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# Corporate Tax 2022

Austria: Law & Practice

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# AUSTRIA

## Law and Practice

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# 1. TYPES OF BUSINESS ENTITIES, THEIR RESIDENCE AND BASIC TAX TREATMENT

## 1.1 Corporate Structures and Tax Treatment

Corporate businesses generally adopt one of the following two forms of companies:

- the limited liability company (*Gesellschaft mit beschränkter Haftung* – GmbH); or
- the stock corporation (*Aktiengesellschaft* – AG).

Further corporate forms include the co-operative (*Genossenschaft* – Gen) and the *Societas Europaea* (SE), which are taxed as legal entities and are subject to corporate income tax in Austria.

Whereas the GmbH is a private limited company with a typically low number of shareholders, the AG tends to have a multitude of shareholders. In contrast to a GmbH, an AG can be a public limited company, the shares of which can be held on securities deposits of banks and also be listed at the stock exchange. However, both types of companies can also be formed as a one-man company. In both cases, the liability of the shareholders is generally limited to the amount of the nominal capital allocated to their shares.

Further key differences are as follows:

- GmbH shareholders are authorised to give instructions to a managing director, the transfer of shares can be restricted by the company statutes and there is a wide range of possibilities for the design of the company statutes; and
- in contrast, a supervisory board and a management board are mandatory at an AG, with both operating independently from the AG shareholders regarding the business decisions. There is a higher degree of organisational strictness and a high degree of fungibility of the shares.

## 1.2 Transparent Entities

Limited partnerships (*Kommanditgesellschaft* – KG) and general partnerships (*Offene Gesellschaft* – OG) are legal entities but are treated as transparent for Austrian income and Austrian corporate income tax purposes. There is also a general partnership under civil law (*Gesellschaft bürgerlichen Rechts* – GesbR), which is not a legal entity at all.

However, partnerships may be opaque for VAT purposes. The VAT treatment of partnerships depends on whether or not they engage as entrepreneurs with the public.

The OG is a general partnership (with unlimited liability of the partners), whereas the KG is a limited partnership (where at least one general partner has unlimited liability, while the limited partner's liability is limited to their contribution). A common structure for a partnership is to use a limited liability company (GmbH) as the general partner of a KG, with the remaining partners (investors) being limited partners (GmbH & Co KG).

For example, an investment fund business can be made either by an Undertaking for Collective Investment in Transferable Shares (UCITS) regulated under the UCITS V Directive or in the form of an alternative investment fund under the Alternative Investment Fund Managers Act (AIFMG), encompassing most private equity funds and hedge funds. An alternative investment fund is defined as a vehicle that invests regularly on the basis of an investment concept for the benefit of its investors, regardless of its legal form and whether it is a closed or open construction, with

the exception of industrial holding companies and single family offices, among others.

In Austria, alternative investment fund managers are basically subject to the same taxation rules as investment funds regulated as UCITS. The fund itself is treated as transparent for income tax purposes and, as such, is not subject to income tax at the fund level. A tax-free accumulation of proceeds is not possible at the fund level. Upon distribution to investors (or as deemed distributions at year end in the case of fully or partially accumulating funds), the components of the fund's income are taxed in the hands of the investors and (if applicable) capital yields tax is withheld by the bank on the taxable components thereof. Both Austrian and foreign UCITS and alternative investment fund managers are obliged to have a fiscal representative, which is obliged to notify the composition of the annual fund income to the Austrian Control Bank. If the fund has not reported its income to the Austrian Control Bank, a lump sum taxation applies, unless the income of the fund can be proved otherwise by the investor(s).

## 1.3 Determining Residence of Incorporated Businesses

A corporation is treated as being resident under Austrian domestic tax law if it has its statutory seat or place of management in Austria (ie, the place where the most important business decisions for the company are taken and prepared by its managers). If the seat and the place of management of the company are in different countries (ie, a dual-resident company), the company could face unlimited tax liability in both countries.

If a double taxation convention applies, double taxation of dual-resident companies is avoided by the "tie-breaker rule". According to most Austrian double taxation conventions, a dual-resident company is regarded as being resident in the contracting state where its effective place of management is located. In this regard, Austria has not followed Article 4 of the Multilateral Instrument to Modify Bilateral Tax Treaties (MLI), with its new rules for dual-resident companies.

If a company has its seat or place of effective management in Austria, it has to pay Austrian corporate income tax on all its profits (regardless of whether they are sourced from Austria or from abroad). If a company has neither its seat nor place of effective management in Austria but has a permanent establishment there (eg, an office or branch), it only pays Austrian corporate income tax on profits realised through this permanent establishment.

Transparent entities (eg, partnerships, investment funds and certain foreign trusts) are not regarded as taxpayers in Austria. Their income is allocated proportionately to their partners, investors or beneficiaries, being individuals or corporations. Therefore, the taxation of a transparent entity's income depends on the residence of its partners, being individuals or corporations that hold the interest either directly or indirectly via other transparent entities.

## 1.4 Tax Rates

Corporate income tax amounts to 25% in Austria (planned to be gradually decreased to 24% for income realised in the calendar year 2023 and 23% for any income realised thereafter). There is an annual minimum corporate income tax of EUR1,750 for a limited liability company (with privileged minimum taxes for newly formed companies within their first ten years of existence) and EUR3,500 for a joint stock company.

The individual's income tax rate is progressive, as follows:

- 0% for annual income of EUR0–11,000;
- 25% (EUR11,001–18,000);

- 35% (EUR18,001–31,000) (planned to be reduced to 30% with effect from 1 July 2022);
- 42% (EUR31,000–60,000) (planned to be reduced to 40% with effect from 1 July 2022);
- 48% (EUR60,001–90,000); and
- 50% (for annual income exceeding EUR90,000).

For annual income exceeding EUR1 million, a tax rate of 55% applies until the end of 2025.

Corporate income tax is paid by corporations, and individuals' income tax is paid by individuals operating a business as sole proprietors. Income tax (or corporate income tax) is also paid by companies or individuals respectively that hold an interest or share in a partnership or other transparent entity on the profits allocated to them from the partnership or other transparent entity.

