Austria

International Estate Planning Guide

Individual Tax and Private Client Committee

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I. Succession Regulation (EU 650/2012)

The Succession Regulation (EU 650/2012) is applicable for all inheritance cases in Austria after 17 August 2015. The Regulation generally determines the applicable inheritance law as well as the competent courts for the inheritance proceedings.

According to the general rule of law, the applicable law for succession is the law of the state in which the deceased person had his/her habitual residence at the time of death (no matter which nationality the deceased holds). Only if a majority of circumstances indicate a closer relation of the deceased to another state, is the law of this respective state applicable (Article 21 of the Succession Regulation).

A person may choose the state's law, of which he/she possesses nationality at the time of making the choice, or at the time of death, to govern over his/her succession. A person possessing multiple nationalities may choose the law of any state whose nationality he/she possesses at the time of making the choice or at the time of death. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition. The substantive validity of the act shall be governed by the chosen law (Article 22 of the Succession Regulation).

Habitual residence in Austria is assumed if one's center of life regarding family, profession, and cultural activities is in Austria. Additionally, the duration and regularity of residence is considered.

According to the general rule, the courts of the EU Member State, in which the deceased had his habitual residence at the time of death, shall have jurisdiction to rule on the succession as a whole. In case the deceased has chosen the law of his/her nationality to govern the succession and the chosen law is the law of an EU member state, the parties concerned may agree that the court(s) of that Member State are to have exclusive jurisdiction to rule on any succession matter.

Provided the law of a non-EU member state is chosen by the deceased to govern the succession, a general rule is that the Austrian courts remain competent to rule on the succession as a whole, in accordance with Austrian inheritance proceedings, if the deceased's habitual residence was in Austria (Article 4 of the Succession Regulation).

II. Wills and Disability Planning Documents

A. Will Formalities and Enforceability of Foreign Wills

Testators may deviate from statutory intestacy rules either unilaterally by a will or a legacy, or contractually by way of agreement. An inheritance contract may only be validly concluded between spouses. In order to draw up a valid will, testators in general must be at least 18 years of age and be contractually capable. Furthermore, the creation of a valid will requires that the testator is aware of disposing of his/her estate in favour of a future heir ("*animus testandi*"). Finally, a will must be drawn up in absence of force or cunning, which would render a will contestable.

As in most jurisdictions, in Austria wills need to comply with rigid formal criteria, which on the one hand should make the testator aware of the importance of its action and on the other hand avoid potential disputes after the testator's death. Although it is possible to declare a will orally under certain circumstances, wills almost always are made in writing. When declaring in writing, a testator may do so in handwriting and sign the will himself/herself, or sign a document which has either been written by a third person or produced by a typewriter or another means of data processing. When signing a will that is not in the testators own handwriting, the involvement of three capable witnesses is

essential in order to draw up a valid will. When signing this document, the testator shall confirm on the document in handwriting that the document comprises his/her last will in the presence of the witnesses. The witnesses must also sign the will and explicitly state that they have been involved as witnesses. It is not required, however, that the witnesses know the contents of the will.

In order to be capable, witnesses need to be at least 18 years of age and "independent", meaning they are not beneficiaries, a spouse, a partner, parents, children, nor brother or sister of a beneficiary. Furthermore, persons who are related by marriage as well as domestic staff are not deemed capable as witnesses.

As a will is a unilateral declaration (as opposed to a contract of inheritance – see below), it may be revoked at any time. In order to safeguard that a will can be retrieved after the testator passed away, it is common to register the existence of a will with a centralized register, either kept by Austrian attorneys-at-law, public notaries, or Austrian courts, and to hand the will to said professionals or to a court which would keep the document in custody either until it is revoked or until the depository becomes aware of the testator's death.

A contract of inheritance, according to Austrian law, is a way to determine the legal succession of a decedent with binding effect. Unlike wills or legacies which may be revoked or altered any time by the testator, a contract of inheritance may not be amended unilaterally, once in place. Under Austrian inheritance law, a contract of inheritance may only be entered into by spouses and registered partners, requires the form of a notarial deed, and shall be entered into in the presence of two notaries or a notary plus two witnesses. A decedent may only dispose of 75% of its (net) estate by way of a contract of inheritance.

