The Corporate Tax Planning Law Review

Fourth Edition

Editors
Jodi J Schwartz and Swift S O Edgar

The Law Reviews

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The Law Reviews

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PREFACE

We are pleased to present the fourth edition of *The Corporate Tax Planning Review*. This volume contains 19 chapters, each devoted to a different country and each providing expert analysis by leading practitioners of the most important aspects of tax planning for multinational corporate groups in that country, with a particular focus on recent developments.

The jurisdictions represented in this volume are diverse and include established major economies (e.g., the United States, Germany and Korea), EU countries (both those that have become popular destinations for new business organisations and those where multinationals tend to form entities to facilitate local operations or investments), the city-state of Singapore and several nations in the Global South (Colombia, Malaysia and more). Echoing this geographical variety, *The Corporate Tax Planning Review* describes tax developments worldwide that are a response to different challenges in different places. At the same time, many countries share goals of preventing jurisdiction shopping, protecting against erosion of the tax base, promoting local investment and raising revenue. These complex and at times conflicting goals present opportunities for the well advised and traps for the unwary.

Although each chapter discusses issues at the cutting edge of tax law, the authors have contextualised their analyses with sufficient background information to make this volume accessible and useful to generalists and to tax practitioners outside each particular jurisdiction. Although *The Corporate Tax Planning Review* is by its nature an abbreviated overview, we hope it will at least serve as a workable compass to in-house counsel and outside advisers as they attempt to navigate their clients through the unsteady and sometimes uncharted waters of contemporary corporate tax planning.

We are extremely grateful to the contributors who have assiduously distilled a wealth of expertise to create this volume and to Isabelle Gray, Nick Barette and Adam Myers at Law Business Research Ltd for their editorial acumen and dedication to this project.

Jodi J Schwartz
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Chapter 2

AUSTRIA

Gerald Schachner, Kornelia Wittmann, Nicolas D Wolski and Lucas Hora

I INTRODUCTION

In recent years, the OECD's initiative against base erosion and profit shifting (BEPS) and its corresponding implementations at EU level (e.g., the Anti Tax Avoidance Directive (ATAD)) strongly influenced Austrian tax legislation. This development aggravated cross-border tax planning. Conversely, it equalised interstate tax competition and prevented a certain 'race to the bottom'. Recent developments in this important field are described in Section III.

Section II broadly covers the basic elements of corporate taxation that have to be taken into account when planning for a transaction relating to Austria. In this context, the most important recent and past developments are addressed.

Section IV outlines a few of the implications of recent jurisdiction on tax planning based on recent court decisions.

Section V closes with a brief outlook to the future.

II LOCAL DEVELOPMENTS

Some of the major cornerstones of the Austrian corporate tax regime – and therefore key factors of high importance in terms of tax planning – are addressed in this section.

i Entity forms

Corporate business is, in the vast majority of cases, carried out in the form of a corporation. In Austria, there are two major forms of corporations: limited liability companies (GmbHs) and stock corporations (AGs). A third, although not excessively popular, possible form is the *societas Europaea*, whose law is harmonised within the EU. In the following, some of the key differences between the two most common forms of corporations are described.

A GmbH, as a private limited company, typically has a rather low total number of shareholders, and its shares cannot be traded on a stock exchange. In addition, the transferability of its shares can be further restricted via the corporation's statute. In general, there is a wide range of possibilities regarding the design of the corporation's statute. A GmbH's shareholders are entitled to intervene in corporate management and are allowed to give instructions to the managing directors. Share capital has to be at least €35,000, and there

1 Gerald Schachner, Kornelia Wittmann and Nicolas D Wolski are partners and Lucas Hora is an associate at bpv Huegel.

is the possibility of claiming a privilege for newly formed corporations, which reduces the capital requirement to €10,000. There are no residential requirements for managing directors and, since 2018, there is also the possibility of forming a one-person corporation.

An AG, however, is a public limited company whose shares can be listed on a stock exchange and are usually held in bank deposits. Generally, an AG's shares have a higher degree of fungibility, which in return comes with an increased statutory strictness. A supervisory board and a management board are mandatory bodies of an AG, and they act mostly independently from the shareholders in terms of business decisions.

These corporations are treated as opaque legal entities for Austrian (corporate) income tax purposes and therefore are subject to Austrian corporate income tax. Income realised by these entities is taxed directly at the level of the corporation. These entities may also be subject to VAT if they qualify as entrepreneurs for VAT purposes.