## 2. KEY GENERAL FEATURES OF THE TAX REGIME APPLICABLE TO INCORPORATED BUSINESSES

### 2.1 Calculation for Taxable Profits

Most corporations (especially companies and co-operatives) have to determine their profits based on the statutory accounts under generally accepted accounting principles (Austrian GAAP), adapted by book-to-tax adjustments as required by Austrian corporate income tax law. Major mandatory deviations provided for by tax law for the determination of profits by corporations are as follows:

- losses from the sale or depreciation of participations in other companies have to be spread over seven years;
- dividend income is largely exempt from corporate income tax (see **6.3 Taxation on Dividends from Foreign Subsidiaries**, for example); and
- remunerations paid to supervisory board members are only deductible at 50%.

Further special deviations may also occur (eg, regarding the acceptance of accruals, car depreciation or the non-deductibility of representational expenses).

Individuals have to determine their profits based on statutory accounts (in the aforementioned way) only if their turnover exceeds certain thresholds (ie, EUR700,000 in two consecutive years). If the turnover does not exceed these thresholds, an individual can determine their profits based on a receipts basis (ie, set up a revenue and expense statement) or optionally on an accrual basis for tax purposes only (except independent services).

Individuals who do not perform an active business always determine their profits on the basis of a revenue and expense statement.

Special rules apply to partnerships, whose statutory accounts serve as the basis for the individual income tax returns of the partners' income determination together with the special tax balance for each partner's partnership interest.

### 2.2 Special Incentives for Technology Investments

There are no special patent box regimes in Austria, but expenses for in-house research are fully tax deductible. There is also a cash-premium for research and development expenses accrued in Austria by Austrian corporations or by Austrian permanent establishments of foreign corporations, amounting to 14% according to Section 108c of the Austrian Income Tax Act, which is unrestricted for in-house research but restricted to expenses of EUR1 million for contracted research.

Furthermore, to create an incentive for companies to invest during and after the economic crisis following the COVID-19 pandemic (especially in environmentally friendly assets), the Austrian legislator plans to introduce an investment allowance from 1 January 2023. Under this new provision, 10% of a depreciable fixed asset's acquisition or production costs (of up to EUR 1 million per financial year) are to be tax deductible. This percentage increases to 15% for investments in environmentally friendly assets.

## 2.3 Other Special Incentives

When one Austrian company acquires another Austrian company, it is generally possible to deduct interest expenses incurred in the acquisition from the Austrian corporate income tax base of the acquiring Austrian company (for exceptions to that general rule, however, see **2.5 Imposed Limits on Deduction of Interest**). By electing to form a (consolidated) tax group between the acquiring company and the target company in Austria, the future operating profits of the target company are taxed at the level of the acquiring company, from which the interest expenses for the debt used for the acquisition of the target can be set off.

The Austrian legislator has implemented a range of supporting measures and incentives for companies affected by the COVID-19 crisis, such as an allowance for overhead costs or compensation for a certain rate of turnover.

## 2.4 Basic Rules on Loss Relief

In general, business corporations (AG, GmbH) can set off losses without limitation (although this is not the case for corporations that are not operating as a business or individuals).

Tax loss carry-forward is possible, with no time limit, but generally no carry-back option of tax losses is available (an exception to this is the COVID-19 related possibility to (partially) carry-back losses that occurred in 2020 to the years 2019 and 2018); neither option is available for non-business income.

For a corporation, the deduction of the loss carry-forward is limited to 75% of its annual taxable income; the leftover losses remain deductible in later periods, subject to the same 75% limitation.

As the tax loss is carried forward at the level of the corporation, it is possible – unlike in a partnership where the loss is proportionally allocated to the partners – to utilise tax losses at a company level irrespective of shareholder changes, unless the so-called "change of ownership rules" apply, according to which tax loss carry-forwards of a company are forfeited if a substantial change in the company's shareholders occurs in connection with a substantial change in its business and management structure (although special rules apply for the forfeiture of tax losses in the case of corporate reorganisations).

## 2.5 Imposed Limits on Deduction of Interest

There used to be no general interest barrier regulations in Austria. The financing structure of an Austrian company generally had to be at arm's length, to avoid a requalification of debt into equity or an adjustment of the concrete interest rate taking place.

However, the EU Anti-Tax Avoidance Directive (EU 2016/1164 – ATAD) stipulates a general interest barrier regulation, stating that interest expenses are fully tax-deductible only up to the amount of the interest income, and only up to 30% of the EBITDA. After a lengthy controversy with the EU Commission, the Austrian legislator finally enacted an ATAD-compliant interest barrier regulation, entering into force in mid-January 2021 with retroactive effect from 1 January 2021. This new rule is very much based on the corre-

sponding Article 4 of ATAD and contains nearly all of the reliefs provided for therein, such as the exemption for amounts up to EUR3 million, the so-called Equity-Escape, the standalone exemption and the extended carry-forward option.

In addition to the interest barrier, intra-group interest and royalties (ie, interest expenses or royalties paid to foreign affiliated companies) are non-deductible if the foreign receiving company is subject to low taxes.

## 2.6 Basic Rules on Consolidated Tax Grouping

In Austria, a group taxation regime applies upon election, which allows parent companies and their Austrian subsidiaries to consolidate their taxable income at the level of the upper tier parent company (group head) for corporate income tax purposes. The group head must be an Austrian company or a registered branch of an EU/EEA corporate entity that has held more than 50% of the capital and voting rights in the Austrian subsidiary company (group member) since the beginning of the subsidiary's fiscal year. The holding can be either direct or indirect via a partnership or a further group member. If the holding requirement is fulfilled and a request for group taxation was filed with the tax office before the elapse of the calendar year, 100% of the subsidiary's income (profit or loss) is allocated to the taxable income of the group parent company (group head).

There is no need to transfer the actual profits as a condition for the allocation of profits to the group parent company (group head). The minimum duration of the group taxation regime and of the participation in such group taxation regime of each group member is three entire fiscal years; otherwise, a recapture rule provides for retroactive taxation on a standalone basis.