Austria is member of the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions of 1961. According to this convention, a foreign will is formally valid in Austria if it is either established in accordance with the laws of the state of which the testator is a citizen, where the will is established, in which the testator had his domicile either at the time when he/she established the disposition, or at the time of his/her death, or where immovable property is located. Regarding the formal validity of succession agreements (e.g. contract of inheritance) Article 27 of the Succession Regulation is applicable.

B. Will Substitutes (Revocable Trusts or Entities)

Especially in connection with the planning of substantial estates, frequently legal entities in the form of an Austrian private foundation are established, in particular when founders seek to avoid the division of their estate after they pass away (see section 3, below). Apart from the establishment of such private foundation, the formation of other legal entities as a substitute for wills is not common.

However, in some cases testators decide to enter into donation agreements conditioned upon the donator's death, which is decisive for the transfer of ownership. Contrary to wills, such donations cannot be revoked by the donator. Therefore, the conclusion of donation agreements conditioned on the donator's death is a way to improve the level of legal certainty for the beneficiary and may therefore also serve as a substitute for wills.

C. Powers of Attorney, Directives, and Similar Disability Documents

In order to avoid the appointment of a guardian in the event a person loses his/her legal capacity, Austrian law provides the possibility to appoint a proxy who should be entitled to represent the incapacitated person's interests (as defined in advance in such power of attorney). Such appointment

comprises a power of attorney which will be registered in a centralized register, kept by Austrian public notaries. Such power of attorney becomes legally effective, once it has been registered in the centralized register that the grantor lost its legal capacity. This also needs to be done by a public notary on the basis of a medical certificate.

As the proxy could be entitled to carry out measures with substantial legal impact, the formalities that need to be complied with are comparable to those which are required when declaring a will. Therefore, the appointment of a proxy and the issuance of a power of attorney either requires that the grantor issues the respective deeds in handwriting and with his/her personal signature or otherwise the signatures of three capable witnesses.

To the extent such power of attorney has been granted, the official court appointment of a guardian can be avoided. Therefore, such powers of attorney offer the possibility that (i) the grantor's directives will be observed and (ii) a pre-determined person will be in charge of representing the grantor, if the grantor loses his/her legal capacity. Such powers of attorney are usually granted with legal effect beyond the issuer's death.

III. **Estate Administration**

A. Overview of Administration Procedures

Probate proceedings are initiated by Austrian courts *per curiam* once they become aware of a person's death. After probate proceedings have been opened, the court assigns a notary public, who acts on behalf of the court to carry out the research required in order to determine the relevant facts and circumstances on the one hand and to secure the deceased's assets on the other hand. Third persons must not dispose of a deceased person's assets as long as the probate court either ceased its proceedings (e.g. due to lack of substantial assets) or issued a certificate of inheritance. If the assets of an estate most likely will exceed EUR 5,000, parties may only be represented by attorneys-at-law or public notaries.

Contrary to what is the case in other jurisdictions, in Austria heirs acquire the estate of a deceased person not *eo ipso* (upon the latter's death), but only after they have formally declared to assume a particular share of the estate, either based on intestate succession, a will, or an inheritance contract.

In international inheritance cases, heirs, legatees, and executors of the last will may apply for the issuance of a European Certificate of Succession according to the Succession Regulation to demonstrate (i) the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the certificate and their respective shares of the estate; (ii) the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the certificate, (iii) the powers of the person mentioned in the certificate to execute the will or administer the estate.

B. Intestate Succession and Forced Heirship

In the absence of a (valid) will or an inheritance contract or if a valid will or an inheritance contract do not cover the entire estate, statutes provide for the allocation of the (remaining) estate. However, this does not mean that upon a person's death his/her estate *eo ipso* passes over to its legal successors (as described under Section A, above).

In general, the deceased person's children shall receive the entire estate in equal shares. If a child passed away prior to the testator, it shall be substituted by its own children (i.e. the testator's grandchildren);

If the deceased person is not only survived by its children, but also by a spouse, the estate will be split 1/3 to 2/3 between the surviving spouse on the one hand and the children on the other hand.