Partnerships, however, are also legal entities but are treated as transparent for income and corporate income tax purposes.

An *Offene Gesellschaft* is designed as a general partnership (with unlimited liability of the partners), whereas a *Kommanditgesellschaft* (KG) functions as a limited partnership (with at least one general partner having unlimited liability and a limited partner's liability being limited to his or her contribution). A partnership can also be used as a 'de facto corporation' if its sole general partner is a corporation (e.g., a GmbH, which is often called a 'GmbH & Co KG').

Apart from these partnerships, there is also a *Gesellschaft bürgerlichen Rechts*, a general partnership under civil law that is not regarded as a separate legal entity under Austrian law.

Owing to the partnerships being regarded as fully transparent, their income is taxed pro rata at the level of the partners. Treatment for VAT purposes, however, depends on whether partnerships qualify as entrepreneurs.

ii Taxation of corporate income

In general, the determination of the taxable corporate income is based on Austrian generally accepted accounting principles. However, adjustments are necessary to comply with specific tax provisions (e.g., deductions disregarded for tax purposes or due to different depreciation periods). However, the consolidation of the tax and commercial balance sheet has been intended for years but has not been implemented so far.

The Austrian corporate income tax rate currently is 25 per cent. In February 2022, the Austrian legislator passed a gradual reduction of the corporate income tax rate to 24 per cent for income realised in the calendar year 2023 and 23 per cent for any income realised thereafter. An annual minimum corporate tax of €1,750 for limited liability companies (with lowered minimum taxes for newly formed companies within their first 10 years of existence) and €3,500 for stock corporations is levied. Corporate income is subject to corporate income tax regardless of its source, unless a tax exemption applies (e.g., for dividends, as addressed below).

Under Austrian law, a corporation is regarded as resident if it has its registered office or its effective place of management in Austria. The registered office is the place determined in the corporation's articles of association. The effective place of management is the place where essential business decisions are taken by the corporation's managers. Dual-resident corporations potentially face unlimited tax liability in both Austria and the other country. If a double taxation agreement (DTA) applies, the double taxation of dual-resident companies is avoided by tiebreaker rules. Pursuant to most Austrian DTAs, a dual-resident corporation

is regarded as resident in the state where its effective place of management is located. In this respect, Austria has not followed Article 4 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI) with its new rules for dual-resident companies. If unlimited tax liability applies, corporate income tax on all of the corporation's income (both domestic and foreign income) is levied. If there is only a permanent establishment in Austria, the corporation is obligated to pay Austrian corporate income tax only on profits arising from its domestic business activities.

A transparent entity's income is allocated directly to its partners. Therefore, the taxation of a partnership's income depends on the residence of its partners (either individuals or corporations).

Individuals operating a business as sole proprietors are subject to personal income tax at a progressive rate starting at 25 per cent (for net income above €11,000) and going up to a maximum rate of 50 per cent (for net income above €90,000). For net income above €1 million, a special maximum tax rate of 55 per cent applies. This special maximum rate currently applies until and including 2025.

iii Tax incentives

Currently in Austria, no special tax regimes such as enterprise zones or favourable tax regimes for financial services exist.

There is also no patent box regime but, as compensation, the Austrian tax law provides for a competitive bonus system encouraging domestic research and development activities. A cash premium for qualified expenditures is granted as far as they are exercised domestically by Austrian corporations or by Austrian permanent establishments of foreign corporations. This premium amounts to 14 per cent of the respective expenses and is unrestricted for in-house research but restricted to expenses of €1 million for external research. To create an incentive for companies to invest during and after the economic crisis following the covid-19 pandemic, the Austrian legislator introduced an investment allowance from 1 January 2023. Under this new provision, 10 per cent of depreciable fixed assets' acquisition or production costs (up to a maximum amount of €1 million per financial year) are to be tax deductible. This percentage increases to 15 per cent for investments in environmentally friendly assets.

Further relief is provided through the possibility of deducting interest expenses incurred during transactions involving an Austrian corporation acquiring another Austrian corporation. These interest expenses incurred for the acquisition of an Austrian target corporation may, in general, be deducted from the Austrian corporate income tax base of the domestic acquiring corporation (although certain limits may apply). This possibility can be further enhanced by forming a tax group between the acquiring and the target corporation, to transfer future operating profits of the target corporation to the level of the acquiring corporation, where they can be set off with the existing interest expenses generated from the debt used for the acquisition (for tax groups see below).