The group taxation regime is also available for first-tier foreign subsidiaries in relation to which an Austrian group member fulfils the holding requirement of more than 50% of capital and voting rights. A foreign group member is only accepted if it is a corporation resident in an EU country or in any other country with which Austria has agreed on a comprehensive mutual information exchange (eg, the USA or China). The set-off of the foreign losses from the Austrian tax base is allowed in proportion to the percentage of the share held in the foreign company; it is not required to include foreign profits into Austrian taxation. Certain recapture rules may apply, however (eg, if the losses are later exploited abroad).

## 2.7 Capital Gains Taxation

Capital gains realised by corporations are subject to the ordinary corporate income tax rate of 25%, as part of the overall profits of the corporation.

This is also applicable for capital gains realised from the sale of shares or a participation in a domestic company that (unlike dividend distributions) is subject to corporate income tax. Capital losses realised from the sale of participations are deductible; such deduction has to be spread over seven years.

The sale of participations in non-Austrian corporations is generally tax neutral under the conditions of the international participation exemption (ie, a participation of at least 10% held for at least one year), unless the option for tax effectiveness has been elected in the tax return for the year of the acquisition of the participation (see also **6.7 Taxation on Gain on the Sale of Shares in Non-local Affiliates**).

### 2.8 Other Taxes Payable by an Incorporated Business

General Austrian taxes in connection with transactions include Real Estate Transfer Tax (RETT) for the transfer of legal or economic ownership in land or real estate located in Austria. RETT amounts to 3.5% of the sales price or, in certain cases, 0.5% of the market value of the Austrian real estate. Also, the transfer of 95% or more of the shares in a partnership or company can trigger RETT for Austrian real estate held by the entity (generally at a rate of 0.5%). A further 1.1% is due for the entry of the new owner of the real estate into the Austrian land register.

In addition, stamp duty has to be paid for the setting up of written deeds for certain contracts. This applies if the written deed for the contract is either set up in Austria or set up abroad and there are certain connections to Austria. Contracts subject to stamp duty include business rental agreements (stamp duty of 1% of the annual rent multiplied by the years of duration or of the three-fold annual rent in case of unlimited duration) and assignments of rights (stamp duty of 0.8% of the consideration).

### 2.9 Incorporated Businesses and Notable Taxes

Generally, corporations are subject to VAT if they are regarded as an entrepreneur and carry out transactions that are taxable for VAT purposes in Austria. An entrepreneur has the right to deduct input VAT for supplies and services received.

Every business has to deduct payroll taxes (wage withholding tax, social security contributions, ancillary labour costs) if it employs people. For freelancers, only social security contributions and employer labour costs have to be remitted (ie, no wage withholding tax).

Depending on the business, various other taxes need to be considered, including environmental taxes, various consumption taxes, motor vehicle tax, insurance tax, local taxes, etc.

## 3. DIVISION OF TAX BASE BETWEEN CORPORATIONS AND NON-CORPORATE BUSINESSES

### 3.1 Closely Held Local Businesses

Closely held local businesses are mostly structured as limited liability companies (GmbH) or as limited partnerships with a limited company as general partner (GmbH & Co KG).

### 3.2 Individual Rates and Corporate Rates

The special tax rate on dividends (27.5%) together with the corporate income tax rate (25%) shall ensure that the use of a company for conducting business activities amounts to approximately the same tax burden after dividend distribution as if the taxpayer themself had earned the income at the progressive income tax rate (which is up to 55%).

### 3.3 Accumulating Earnings for Investment Purposes

Apart from the general risk of the attribution of income to shareholders in the case of companies without substance, in certain cases the definition of an alternative investment fund has to be taken into account. This leads to transparent taxation and involves a certain level of regulation.

### 3.4 Sales of Shares by Individuals in Closely Held Corporations

Dividends from closely held Austrian companies (GmbH or AG) are subject to withholding tax at 27.5%, to be withheld by the distributing company upon the distribution. The withholding tax is final, unless the shareholder opts for loss utilisation or the progressive income tax is below 27.5% and the shareholder opts for progressive

income taxation in the annual income tax return. Expenses related to the dividends are not tax deductible.

Individuals who sell shares held in a closely held company (GmbH or AG) are subject to personal income tax on the capital gains derived from the sale, taxed at the special flat rate provided for investment income (27.5%). The individual has to declare the investment income in his or her annual personal income tax return. Expenses related to the capital gains are not tax deductible.

If shares in a stock corporation (AG) are held by a shareholder within an Austrian bank securities account, the Austrian bank will deduct 27.5% dividend withholding tax on the capital gains. This withholding tax has final character, if the shares are not held by the individual as business assets, so the taxpayer does not need to declare the capital gains from the alienation of the shares in his/her personal annual income tax return, unless certain voluntary conditions apply.

However, the withholding tax on capital gains does not have final character if the taxpayer holds the shares as business assets (from commercial or other independent services). The taxpayer then has to include the capital gains from the alienation of the shares in their annual personal income tax return, where the capital gains need to be adapted according to the book values of the shares. The special income tax rate of 27.5% provided for investment income applies in the tax assessment, and the withholding tax is credited to the assessed income tax. If the generation of investment income is the main focus of the individual's business activity, then the progressive income tax rate applies on the capital gains from the alienation of a share (Section 27a paragraph 6 of the Income Tax Act).

### 3.5 Sales of Shares by Individuals in Publicly Traded Corporations

The same rules apply as for privately held shares in a stock corporation (AG), including tax on the capital gains to be withheld by the bank, as explained in **3.4 Sales of Shares by Individuals in Closely Held Corporations**.

## 4. KEY FEATURES OF TAXATION OF INBOUND INVESTMENTS

### 4.1 Withholding Taxes

Dividend withholding tax amounts to 27.5% (25% if paid to a corporate shareholder), to be withheld by the distributing Austrian company, unless a reduced rate applies under a tax treaty.

Dividends paid to corporations resident in other EU member states falling under the scope of the EU Parent-Subsidiary Directive (company form listed in Annex 2 of the Directive) are exempt from any withholding tax if the EU parent company holds at least 10% of the issued share capital of the Austrian company for an uninterrupted period of at least one year, and if it has sufficient substance in terms of office space and personnel, and conducts operative activity in its state of residence. If the conditions for dividend relief at source are not fulfilled (due to missing substance of the EU parent company or missing certificate of residence), the EU parent company can request a refund procedure with the Austrian tax authority, where it can prove that no case of abuse (directive shopping) is given.