If the deceased person did not have children, the estate would be split between the deceased person's surviving spouse on the one hand and the deceased person's parents on the other hand in the ratio 2/3 to 1/3.

The testator's discretion in allocating his/her assets to relatives or third parties either by a will or an inheritance contract is limited by the provisions on forced heirship. According to these provisions the testator must consider his/her children and spouse when disposing of his/her estate. The children and the surviving spouse shall receive at least half of the share they would receive if the provision on intestate succession applied. Such forced heirship may be satisfied by donations inter vivos, by testamentary disposition, or intestate succession. Additionally, the status of a beneficiary in an Austrian private foundation may satisfy forced heirship claims.

In order to safeguard that these provisions are not being circumvented by testators – which in general could easily be done by reducing assets during the testator's lifetime, e.g. by way of donations – forced heirs are entitled to request that such donations are taken into account when calculating their mandatory shares. This means that such donations would be added to the testator's estate and therefore increase the calculation base for the forced heirs' share. If the estate itself does not comprise sufficient assets to cover the respective share, beneficiaries of donations may even be forced to return (at least part of) such donations.

This right of forced heirs expires after two years with respect to donations that have been made to persons other than forced heirs, e.g endowments (donations) to an Austrian private foundation. Any donations or pecuniary advantages made to forced heirs must be considered upon request of another forced heir without limitation. The status of a forced heir as a beneficiary in an Austrian private foundation has to be evaluated and considered for the calculation of the forced heir’s share upon request of another forced heir.

C. Marital Property

The aspects of marital property are usually not an issue in probate proceedings, since as a general rule spouses under Austrian law do not hold assets acquired during marriage jointly. In the event that spouses decided to deviate from said general rule, half of the jointly owned assets would become part of the estate upon one of the spouses' death. From an inheritance law perspective, the concept of joint ownership might be detrimental for extramarital children in the event of intestate succession.

D. Tenancies, Survivorship Accounts and Payable on Death Accounts

As all and any rights and obligations of a person pass over to its estate upon the person's death, also tenancy rights are generally part of an estate.

According to the Austrian Tenancy Act, neither the death of the landlord nor the tenant's death terminate the tenancy agreement. If they do not object within two weeks as of the tenant's death, *inter alia* the surviving spouse, the life partner, or the tenant’s children assume the deceased person's position in a tenancy agreement by law, provided that they have an urgent requirement for

accommodation and have already used the premises jointly with the deceased. Although this regime applies to most Austrian tenancy agreements, there are also agreements which are governed by general civil law provisions (and not by the specific rules of the Austrian Tenancy Act). In this case, both parties – i.e. the landlord and the tenant's successors – are entitled to terminate the tenancy agreement, irrespective of the agreed term.

Most general terms of Austrian banks comprise provisions according to which banks shall freeze accounts once they have become aware of the death of the respective account holder. In such a case, the bank accounts are usually only released on the basis of a court order. Such court order is usually issued at the completion of probate proceeding. In international inheritance cases, the bank accounts may be released on the basis of a European Certificate of Succession. The foregoing does not apply to bank accounts that have been established for more than one beneficiary, i.e. in the name of the first "and/or" (at least) the second beneficiary. This means that the second beneficiary would generally be able to dispose of property in the account after the first beneficiaries' death.

Nevertheless, Austrian procedural law prohibits any disposition of assets that are part of a deceased's estate. Therefore, a second account holder might face damage claims of (other) heirs if, for example, the balance on the account is fully attributable to the deceased, which might be the case if the account deposits have solely been made by the deceased.

IV. **Trusts, Foundations, and Other Planning Structures**

A. Legal Concept

A private foundation can be founded by one or more individuals or legal entities. The private foundation is a legal entity without proprietors/shareholders. Its purpose and internal organization can – to a large extent – be determined by the founder(s).