The carry-forward of tax losses is possible without limitation. This possibility is, however, permitted only with regard to business-related losses. The deduction of the loss carry-forward is limited to 75 per cent of the corporation's annual taxable income. The remaining losses, however, are deductible in later periods (again applying the same 75 per cent limitation). The utilisation of carried-forward tax losses at the corporate level is, in principle, possible irrespective of shareholder changes, until the point of a 'change in ownership' is reached. According to this rule, tax loss carry-forwards are forfeited if a substantial change in the corporation's shareholder structure, in combination with a substantial change in its business

and management structure, occurs. This rule, however, does not apply in certain cases of corporate reorganisations. Generally, there is no carry-back option available. To mitigate the impacts of the covid-19-induced economic crisis, the Austrian legislator, however, provided for a one-time possibility to carry back losses incurred in 2020. Accordingly, such losses may be utilised in 2019 (up to a maximum amount of €5 million) and 2018 (up to a maximum amount of €2 million).

Finally, certain corporate income tax exemptions regarding income from international participations may be applicable (for that see below).

iv Tax grouping

The Austrian tax group regime allows the consolidation of a parent corporation's taxable income with the taxable income of its Austrian subsidiaries at the level of the upper-tier parent corporation (the 'tax group parent'). As a tax group parent, only an Austrian corporation or a qualified permanent establishment of an EU or EEA entity may be considered. The tax group parent must hold more than 50 per cent of the capital and voting rights in the Austrian subsidiary corporation (the 'tax group member') since the beginning of the subsidiary's fiscal year. Both direct and indirect participations are conceivable (e.g., via a partnership or further tax group member). If the requirements are fulfilled, an application for group taxation may be submitted to the competent tax office. The entire income of the subsidiary is then allocated to the taxable income of the tax group parent, although there is no need to actually transfer the respective profits. In this respect, the income of each tax group member has to be calculated separately, which also includes the filing of annual corporate income tax returns to the Austrian tax authorities. The tax group parent is then the only entity against which corporate income tax will be levied. For the tax group regime, a minimum duration of three fiscal years applies; otherwise, a recapture rule provides for retroactive taxation on a stand-alone basis.

With regard to foreign subsidiaries, the tax group regime is available only for first-tier tax group members in relation to which an Austrian tax group member or tax group parent fulfils the participation requirement of more than 50 per cent of capital and voting rights. Apart from this, a foreign tax group member is accepted only if its residence is either in the EU or in any other country with which Austria has agreed on a comprehensive mutual exchange of information (e.g., the United States or China). Another difference compared with domestic-only tax groups is that the foreign losses may only be offset from the Austrian tax base proportionally in relation to the actual percentage of the share held in the foreign corporation. However, certain recapture rules may apply in this context (e.g., for disposal of the foreign corporation).

The Austrian tax system also provides for a group for VAT purposes, although different criteria apply in this respect.

v Taxation of dividends

With regard to dividend income from foreign corporations, a relief (the 'international participation exemption') may apply under the following circumstances:

a the foreign subsidiary is an EU-resident corporation listed in Annex 2 of the EU Parent–Subsidiary Directive or a foreign entity comparable with an Austrian corporation;

b the respective participation amounts to at least 10 per cent of the subsidiary's nominal capital; and

c the participation is held for a consecutive period of at least one year.

The international participation exemption is denied if the foreign corporation is taxed abroad at a low rate (not more than 12.5 per cent) and mainly derives passive income. In this case, a 'switchover' applies and the exemption of the dividend is replaced by a crediting of the underlying foreign corporate tax on the Austrian corporate income tax levied on the dividend. On 1 January 2019, general controlled foreign company rules (CFC rules) with regard to foreign subsidiaries entered into force in Austria. Since then, the switchover provision applies only to participations in foreign subsidiaries of less than 50 per cent. For participations exceeding this threshold, the CFC rules might apply. The CFC rules might result in an attribution of low-taxed passive income (e.g., income from interest, licences, dividends or income derived from the sale of shares) of the controlled corporations or permanent establishments to the controlling domestic corporation. The objective is to prevent profit from shifting to low or no tax countries. However, exceptions exist for foreign entities with significant economic activity in terms of personnel, equipment, assets and premises. Furthermore, Austria has also made use of the option provided for in the ATAD, pursuant to which CFC legislation shall apply only if the foreign subsidiary's passive income accounts for more than one-third of its total income. Therefore, Austrian CFC legislation does not apply if at least two-thirds of the subsidiary's income originates from active sources.