Apart from the general relief for EU companies under the EU Parent-Subsidiary Directive, the Austrian corporate income tax law provides – based on the general Fundamental Freedoms of the EU – for a refund of Austrian dividend withholding tax upon the request of all corporations resident in an EU or EEA country, regardless of

the percentage held in the Austrian company and the period of holding (ie, also for portfolio shares in Austrian companies held by the EU or EEA corporation). The refund is only possible insofar as the Austrian dividend withholding tax is not credited in the other member state where the parent company is resident.

Interest income paid from Austrian debtors is subject to a withholding tax of 27.5% under domestic Austrian tax law (25% for corporations as income recipients). However, interest payments to non-residents that are not received via an Austrian permanent establishment of the non-resident are not subject to tax liability and have to be fully relieved in Austria if the recipient is either a non-resident corporation or a non-resident individual resident in a country that is committed to an automatic information exchange with Austria, and if a certificate of residence is provided by the recipient.

Royalties paid to non-resident companies are subject to a withholding tax of 20%, unless a reduced rate applies under a tax treaty or said royalties are exempt from any withholding taxes pursuant to the EU Interest and Royalties Directive.

A special 20% interest rate for non-residents applies to fees for technical or commercial advisory services, even if the provider does not render such services through a permanent establishment in Austria, unless the rate is reduced or the payments are exempt under an applicable tax treaty.

## 4.2 Primary Tax Treaty Countries

Due to favourable taxation measures granted to EU corporations, many foreign investors invest via EU member states. Austria also has advantageous double taxation conventions with non-EU countries providing for a dividend withholding tax of 0% (eg, with the United Arab Emirates or Bahrain).

## 4.3 Use of Treaty Country Entities by Non-treaty Country Residents

According to the rather strict case law of the Austrian Supreme Administrative Court, a structure is regarded as abusive if the use of a foreign company does not have a meaningful purpose apart from the channelling of the Austrian dividends or other payments to persons who would otherwise not be entitled to tax relief regarding said payments.

Therefore, mere conduit companies are not accepted by the Austrian tax authorities when it comes to granting a refund of dividend withholding tax or withholding tax for other income categories under a double taxation convention. This is especially the case if the actual beneficial owners of the payments are different persons, but even if this is not the case, there is still a risk that the interposition of a company will not be accepted by the tax authorities if the substantial business reasons and functions of the company cannot be proved. There are various ways to document the economic reasons and functions of a foreign company receiving income from Austria (eg, economic concepts of the group, reinvestment of the income) but if the missing operative character of the non-resident holding company is not obvious, the acceptance will always depend on the overall facts and circumstances.

## 4.4 Transfer Pricing Issues

All transactions between related parties have to be at arm's length – ie, concluded under the same conditions as between unrelated parties, as defined in Section 6 paragraph 6 of the Austrian Income Tax Act and corresponding to the principle laid down by the OECD in the Transfer Pricing Guidelines. For all companies (and branches of foreign companies) established in

Austria, documentation requirements exist for the taxpayers, in order to prove that the transactions with related parties were at arm's length. The documentation should demonstrate in a clear manner that the group has complied with the arm's-length principle. In large transactions, it is important to note that it is recommendable to conduct a transfer pricing study (or benchmark study).

Transfer pricing rules are particularly relevant for large service providers rendering services in Austria or trading activities via Austria, and for transactions in connection with intellectual property rights. Likewise, in the context of intra-group financing, inbound investors should bear in mind the potential restrictions to interest deduction. Currently, there are no statutory thin-cap rules in Austria, so arm's-length inbound financings are accepted in principle (ie, if the Austrian company is not effectively in default or extremely undercapitalised and the financing would have been concluded under the same conditions with an unrelated third party).

Austrian group companies with an annual turnover of more than EUR50 million in two consecutive years (or EUR5 million in commission fees from the principal) have to prepare a master file and/or local file, the content of which corresponds to the descriptions contained in Annex I and Annex II to Chapter V of the OECD Transfer Pricing Guidelines, respectively.

Large multinational enterprises with consolidated group turnover of at least EUR750 million must additionally take part in country-by-country reporting. In general, the ultimate parent company of the multinational must annually file the country-by-country report with its tax administration, which then distributes it to all participating jurisdictions where entities of the multinational have been set up.

## 4.5 Related-Party Limited Risk Distribution Arrangements

In an Austrian distribution company, high importance has to be placed on an arm's-length remuneration to be paid by the foreign principal to the Austrian distributing company, which has to correspond to the risks and functions borne and the assets employed by the distribution company. Furthermore, it has to be noted that Austria follows the two-taxpayers approach in cases of limited risk distributors, as is advocated in the OECD Model Tax Commentary on Article 7 of the OECD Model Tax Convention and suggested in BEPS Action 7. Accordingly, an agent acting for the foreign principal constitutes a permanent establishment as a dependent agent in Austria. Therefore, if a foreign company sells goods via subsidiaries or other affiliates in Austria that do not assume the responsibility of a fully fledged distributor, close attention needs to be devoted to the arm's-length principle.

The Double Taxation Convention between Austria and Germany provides a special rule whereby the creation of a permanent establishment of the principal (via an Austrian distribution entity as its dependent agent) is generally avoided by the payment of an adequate remuneration to the Austrian distribution entity for its distribution services. It is unclear, however, whether this could avoid the existence of a permanent establishment of the principal in Austria in all cases of limited risk distributors.

Austria also assumes the creation of a principal's dependent agency permanent establishment in cases of commissionaire structures, which are also targeted by the BEPS recommendations. It is advisable to check in the MLI for the adaption of double taxation conventions whether a revised definition of "permanent establishment" is provided for the particular country in that regard. This is not the case with Austria, because the Austrian Ministry is of the opinion that this

interpretation was already possible based on the original wording of the OECD Commentary.