All founders have to be designated in the deed of foundation and the so-called founder’s rights (the right to draw up a supplementary deed of foundation, the right of amendment of the deed of foundation, and the right of a supplementary deed of foundation, if any, and the right of revocation) are personal rights, which cannot be transferred (i.e. they cease with the death of a founder). Therefore, in some cases, entities act as co-founders based on the notion that an entity does not die and therefore the right to amend the deed of foundation and the supplementary deed of foundation, if any, can be perpetuated. Note that such structure implies certain risks, therefore requiring careful structuring. Several founders generally exercise their rights jointly, unless the deed of foundation provides otherwise.

Founders can, but are not necessarily required to, contribute assets to the private foundation (please note that it is possible to donate assets to a private foundation without being a founder and that founders can also subsequently contribute assets to the private foundation; however, the minimum contribution of EUR 70,000 has to be contributed by one or more founders as a legal requirement for the private foundation’s incorporation). Ownership of the assets held by the private foundation rests exclusively with the private foundation and neither the founder nor the beneficiaries hold any share of ownership in the private foundation or the assets held by it. Accordingly, if the founder or the beneficiaries pass away, no probate proceedings will be initiated with respect to the assets held by the private foundation – therefore, a private foundation is often chosen as an estate planning tool, also to avoid fractional ownership (of various heirs) in assets.

A private foundation must not be actively engaged in a trade or business, i.e. only the mere administration of assets – including the holding of participations – is permissible. Therefore, if a business is to be transferred, it would have to be contributed to a company, the shares of which could then be transferred to the private foundation.

B. Fiduciary Duties

The private foundation's bodies are:

- Board of directors (at least three members, two of them must have their habitual abode in the EU or in the European Economic Area (EEA)): The board of directors manages the private foundation independently of the founders and beneficiaries and has to perform its duties economically, in accordance with the declaration of foundation, with respect to and in compliance with the foundation purpose, as well as the principle of creditor protection. It is admissible to determine internal directives regarding investment strategies or guidelines. Resolutions are generally passed by simple majority, unanimity or qualified majorities may be stipulated in the deed of foundation. The appointment and the internal organization of the board of directors may basically be freely regulated but the board of directors cannot be bound to the cooperation of other bodies; No close relative (in the direct line, i.e. descendants, or up to the third degree of the collateral line), spouse, or life partner of a beneficiary may assume the office of director. Besides, persons that have been mandated and are bound by instructions, by any of the afore-mentioned excluded persons, (i.e. beneficiaries and close relatives) are also excluded from the board of directors. With a few exceptions, the board of directors is the only body to represent the private foundation vis-à-vis third parties and is subject to supervision by the auditor and the court.

- Auditor:

  Each private foundation must have an auditor from the beginning of existence. Only Austrian certified public accountants or the respective auditing companies may serve as auditors. The auditor is appointed by the court; however, the founder may stipulate a proposal right for himself or a body of the private foundation. The auditor has to review the business practice of the private foundation and is entitled to apply for a special audit as well as for the revocation of directors by court order. Such requirements shall serve as a substitute for not having “shareholders,” which in a company would ensure a certain level of checks and balances.

- Beneficiaries/ultimate beneficiaries: The beneficiaries (regularly or irregularly) receive distributions during the existence of the private foundation. The ultimate beneficiaries (who may also be identical to the beneficiaries) receive the assets remaining after dissolution of the private foundation. The founder may be, but need not necessarily be, a beneficiary and/or an ultimate beneficiary.

- Supervisory board: Such body is required if either the private foundation and/or its group companies employ more than 300 staff in total.

- Advisory board (optional, but common in practice): Such body commonly consists of all or some current beneficiaries, but generally any person may be a member of the advisory board. The advisory board may be vested with approval rights for certain transactions (e.g. transactions exceeding specific amounts / a certain scope or extraordinary activities); distributions (e.g. distributions from the foundation’s substance); rights of control (information

rights, veto rights, inspection rights, hearing and advice rights etc.); proposal rights (e.g. regarding distributions); and the right to nominate/appoint directors. However, if the advisory board is vested with the right to revoke directors (only possible for cause), only half of the members who are entitled to vote on the revocation may be beneficiaries, their relatives or their representatives.