Even before the introduction of the aforementioned CFC rules, general anti-abuse provisions and the 'substance-over-form' approach were applied by the Austrian tax authorities (and are still applicable in addition to the application of CFC rules) in relation to foreign subsidiaries of Austrian companies. Pursuant to these provisions, a transparency approach could be applied, and the foreign subsidiary's income might directly be allocated to the Austrian shareholder in the case of 'wholly artificial arrangements' or completely controlled management by the Austrian shareholder. These general anti-abuse rules will remain of importance even after the implementation of the CFC rules in cases where the CFC rules do not apply (e.g., in relation to individuals as shareholders of foreign companies).

Dividend income from participations amounting to less than 10 per cent (the 'portfolio participations') in foreign companies is exempt from corporate income tax under the following circumstances:

a the foreign company is comparable with an Austrian corporation;

b the foreign company is either resident in a country with which Austria has agreed on a comprehensive exchange of information or resident in the EU and listed in the annex to the EU Parent–Subsidiary Directive; and

c the foreign company is not in the scope of the international participation privilege. The portfolio participation exemption does not apply to portfolio participations of more than 5 per cent if the foreign corporation is taxed at a low rate abroad (less than 12.5 per cent) and mainly derives passive income.

In general, the exemptions of foreign dividends do not apply in 'hybrid' situations. A regulation targeting hybrid mismatches entered into force on 1 January 2020, aimed at neutralising deduction/no inclusion (D/NI) and double deduction (D/D) situations. In this respect, D/D means an arrangement whereby a deduction related to the same contractual obligation is claimed for income tax purposes in two different countries, and D/NI is an arrangement that creates a deduction in one country but avoids a corresponding inclusion in the taxable income in another country.

Regarding dividends paid from Austrian corporations to foreign corporations, strict rules under the EU Parent–Subsidiary Directive apply. The receiving EU parent has to have office space and personnel and must conduct actual operative activities. If these criteria are not met, tax has to be withheld on the dividends in Austria. In principle, the same rules apply for the eligibility of non-resident corporations for relief under DTAs.

vi Withholding taxes

In Austria, several cross-border constellations may trigger withholding tax. As mentioned, withholding tax first applies if dividends are paid by an Austrian corporation to a foreign shareholder. The tax rate amounts to 25 per cent (in February 2022, reduced to 24 per cent in the calendar year 2023, and 23 per cent thereafter) or, respectively, 27.5 per cent if paid to a non-corporate shareholder, unless a reduced rate according to a certain DTA applies. As is already outlined above, dividends paid to certain types of corporations that are listed in the EU Parent–Subsidiary Directive and that are resident in another EU Member State are exempt from Austrian withholding tax if the EU parent:

a holds at least 10 per cent of the issued share capital of the Austrian subsidiary for a consecutive period of at least one year;

b can prove sufficient substance in terms of office space and personnel; and

c conducts actual operative activities in its state of residence.

If the requirements for the dividend relief at source are not met (e.g., due to missing substance of the EU parent company or missing certificate of residence), the EU parent may file a request for a refund with the Austrian tax authority. The refund will be granted unless in the event of an abuse. Apart from this general relief under the EU Parent–Subsidiary Directive, Austrian corporate income tax law also provides for a refund of Austrian dividend withholding tax upon the request of corporations that are resident in the EU or EEA, regardless of the percentage held in the Austrian corporation and the period of holding. The refund takes effect only to the extent that the Austrian dividend withholding tax is not credited in the parent's Member State of residence.

Furthermore, interest income paid by Austrian debtors is subject to a withholding tax of 25 per cent (24 per cent in the calendar year 2023 and 23 per cent thereafter) or, respectively, 27.5 per cent in the case of individuals as income recipients. However, unless the interest payment is received via an Austrian permanent establishment, non-tax residents are not subject to tax liability in Austria if (1) the recipient is either a non-tax-resident corporation or a non-tax-resident individual resident in a country that is committed to an automatic exchange of information with Austria and (2) a certificate of residence is provided by the recipient. In these cases, Austrian withholding tax does not apply.