### 4.6 Comparing Local Transfer Pricing Rules and/or Enforcement and OECD Standards

As far as is known, the Austrian Ministry's interpretation of the transfer pricing rules does not deviate significantly from the OECD standards. In particular, the Austrian Ministry of Finance follows the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. In addition, several decrees and the Austrian Transfer Pricing Guidelines 2021 have been issued by the Austrian Ministry of Finance in accordance with the OECD Transfer Pricing Guidelines.

### 4.7 International Transfer Pricing Disputes

To settle or prevent disputes arising from transfer pricing matters, a taxpayer may apply for the following:

- dispute resolution under a double taxation convention following Article 25 of the OECD Model Tax Convention;
- the negotiation of a unilateral or bilateral Advance Pricing Arrangement (APA) on a rather generic level; or
- dispute resolution following the EU Arbitration Convention (90/463/EEC).

Since September 2019, taxpayers may also lodge dispute settlement complaints regarding the interpretation and application of intra-EU double taxation conventions in accordance with the implementing provision of Directive 2017/1852/EU. During this procedure, the member states involved are encouraged to find a common solution within two years, which constitutes an enforceable decision for the taxpayer concerned. If no such agreement is reached, arbitration proceedings must be carried out. The final decision by the advisory committee then binds the member states involved, if no agreement can be reached within a further six months.

However, the Austrian tax authorities do not provide public figures regarding the exact number of disputes solved through the above-mentioned measures.

## 5. KEY FEATURES OF TAXATION OF NON-LOCAL CORPORATIONS

### 5.1 Compensating Adjustments when Transfer Pricing Claims Are Settled

In the case of primary adjustments provided to a related party by the tax authorities of another contracting state, the Austrian tax authority in charge is – in principle – obliged to re-open the Austrian tax of the Austrian related party, in order to make a corresponding (compensating) adjustment. A compensating adjustment (reduction of Austrian taxes after mark-up in the other state) can be made either upon the request of the Austrian related party (subject to the condition that said party can prove the correctness of a transfer pricing correction made in the other contracting state) or ex officio.

If double taxation remains due to diverging interpretations of the double taxation convention by the contracting states, a mutual agreement procedure between Austria and the other contracting state can be initiated (see also **4.7 International Transfer Pricing Disputes**). Basically, the request for such mutual agreement procedure has to be made by the parent company in its residence state or in either of the residence states in transactions between sister companies. Based on the EU Arbitration Convention, the arbitration procedure should be able to be initiated in either of the member states.

## 5.2 Taxation Differences between Local Branches and Local Subsidiaries of Non-local Corporations

Generally, there are no differences between the taxation of corporations resident in Austria and Austrian branches of non-resident corporations. It needs to be determined whether the branch qualifies as a permanent establishment under the applicable double taxation convention with the residence state of the company, and which income needs to be allocated to the permanent establishment in relation to the head office of the company located in the residence state.

The "separate entity rule", which requires similar treatment of branches and resident companies in all respects, as advocated by the Authorised OECD Approach of 2010 (Report on the Attribution of Profits to Permanent Establishments), has not been implemented in any of the Austrian bilateral tax conventions so far, which leads to differences compared to subsidiaries (regarding financing or the letting of intangibles between the head office and the branch).

As such, interest expenses for debt granted by the foreign head office of the company to its Austrian branch will not be fully deductible at the level of the Austrian branch. Conversely, no (fictitious) interest income will have to be taxed by the Austrian branch for financial means granted by the Austrian branch to its foreign head office (unlike how the French Supreme Court has ruled for the French tax law). Accordingly, the usual methods for the allocation of interest expenses to the Austrian branch can be used (eg, the capital allocation method).

## 5.3 Capital Gains of Non-residents

Capital gains realised by a non-resident on a sale of shares in an Austrian company are subject to income tax according to domestic Austrian income tax law, if the shareholding amounts to at least 1% (or amounted to at least 1% within the last five years). Basically, the sale of a company at an upper-tier level (unlike in the case of a partnership structure) does not trigger Austrian taxation as long as the direct shares in the Austrian company are not sold.

If a double taxation convention is applicable between the country of the alienating shareholder and Austria, which follows the OECD Model Tax Convention, Austria does not have a taxing right on the capital gains derived by the non-resident from the sale of the shares in the Austrian company.

However, capital gains will be subject to taxation in Austria if the convention deviates from the OECD Model Tax Convention (eg, DTT Austria-France for participations of more 25% or more) or if the company mainly owns domestic real estate and the double taxation convention contains a real estate clause along the lines of Article 13 paragraph 4 of the OECD Model Tax Convention.

## 5.4 Change of Control Provisions

If there is a substantial change to the direct shareholder structure (ie, if more than 75% of the shareholders change) against consideration together with substantial changes in the economic and management structure, tax loss carry-forwards are no longer available at the level of the Austrian company. A substantial change in the economic structure is deemed to have occurred if the company's activity significantly decreases in terms of assets, income or other economic operators. A substantial change in the management structure is deemed to have occurred if more than the half of the company's managers are replaced. An exception applies if the share sale serves the restoration of a company. Special rules apply for corporate reorganisations, where the situation of all companies involved needs to be taken into account.

RETT is triggered if there is a sale of 95% or more of the shares in an Austrian company or partnership holding Austrian real estate, amounting to 0.5% of the market value of the Austrian real estate. It has to be noted that there are grandfathering rules in place, due to which the transfer of minority shares might also trigger RETT.

### 5.5 Formulas Used to Determine Income of Foreign-Owned Local Affiliates

Formula apportionment is not accepted as a method of determining the profits of an Austrian affiliated enterprise. The transfer pricing methods accepted by the OECD Transfer Pricing Guidelines can be used to allocate income to Austrian affiliated enterprises. Apart from the comparable controlled price method, this refers especially to the other standard methods like the cost-plus or the resale minus method, as well as the transactional net margin method.

### 5.6 Deductions for Payments by Local Affiliates

There are no specific rules regarding the deduction of payments made by an Austrian (resident) affiliate to a non-Austrian (non-resident) affiliate for the management of the Austrian (resident) affiliate.

When determining remuneration for the services rendered by a foreign affiliate, the arm's-length principle must be considered, taking into account the functions and risks borne by the foreign affiliate.