C. Establishment and Incorporation

Every private foundation must have a deed of foundation. The deed of foundation is submitted to the tax authorities and filed with the companies register (and by the latter filing becomes publicly available) and, *inter alia*, has to include (mandatory):

- the name and the seat of the private foundation;
- the name, the address, and the date of birth/registration number of the founder(s);
- the endowment of assets (minimum of EUR 70,000);
- the purpose of the private foundation;
- a general description of beneficiaries and/or determination of an intermediate person or entity which shall ascertain the beneficiaries;
- the rights of amendment and revocation; and
- the duration of the private foundation (definite or indefinite period of time, but 100 years at the most with the option to prolong for another 100 years and so forth).

The deed of foundation may further include (non-mandatory):

- provisions regarding the appointment, revocation, and the term periods of body members (board of directors, auditor and supervisory board);
- founder's rights (please note that certain founder's rights have to be retained in the deed of foundation in order to be valid, e.g. the right of amendment of the deed of foundation, the admissibility of a supplementary deed, and the right of revocation of the private foundation);
- determination of the beneficiaries as well as of the ultimate beneficiaries (it is also permissible to determine beneficiary quotas, to define the beginning and/or the end of the beneficiary status, to link it to certain conditions, or to impose obligations in connection with it)
- establishment of an advisory board, if any;
- provisions regarding the amendment of the deed of foundation;
- specifications with respect to supplementary deed.

The (non-mandatory) supplementary deed has to be submitted to the tax authorities, but not to the companies register (and thus is not disclosed to the public) and may contain:

- further endowments;

- the designation of beneficiaries and/or the type and extend of distributions;
- detailed rules on distributions; and
- other issues (e.g. compensation of board members).

An Austrian private foundation is established by the execution of a foundation deed and becomes a legal entity by its registration with the companies register (incorporation). The following steps need to be accomplished for the incorporation:

- Execution of a foundation deed (which might be inspected at the companies register; therefore, it usually does not contain confidential details and non-mandatory contents / regulations, which will rather be laid down in the supplementary deed). A supplementary deed is usually executed together with the deed (both referred to as the "declaration of foundation") but may be executed at a later time.
- Appointment of the first board of directors: The first board of directors is appointed by the founder within the deed of foundation; the appointment of subsequent directors may be vested in the founder or any other person in the deed of foundation or, for lack of regulation, by the court.
- Opening of an Austrian bank account.
- Payment of the minimum capital (with bank confirmation): The minimum contribution of EUR 70,000 can be paid in cash (which is the most common form) or in kind (which requires an audit). A bank letter confirming that the (minimum) cash contribution has been credited to the foundation's bank account and is available in full to the directors must be filed with the court.
- Application to the commercial court: The deed of foundation has to be filed together with specimen signatures of the first directors, the bank letter and an application for incorporation. The supplementary deed has to be submitted to the tax authorities only.
- Public announcement of the incorporation in the federal gazette (i.e. Amtsblatt zur Wiener Zeitung) which is impacted by the court (but payable by the private foundation)

D. Dissolution

A private foundation will be dissolved by the institution of bankruptcy proceedings, by unanimous dissolution resolution of the board of directors, or by dissolution order of the court.

The board of directors must pass a dissolution resolution if:

- the founder has validly revoked the private foundation;
- the foundation purpose has been achieved (or is not achievable anymore);
- the (non-charitable) private foundation has been in existence for 100 years; or
- any other dissolution cause designated in the declaration of foundation occurs.

After expiry of the first 100-year-term, all beneficiaries may unanimously resolve continuation of the private foundation for another specified term not exceeding 100 years.

All remaining assets of the dissolved private foundation will be transferred to the ultimate beneficiary.

E. Treatment of Foreign Trusts and Foundations

A beneficiary status in a foreign foundation (e.g. foundation according to the laws of Fürstentum Liechtenstein) or in a trust for a forced heir may qualify to satisfy forced heirship claims. Depending on the evaluation of the position according to the specific regulations, the respective forced heir may or may not have additional claims for an augmented compulsory portion. Referring to section III. B a position of a forced heir as a beneficiary of a foreign foundation or a trust has to be considered upon request of another forced heir for the calculation of the forced heirship proportion.

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