Royalties paid to non-resident recipients (unless they are exempt from withholding tax pursuant to the EU Interest and Royalties Directive) and fees for technical or commercial advisory services are subject to a withholding tax of 20 per cent, unless a reduced rate applies under a DTA.

A special withholding tax of 8.25 per cent (respectively, 10 per cent in the case of individuals) applies on income derived from the letting of rights in connection with the transmission of energy or the use of cables in the public interest.

Interest payments to non-residents under 'plain vanilla' loans are currently not subject to Austrian withholding tax unless the loan is secured with domestic real estate. Interest payments on bank deposit or certain publicly issued corporate bonds, however, trigger withholding tax if an Austrian paying agent or custodian is involved.

vii Inbound financing

In Austria, there are currently no rules implemented that target thin capitalisation (also known as 'thin cap'). Thin cap in this respect refers to the situation in which a corporation is financed through a relatively high level of debt compared with equity, to benefit from the debt's tax-lowering effect.

The Austrian Supreme Administrative Court, however, has, through its past case law, established guidelines to determine whether the related-party financing was acceptable for Austrian tax purposes. If the funding was regarded as inadequate, interest expenses for related-party debt was disregarded for tax purposes. Interest payments made under this disregarded related-party debt was recharacterised into constructive dividends and, as a consequence, was subject to withholding tax. In this respect, a debt–equity ratio of 4:1 was seen as a common practical guideline. Although the Austrian Supreme Administrative Court no longer follows this principle, the tax authorities still apply this case law.

In general, the financing structure of an Austrian corporation must be at arm's length; otherwise, the tax authorities may recharacterise related-party debt into equity or adjust the interest rate under related-party debt. Interest expenses directly relating to tax-exempt income are not deductible. In addition, intra-group interest and royalties are non-deductible if the foreign receiving corporation is subject to a low tax rate. After a lengthy controversy between the Austrian federal government and the European Commission, the Austrian legislator enacted an interest barrier regime in response to the obligation set out in the ATAD at the end of 2020. This new regime, which entered into force in mid-January 2021 with retroactive effect from 1 January 2021, is very much based on the corresponding Article 4 of the ATAD and also contains nearly all the possible reliefs provided for therein.

viii Transfer pricing

In general, all transactions between related parties have to be at arm's length. This means that related-party transactions must be set in the same way as they would be in a comparable transaction between unrelated third parties. The Austrian understanding of the arm's-length principle corresponds to the arm's-length principle laid down by the OECD in the Transfer Pricing Guidelines. For all companies (and branches of foreign corporations) resident in Austria, documentation requirements exist.

Pursuant to the Austrian Transfer Pricing Documentation Act, Austrian group companies with an annual turnover of more than €50 million over two consecutive years have to prepare a master or local file, or both, along the lines of BEPS Action 13. The content and form requirements of the master file correspond to those described in Annex I to Chapter V of the OECD Transfer Pricing Guidelines. The local file's expected core information is described in Annex II to Chapter V of the OECD Transfer Pricing Guidelines. In addition, large multinational enterprises (MNEs) with consolidated group revenue of at least €750 million have to submit country-by-country reports (CbCRs). The ultimate parent has to submit the CbCR on an annual basis according to the form described in Annexes I, II and III of the Austrian Transfer Pricing Documentation Act to the tax authority, which then shares the received information with all participating jurisdictions where entities of the

MNE are located. Regardless of whether an Austrian-affiliated entity falls under the increased documentation requirements for MNEs, it is, however, always necessary to keep transfer pricing documentation explaining the cross-border intercompany relations in an adequate manner. Regarding comprehensive transactions, it is, further, very much recommended to conduct a transfer pricing study in this respect.

Finally, taxpayers may apply for a binding advance tax ruling with the competent local tax office regarding transfer pricing matters, based on the facts and circumstances presented by the taxpayer prior to implementing the structure. To a certain degree, it is also possible to reach cross-border advance pricing arrangements on a bilateral or multilateral basis, although the taxpayer has no formal right to request such mutual agreements.

ix Other taxes (VAT, RETT and stamp duties)

Corporations are subject to Austrian value added tax (VAT) if they are regarded as entrepreneurs in terms of VAT and carry out transactions that are taxable in Austria. An entrepreneur has the right to deduct input VAT for supplies and services received. Taxable transactions generally comprise the supply of goods and services. The standard rate is 20 per cent; certain goods and services, however, are subject to a reduced tax rate of 10 per cent (e.g., food and books) or 13 per cent (e.g., plants and hotel accommodation).

