborated at this time.

1.2.5. If not, does your jurisdiction know similar shareholder registers?

n/a

1.2.6. Are there any other transparency requirements in your country that pose a threat on the anonymity of asset protection structures?

The Austrian law recognizes different transparency provisions and reporting requirements connected therewith.

Only as an example for the comprehensive tax reporting duties in this context the reporting duties in connection with using private foundations are discussed. Violation of reporting duties may, for example, lead to a raise of the initial endowment tax (*Stiftungseingangssteuer*), but also lead to other fiscal disadvantages. The board of directors of the private foundation is moreover obliged to immediately inform the financial authority competent for the collection of the corporate income tax of the private foundation of the beneficiaries by means of electronic communication. Changes in the beneficiaries are always and immediately to be reported to the financial authorities.

2. Tax

2.1. Transparency requirements under national law

2.1.1. Does the national law currently include transparency obligations regarding income derived from other states (directly or by subsidiaries) and the tax treatment thereof (including the transfer pricing applied)?

The Austrian tax law knows a number of special reporting duties and especially a general duty to disclosure, duty to cooperation and duty to tell the truth. Resident individuals or resident legal entities subject to tax are therefore obliged to have their complete global income taxed in Austria already solely due to general provisions. Possible special provisions may, however, result from applicable double tax treaties or similar legal provisions.

2.1.2. Does the national law in your country currently include regulations to report the world wide transfer pricing policy of the group?

No, there is no such general provision. Yet, in individual cases there may be a duty to report or an obligation to prove the accuracy of a tax return due to general duties to disclose and to tell the truth. Furthermore, facts involving foreign countries are subject to an increased duty to cooperate following the case law.

2.1.3. Does the national law currently include obligations to report tax schemes?

No, there is no such obligation in Austria. Yet, it is common in practice to obtain rulings in advance from the competent tax authority especially in connection with complicated transaction including fiscal consequences.

2.2. Exchange of information under national law

2.2.1. What are the current regulations regarding international tax assistance and exchange of information on the tax position of companies in your country?

See answer question 2.2.2.

2.2.2. For EU countries, please describe the current implementation in our country of the Directive 2011/16/EU of 15 February 2011 and any developments regarding the automatic exchange of information on tax rulings? Please also describe the current status and any legislative proposals.

Directive 2011/16/EU was completely integrated into the EU-Amtshilfegesetz (EU-AHG), the automatic exchange of Tax Rulings and APAs will also be integrated into Austrian law by an amendment of the EU-AHG. There is, however, no draft bill at the time being.

2.2.3. What are the current developments in your country regarding international tax assistance and exchange of information on the tax position of companies (other than the BEPS and EU action plans)?

n/a

2.3. BEPS Action Plan

2.3.1. Please describe in what way the BEPS Action Plan no. 5, 12 and 13 will be introduced in the national tax law of your country (e.g. via legislative proposals, inclusion in the policy of the tax authorities or solely used as guidelines) and the current status thereof.

Austria implemented already some regulations in the meaning of BEPS in national tax law in the past (e.g. tax duty for hybrid participations in profits which are deductible at the distributing foreign company; prohibition to deduct interest for group internal purchase of shareholdings; non-deductibility of interests and royalties to low-tax group companies).

It is currently hard to anticipate when Austria will take the next steps on a national level. As regards the provisions regarding „Country by Country Reporting" (CbC), originally planned for autumn 2015, no further details are yet known. A major deviation from the proposals made by the OECD in BEPS Action 13 is, however, not to be expected.