Usually the cost-plus method is accepted for routine services – ie, the costs of the services plus a certain mark-up to be charged to the Austrian affiliate. A cost allocation without a profit margin is possible and even required for ancillary services – ie, services that do not belong to the business focus of the affiliate rendering the services.

### 5.7 Constraints on Related-Party Borrowing

Borrowing by an Austrian subsidiary from a non-Austrian parent company or other affiliated company abroad is subject to the arm's-length principle (ie, an arm's-length interest income will need to be allocated) and to corporate income tax at the level of the Austrian subsidiary.

To determine the interest rate, a comparison with third-party banks is possible. The Austrian Ministry of Finance holds that a direct comparison of the lender with an Austrian bank is not always adequate, as the aims of banks and intra-group financings are different. Whereas the bank's business is to achieve profits from the borrowing of loans to the market, the aim of intra-group financings is to safeguard liquidity and optimise the group internal financing structure. As a consequence, the Austrian Ministry of Finance does not accept that a borrowing group entity charges a rate as high as the rate a bank would have charged to its customers. The effective interest rate applied for intra-group financings depends on various circumstances – eg, the liquidity of the Austrian company (the higher the liquidity, the lower the interest rate), the interest rates that would be offered to the foreign affiliate from Austrian and/or foreign banks, and whether the Austrian company had to refinance the loan.

## 6. KEY FEATURES OF TAXATION OF FOREIGN INCOME OF LOCAL CORPORATIONS

### 6.1 Foreign Income of Local Corporations

Austrian corporations are subject to corporate income tax in Austria on their worldwide income. Income that originates from foreign sources may be relieved under a decree of the Ministry of Finance for the unilateral avoidance of interna-

tional double taxation. The relief takes the form of either a credit of foreign taxes or an exemption in the case of certain active income (eg, income derived from a permanent establishment abroad or income from foreign real estate), which is effectively subject to certain taxation abroad (ie, more than 15%). If a double taxation convention applies, the rules thereof take precedence over the unilateral relief measures. However, due to the entering into force of CFC rules on 1 January 2019, the exemption of foreign permanent establishments' profits is no longer applicable in the case of double taxation conventions regarding low-taxed foreign permanent establishments (lower than 12.5%).

## 6.2 Non-deductible Local Expenses

Expenses incurred for business purposes are deductible at the level of the Austrian corporation, unless they are immediately economically related to tax-exempt income. When an Austrian corporation is regarded as having a permanent establishment outside Austria that is exempt under either the unilateral relief provision (foreign taxation above 15%) or a double taxation convention (foreign taxation above 12.5% as of 2020), the expenses and losses attributable to the foreign permanent establishment are not deductible for the purpose of Austrian corporate income tax and need to be added back to the corporate income tax base.

## 6.3 Taxation on Dividends from Foreign Subsidiaries

Dividend income from foreign corporations is exempt from corporate income tax under the international participation exemption in the following circumstances:

- if the foreign subsidiary is an EU company listed in Annex 2 of the EU Parent-Subsidiary Directive or a foreign corporation comparable with an Austrian company from the corporate law perspective;
- if the participation amounts to at least 10% of the nominal capital; and
- if the participation is held for an uninterrupted period of one year.

The international participation exemption is denied if the foreign company is taxed at a low rate abroad (not more than 12.5%) and mainly derives passive income. In this case, the exemption of the dividend is replaced by a credit of the underlying foreign corporate taxes on the Austrian corporate income tax levied on the dividend (switch-over). Due to the introduction of general CFC rules for foreign subsidiaries, the switch-over provision is no longer relevant for participations of 50% or more, as the scope of CFC legislation applies, so that subsequent distributions shall be tax-exempt under the general conditions of the international participation exemption, as described above.

Dividend income from portfolio participations (participation below 10%) in foreign companies is also exempt from corporate income tax if the foreign company is comparable to an Austrian company and is resident in a country with which Austria has agreed on a comprehensive exchange of information, or is an EU company listed in the EU Parent-Subsidiary Directive, and does not fall under the scope of the international participation privilege. The dividend exemption does not apply on qualified portfolio participations (participation of 5% or more) if the foreign company is taxed at a low rate abroad (not more than 12.5%) and mainly derives passive income.

In general, the exemption of foreign dividends does not apply in a hybrid situation – ie, if the dividend payments are deductible from the corporate income tax base abroad.

## 6.4 Use of Intangibles by Non-local Subsidiaries

Intangibles developed by an Austrian corporation may be transferred or let to a non-Austrian subsidiary at arm's-length conditions, resulting in taxable income (transfer price or royalty) at regular rates, which is subject to corporate income tax at the level of the Austrian corporation.

## 6.5 Taxation of Income of Non-local Subsidiaries under Controlled Foreign Corporation-Type Rules

Austria's CFC rules entered into force on 1 January 2019 and are based on the EU Anti-BEPS Directive. They provide for an allocation of non-distributed low-taxed passive income of foreign subsidiaries to the Austrian parent company corresponding to the percentage of the directly and indirectly held shares in the foreign subsidiary.

The CFC rules will apply if the Austrian parent company holds – directly or indirectly, alone or together with associated enterprises – more than 50% of the nominal share capital, voting rights or profit participating rights of the foreign subsidiary, and if the foreign subsidiary is low-taxed and earns passive income.

Austria has made use of the option of ATAD, according to which CFC legislation shall only apply if the foreign subsidiary's passive income accounts for more than one third of its total income. Therefore, CFC legislation is avoided for a subsidiary if at least two thirds of the subsidiary's income is active.

Low taxation is when there is an effective tax rate abroad of 12.5% or lower. Passive income is defined according to the catalogue of Article 7 (2) (a) of the EU Anti-BEPS Directive. Furthermore, there is an exception for foreign subsidiaries with substantive economic activity in certain fields.

## 6.6 Rules Related to the Substance of Non-local Affiliates

There are strict rules regarding the substance of a foreign company for the relief of dividend payments received from Austrian companies under the EU Parent-Subsidiary Directive (Section 94 (2) of the Income Tax Act). Accordingly, the EU parent company must have office space and personnel, and must conduct an operative activity, or else dividend withholding tax has to be withheld on the dividends. The same principle applies in substance for the eligibility of non-resident corporations for relief under double taxation conventions.