Another tax commonly incurring in connection with transactions is Austrian real estate transfer tax (RETT) levied on the transfer of legal or economic ownership in land or real estate located in Austria. In most transactional cases, RETT amounts to 3.5 per cent of the sale price or, respectively, 0.5 per cent of the real estate's market value in certain cases of reorganisation. In this context, it has to be considered that a transfer of 95 per cent or more of the interest or shares in a partnership or corporation holding Austrian real estate might trigger RETT.

Stamp duties are due on certain legal transactions concluded in written form. This applies if the written deed for the transaction is either set up in Austria or set up abroad and there are certain connections to Austria. The respective rates vary between 0.8 per cent and 2 per cent of the underlying right's value. Furthermore, there might be registration fees in connection with transactions (e.g., 1.1 per cent of the sales price or market value is due for the entry of a new owner of real estate into the Austrian land register).

III INTERNATIONAL DEVELOPMENTS AND LOCAL RESPONSES

In recent years, international developments and initiatives foremost targeting tax avoidance and the erosion of tax bases have strongly influenced international (as well as Austrian) tax legislation and therefore also the way tax planning is conducted.

This section gives a brief summary of recent developments in this field, primarily in respect of the OECD's Action Plan on Base Erosion and Profit Shifting (the BEPS Action Plan).

i OECD-G20 BEPS initiative

In general, Austria's approach is to have coordinated actions implementing the OECD recommendations stipulated in the BEPS Action Plan and thereby avoid double efforts that might arise from divergent approaches at the national and EU levels. Therefore, it is reasonable to assume that future Austrian measures regarding pending BEPS Action Points will most likely conform to the progress at the EU level.

Regarding BEPS Action 4 (Limitation on Interest Deductions), the regulation implementing the corresponding Article 4 of the ATAD entered into force with effect from 1 January 2021, as stated above.

BEPS Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status) has been incorporated into the OECD Model Tax Convention and, as such, is followed by the Austrian tax authorities as an interpretation tool. A number of Austrian DTAs were adapted according to the new rules suggested by BEPS Action 7 within the frame of the MLI (BEPS Action 15). Austria signed the MLI in June 2017 and was one of the first countries to submit the ratification instrument to the depositary. Austria has made several reservations to the MLI (e.g., regarding transparent entities or dual-resident entities).

As far as the prevention of treaty abuse is concerned (BEPS Action 6), the Austrian tax law system provides for domestic anti-abuse rules. However, the Austrian general anti-abuse provision was amended to comply with the ATAD.

The transfer pricing changes in respect of value creation proposed by BEPS Actions 8–10 and included in the OECD Transfer Pricing Guidelines have been reflected in the totally revised Austrian Transfer Pricing Guidelines 2021, published in October 2021. For that reason, the development, enhancement, maintenance, protection and exploitation of intangibles principles described in BEPS Action 8, for example, are followed by the Austrian tax authorities (meaning that the person or entity controlling the development, enhancement, maintenance, protection and exploitation of the good in question is regarded as its owner).

BEPS Action 12 (Mandatory Disclosure Rules) was implemented by the Austrian legislator in September 2019 by implementing the sixth amendment to Directive 2011/16/EU (DAC6).[2] Within the framework of this regulation (the Austrian EU Mandatory Disclosure Act), certain cross-border structures and transactions must be reported to the tax authorities, starting from 1 July 2020, on an ad hoc basis within 30 days of the triggering event. The events that are (conditionally or unconditionally) subject to reporting are defined based on certain hallmarks. In this respect, potentially reportable transactions include cross-border intra-group transfers of hard-to-value intangibles, cross-border debt–equity swaps or transfer pricing arrangements using unilateral 'safe harbour' rules.

Austria has fully implemented the OECD recommendations on transfer pricing in its Transfer Pricing Documentation Act (for that see above). Austria has further implemented the Multilateral Competent Authority Agreement, which extends the scope of participating countries of the automatic information exchange for the CbCRs.

As regards BEPS Action 14 (Mutual Agreement Procedure), Austria has opted for the arbitration rule provided for in the MLI.

ii EU proposals on taxation of the digital economy

Regarding (the original) BEPS Action 1 (Tax Challenges Arising from Digitalisation), Austria decided not to wait any longer for coordinated actions by the EU Member States but to introduce unilateral measures. Consequently, the Austrian Parliament passed the Digital Tax Act in September 2019. Under this Act (applicable as from 1 January 2020), online advertising services rendered against consideration in Austria are subject to a 3 per cent digital tax. However, only companies exceeding certain annual turnover thresholds with their online advertising activities are subject to this tax.