Even before the introduction of formal CFC rules, general anti-abuse provisions (which have meanwhile been adjusted to ATAD) and the substance-over-form approach were applied by the Austrian tax authorities (and are still applicable next to the application of CFC rules) in relation to foreign subsidiaries of Austrian companies. Accordingly, a look-through approach could be applied, and the foreign subsidiary's income could be directly allocated to the Austrian shareholder in the case of wholly artificial arrangements or if the management was completely controlled by the Austrian shareholder. The general abuse rules will continue to be important even after the implementation of CFC rules, in cases where the CFC rules do not apply (eg, for individuals as shareholders of foreign companies).

The CFC rules will not apply for foreign subsidiaries with substantive economic activity.

## 6.7 Taxation on Gain on the Sale of Shares in Non-local Affiliates

Capital gains from the sale or other disposition of a foreign participation are exempt from corporate income tax if the participation fulfils the criteria of the international participation exemption, which is applicable on a participation in a foreign entity (which is either comparable to an

Austrian company or a legal form enumerated in Annex 2 of the EU parent-subsidiary directive) if the Austrian corporation holds at least 10% of the issued share capital of the foreign corporation for an uninterrupted period of at least one year. The international participation exemption provides for the neutrality of the participation, which means that capital losses and impairments of the participation also have to be treated as neutral for corporate income tax purposes.

There is also an (irrevocable) option to opt for tax effectiveness of the participation in the corporate income tax return of the year of the acquisition of the participation.

The exemption does not apply if the foreign corporate mainly generates low-taxed passive income, and is replaced by an indirect credit of the underlying foreign corporate taxes. However, the switch-over provision is only relevant for participations of less than 50%, which are not covered by the general CFC legislation. The switch-over rules do not apply to the extent that profits were already attributed to the controlling entity based on the CFC rules.

## 7. ANTI-AVOIDANCE

### 7.1 Overarching Anti-avoidance Provisions

The general anti-abuse provision was adjusted to ATAD and considers legal schemes to be inappropriate if, disregarding the tax savings involved, they no longer seem reasonable because the essential purpose or one of the essential purposes is to obtain a tax advantage that is contrary to the objective or purpose of the applicable tax law in its entirety. In addition, Austrian law follows the substance-over-form approach. These two general anti-abuse rules are often used by the authorities to challenge tax structures, intra-group transactions and reorganisations.

The principal purpose test (PPT), as stipulated in Article 6 of the EU Anti-BEPS Directive, was implemented in Austria in 2019. Accordingly, a transaction is regarded as abusive if one of its principal purposes is the saving of taxes. Apart from looking through foreign base companies, this also enables the non-acceptance of income attribution to companies that do not have any business purpose and are only used for the circumvention of Austrian tax rules. This mainly concerns merely artificial structures for which no reasonable explanation can be given except for the saving of Austrian taxes.

## 8. AUDIT CYCLES

### 8.1 Regular Routine Audit Cycle

After a tax decree has become final and binding on the side of the Austrian tax office, tax audits can be performed by the tax authorities until the statute of limitation has been reached, usually after five years (with an extension of one year if there are external official acts by the tax authorities within these five years), with a maximum of ten years. There is no audit cycle prescribed by the law, but audits used to take place every three to five years. The frequency of tax audits depends on the business size, with large businesses being audited on a permanent basis.

Since 2019, large Austrian businesses (with an annual turnover of more than EUR40 million) with a high degree of compliance in the past and an appropriate internal control system have the possibility to opt for horizontal monitoring, according to which a constant control by the tax office will replace the traditional system of tax audits (upon election only).

## 9. BEPS

### 9.1 Recommended Changes

Regarding BEPS Action 1, the Austrian parliament passed a Digital Tax Act in September 2019, without waiting for co-ordinated actions by the EU member states. Under this new act (applicable from 1 January 2020), income from the online advertising services of companies exceeding certain turnover thresholds is subject to a 3% digital tax.

As suggested by BEPS Action 2, Austria has implemented legislation to neutralise hybrid mismatches creating mismatch outcomes. These rules entered into force in Austria on 1 January 2020, in line with the Anti-Tax Avoidance Directive II (EU 2017/952).

As suggested by BEPS Action 3, Austria has implemented CFC legislation, which entered into force in Austria on 1 January 2019, in line with ATAD.

In January 2021, the Austria legislator implemented an interest barrier rule as suggested by BEPS Action 4 and stipulated in Article 4 of ATAD (see also **2.5 Imposed Limits on Deduction of Interest**).

Austria has introduced the PPT suggested by BEPS Action 6 into its domestic tax law, which also entered into force on 1 January 2019 and adapted the already existing general anti-abuse provision.

BEPS Action 12 was fully implemented by the Austrian legislator in September 2019, in the course of the transposition of the amendment to Directive 2011/16/EU (DAC6). This new regulation (EU-Meldepflichtgesetz) aims for the reporting of certain cross-border structures and transactions to the tax authorities, initially starting from 1 July 2020. However, due to the fact that electronic submissions of reports were not available until 31 October 2020 for technical reasons, the Austrian Ministry of Finance suspended sanctions for a violation of the reporting obligation until 31 October 2020.

Austria has also fully implemented the OECD recommendations on Action 13 regarding the re-examination of transfer pricing documentation.

As recommended by BEPS Action 15, Austria has signed the MLI, in the course of which a number of Austrian double tax conventions were adapted in the framework of the MLI to correspond to BEPS.

### 9.2 Government Attitudes

It is Austria's intention to fully implement the EU directives enacting the BEPS recommendations, as demonstrated by the four amendments of EU Directive 2011/16 on Mutual Cooperation in the field of taxation as regards mandatory information exchange.

The Austrian government is seeking to achieve a uniform approach, implementing the OECD recommendations in the BEPS Action Plan and at the same time avoiding double efforts that might arise from different approaches at an EU level. Therefore, regarding some of the remaining BEPS Action points to be implemented, it has to be expected that the Austrian measures will conform with the progress on an EU level. This will most probably also apply to potential future EU measures implementing the OECD Pillar One and Two concepts.

### 9.3 Profile of International Tax

International tax law is of high importance for Austria as a business location, as a high number of multinationals and international groups of enterprises use Austria as a centre for their activities. As a consequence, the Austrian Ministry of Finance is aiming to establish good relations

with other countries in this respect and to negotiate and further extend the Austrian network of double tax treaties. This led to a quick adaption of the MLI as provided in BEPS Action 15 and the adoption of the arbitration rules as provided for in BEPS Action 14.

## 9.4 Competitive Tax Policy Objective

Austria has good connections to the OECD and has itself fostered several initiatives at OECD level, so BEPS initiatives are expected to be implemented quickly by Austria in most cases. This is also shown by the fact that Austria was the first country to submit the ratification instrument of the MLI to the depositary.

## 9.5 Features of the Competitive Tax System

In Austria, a rather high corporate income tax rate of 25% is combined with a rather modest corporate income tax base, accompanied by modern tax features like a swift group taxation regime, the possibilities of interest deduction and incentives for R&D. However, all of these are not preferential tax regimes and are not vulnerable to the BEPS approach. The same applies to the state aids implemented by the Austrian legislator to combat the economic effects of the COVID-19 pandemic (see also **2.3 Other Special Incentives**), as those are enacted in line with the corresponding EU frameworks (see, for example, Communication from the Commission 2020/C 91 I/01).

## 9.6 Proposals for Dealing with Hybrid Instruments

On the one hand, the existing regime provides for the denial of the exemption of foreign dividends at a company level if the dividends are tax deductible in the state of the paying entity (Section 10 paragraph 4 of the Corporate Income Tax Act). On the other hand, the deduction of interest and royalties as a business expense is denied in Austria for payments to affiliated parties that are subject to low taxation below 10% abroad (Section 12 paragraph 1 sub-paragraph 10 of the Corporate Income Tax Act).

In addition to these existing provisions, proposals for dealing with hybrid mismatches have been implemented from 1 January 2020, targeting the neutralisation of so-called D/NI (Deduction/No Inclusion) and DD (Double Deduction).

## 9.7 Territorial Tax Regime

Austria's tax regime provides for the worldwide taxation of residents. However, due to the double tax treaty network, residents' income generated in foreign establishments may be exempt from tax. This is adapted by CFC rules in the case of passive low-taxed income of not more than 12.5% (in this context see also **2.5 Imposed Limits on Deduction of Interest** regarding the interest barrier rule).

## 9.8 Controlled Foreign Corporation Proposals

The inclusion of foreign permanent establishments located in other states is certainly a treaty override, if an applicable double taxation convention provides for the exemption of the foreign permanent establishment in Austria. Still, it is not assumed that this argument will prevent the application of the CFC rules on foreign permanent establishments in Austria. Changing the CFC rules at an EU level by restricting them to a blacklist of countries may be an alternative, but this was not provided in ATAD. Regarding the possibilities of ATAD, Austria opted for the catalogue of passive income (Article 7 (2) a of ATAD) and not the option of inadequate arrangements (Article 7 (2) b of ATAD).

## 9.9 Anti-avoidance Rules

Austria did not implement the limitation on benefits rules as provided in Action 6 of the BEPS initiative.

However, Austria did implement the PPT rule, which, according to the explanatory notes of the relevant tax bill, is intended to be interpreted along the lines of the ECJ's case law on the abuse of tax law. In the past, the Austrian Supreme Administrative Court has used that same interpretation regarding the existing general anti-abuse rules, which might indicate that the PPT rule is not expected to have a significant impact.

## 9.10 Transfer Pricing Changes

The transfer pricing changes proposed by BEPS Actions 8–10 and included in the OECD Transfer Pricing Guidelines have been reflected in the Austrian Transfer Pricing Guidelines 2021, enacted in October 2021.

## 9.11 Transparency and Country-by-Country Reporting

Austria has implemented the special rules for the automatic information exchange on the country-by-country reports for large multinationals (ie, with consolidated group turnover of at least EUR750 million for accounting periods beginning on or after 1 January 2016), as provided for in BEPS Action 13. Due to the required size of the multinational enterprises, the Ministry of Finance expects that this obligation will only affect around 90 business entities in Austria.

The directives for the automatic exchange of information on tax rulings and on money laundering have been implemented in Austria. The EU-wide mandatory disclosure directive (2018/822/EU) amending Directive 2011/16/EU (DAC6), according to which taxpayers and their intermediaries have to report cross-border tax transactions, has been implemented with Austria's own regulation (see also **9.1 Recommended Changes**).

## 9.12 Taxation of Digital Economy Businesses

In March 2018, the EU Commission published two drafts for directives regarding the enactment of a digital service tax (as a short-term solution) and of digital permanent establishments (as a long-term solution). Austria has so far made no further specifications regarding the provision for digital permanent establishments.

## 9.13 Digital Taxation

In January 2019, the Austrian Federal Government announced that it would no longer wait for co-ordinated actions regarding digital taxation by EU member states, but would introduce unilateral measures. Consequently, in September 2019, the Austrian parliament passed a Digital Tax Act targeting online advertising services rendered against consideration in Austria. These services are subject to a 3% digital tax, but only for companies exceeding certain thresholds for turnover from online advertising.

## 9.14 Taxation of Offshore IP

Despite the withholding tax provisions regarding income from royalties, there are currently no other provisions dealing with the taxation of offshore intellectual property.

**bpv Hügel Rechtsanwälte GmbH** has been one of the largest and most renowned high-end tax law practice groups in Austria for decades. The firm pays special attention to the dual qualification of practice group members as lawyers and tax advisers. The team regularly advises in tax disputes on tax audits and pre-litigation settlements, as well as on fiscal criminal law matters, voluntary disclosures with penal waiver effect and internal investigations. It represents clients in proceedings before the Federal Fiscal Court, the Administrative and Constitutional Court and the Court of Justice of the European Union. The firm also focuses on rulings and the evaluation of tax risks for tax litigation and tax insurance.

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