2 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

Regarding the OECD's newly pursued two-pillar approach to reform international taxation rules (Pillar One) and to establish a certain global minimum taxation (Pillar Two) (the Global Anti-Base Erosion Rules), future reactions at an EU level remain to be seen.

IV RECENT CASES

This section is intended to illustrate a few of the implications outlined above based on several recent decisions of the Austrian Supreme Administrative Court.

i Withholding tax refund in case of the interposition of Luxembourg companies

A Luxembourg holding corporation (LuxCo 1) with no substance held around 40 per cent of the shares in an Austrian stock corporation (Austrian AG). A second Luxembourg corporation (LuxCo 2) with actual office premises and employees held 100 per cent of the shares in LuxCo 1. An Australian fund (AusFund) held 100 per cent of LuxCo 2 via a trustee structure set up in the Cayman Islands and had a consulting contract with a further Australian corporation (AusCo). Withholding tax for dividend distribution was deducted at the level of the Austrian AG, at which point LuxCo 1 filed for a refund of said Austrian withholding tax. The Austrian tax authorities declined the refund, arguing that the business structure was artificial and therefore abusive.

The Federal Fiscal Court (the court of first instance in tax matters) confirmed the decision of the tax authorities, stating that LuxCo 2 did not have the necessary substance to be regarded as an operative entity. Rather, the Federal Fiscal Court held that, in fact, AusFund together with AusCo performed all necessary management activities and that therefore there was no sound reason for the interposition of the two LuxCos.

The Austrian Supreme Administrative Court, however, held[3] that, under the EU Parent–Subsidiary Directive, LuxCo 2 should be qualified as an operative entity due to its having its own personnel and premises. The Court further held that a valid reason for the interposition of two LuxCos is already given if the interposition substantially facilitates the group's business activities.

ii Treatment of unpaid liabilities in the context of the liquidation of a tax group member

An insolvent member of an Austrian tax group had to be liquidated, resulting in unpaid liabilities. The Austrian tax authorities as well as the Austrian Federal Fiscal Court held that these unpaid liabilities are not to be recognised in the final liquidation assets and that the resulting liquidation profit has to be allocated to the tax group parent. In most cases, this would have resulted in a positive liquidation profit that would be subject to Austrian corporate income tax.

By contrast, the Austrian Supreme Administrative Court, however, decided[4] that liabilities not repaid at the end of a liquidation are part of the 'final liquidation assets' and therefore there is no increase in the liquidation profit. In addition, the court ruled that the

3 Austrian Supreme Administrative Court 27 March 2019, Ro 2018/13/0004.

4 Austrian Supreme Administrative Court 4 September 2019, Ro 2017/13/0009 and Ro 2017/13/0010.

liquidation result of a tax group member is not to be allocated to the tax group parent. This ultimately means that tax group members withdraw from the tax group as soon as liquidation proceedings are opened.

iii Successive group acquisition

Interest expenses incurred for the acquisition of participations in companies that belong to the same group of companies as the acquiring company are generally not deductible for tax purposes. The Austrian tax authorities took the position that such a detrimental intra-group acquisition also occurs in cases where the acquisition of a whole group of companies is split up in such a way that, initially, the domestic participations are acquired and only after that are the remaining foreign companies of the group acquired (known as successive group acquisition).

In this context, the Austrian Federal Fiscal Court and, subsequently, the Austrian Supreme Administrative Court, however, held[5] that a detrimental intra-group acquisition occurs only if the acquiring and the acquired companies are members of the same group at the time of acquisition. Even if several participations in the same group are acquired within a short period of time, a group relationship between the acquiring and the acquired companies does not exist at the time of the acquisition, and therefore the deduction of interest expenses incurred is not prohibited.

iv (Constructive) dividend or repayment of capital contributions

Under certain conditions, (hidden) distributions of Austrian corporations may be qualified as tax-neutral repayments of capital contributions instead of taxable (constructive) dividends. In this context, the Austrian tax authorities took the position that the decision on whether some distribution is to be qualified as repayment of capital contributions or as a dividend has to be communicated to the tax authorities until the end of the financial year concerned. Subsequently, the Austrian Federal Fiscal Court held that that decision may be communicated even after the end of the respective financial year, as long as the conditions for a repayment of capital contributions are met at the time of the notification.

The Austrian Supreme Administrative Court eventually opposed[6] the taxpayer-friendly decision of the Federal Fiscal Court. Accordingly, the corporation has to communicate the decision on how to qualify the respective distribution by the end of the calendar year.

V OUTLOOK AND CONCLUSIONS

In the near future especially, two topics are going to be of exceptional relevance with regard to tax planning – that is, on the one hand, the recently enacted interest limitation rule and, on the other hand, the reporting obligation regarding cross-border transactions under the Austrian implementation of the DAC6.

It still remains to be seen to what extent these two factors will influence future planning of international transactions, as there are still a number of outstanding issues. However, it is already obvious now that the trend of recent years – namely the increasing complexity of tax planning in relation to international transactions – is likely to intensify.

5 Austrian Supreme Administrative Court, 6 July 2020, Ro 2019/13/0018.

6 Austrian Supreme Administrative Court, 5 February 2021, Ro 2019/13/0027.

Nevertheless, Austria continues to be an attractive location for international transactions, not only because of the stable political situation but also because of its extensive network of DTAs and its modern tax system, including advantageous features such as a flexible tax group regime and participation exemptions for dividend payments. Finally, the decision of the Austrian legislator to reduce the Austrian corporate income tax rate in two steps (see above) is going to contribute further to the international competitiveness of Austria's tax system.

Appendix 1

ABOUT THE AUTHORS

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Gerald Schachner is a partner at bpv Huegel. Gerald is head of the firm's tax law practice group. He has been practising tax law since 2000 and is dual qualified as an attorney-at-law and a tax adviser. Gerald graduated from the University of Graz. He gained profound experience in tax law while working for several years with Arthur Andersen and Deloitte. Following working with Norton Rose LLP, he joined bpv Huegel in 2010. Gerald has been highly regarded in numerous national and international rankings, is a regular speaker at seminars and conferences, and is an active member of the Austrian Bar Association, the International Bar Association and the International Fiscal Association. Gerald's practice focuses on international and corporate tax law, tax restructuring and tax controversy, including fiscal criminal tax law, and combines comprehensive corporate and M&A experience with in-depth tax knowledge, enabling clients to achieve positive outcomes.

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Kornelia Wittmann is a partner at bpv Huegel. Kornelia has a double degree in economics and law. In addition, she holds an LLM in international tax law. Kornelia is dual qualified as an attorney-at-law and as an Austrian and Hungarian tax adviser. Before joining bpv Huegel, she worked at PricewaterhouseCoopers for several years. Kornelia has been regarded in numerous national and international rankings and is a regular speaker at seminars and conferences. Her main areas of practice are tax litigation, including fiscal criminal law, and corporate, international and M&A tax law. Furthermore, Kornelia provides advice in national and international accounting law and in banking supervisory law.

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Nicolas D Wolski is a partner at bpv Huegel. He is qualified both as an attorney-at-law and as a tax adviser (with qualifications in Germany and Austria). He graduated from the Universities of Marburg, Münster and Vienna. Before joining bpv Huegel, Nicolas worked at Freshfields Bruckhaus Deringer, Graf von Westphalen and, most recently, the Frankfurt office of Willkie Farr & Gallagher as European counsel. Nicolas Wolski focuses on tax advice in M&A transactions. He has extensive experience in the private equity industry.

He further specialises in tax aspects of international reorganisations and financing. Nicolas has an outstanding track record in advising banks, corporates and private equity houses on tax aspects of syndicated loan agreements. He also advises on tax controversies (tax audits and administrative and judicial appeals) and conducts tax-driven internal investigations and advises on how to deal with the findings (e.g., voluntary disclosure with the objective to avoid sanctions).

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Lucas Hora has been an associate with bpv Huegel since 2019. He mainly specialises in tax and tax procedural law and, in addition, deals with fiscal criminal law, corporate law and accounting law issues. Lucas studied law at the University of Vienna and business law at the Vienna University of Economics and Business Administration. Currently, he is completing his doctoral programme in law and his master's degree in business administration at the University of Vienna, focusing on business law and financial reporting. Prior to his engagement at bpv Huegel, Lucas gained experience at PricewaterhouseCoopers and at the Federal Fiscal Court.

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