

Private Equity 2021

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Private Equity 2021

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Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Private Equity*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Russia. The report is divided into two sections: the first deals with fund formation in 13 jurisdictions and the second deals with transactions in 18 jurisdictions.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Atif Azher of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume, and also extend thanks to Bill Curbow of Simpson Thacher & Bartlett LLP, the former contributing editor, who helped to shape the publication to date.



London
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FORMATION

Forms of vehicle

- 1 | What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

The main vehicles used for private equity funds in Austria are limited partnerships (LPs), typically with a corporation as the general partner, or corporations, namely limited liability companies (LLCs) and joint stock companies (JSCs). Each of the aforementioned types of entity has a separate legal personality, but partnerships are transparent for tax purposes.

Limited partnerships

Typically, investors become limited partners in an LP. The general partner is usually a limited liability company that receives a fee for assuming unlimited liability. In some structures, the general partner manages the partnership; in other structures the partnership is managed by a separate management company, which is usually an LLC. As private equity funds in most cases fall under the Alternative Investment Manager Act (AIFMG), the entity managing the fund must be a legal person that is licensed or registered as an alternative investment fund manager (AIFM) under the AIFMG.

Corporations

Investors become shareholders in an LLC or a JSC. A LLC is managed by a managing director, a JSC by a managing board. JSCs (as opposed to LLCs) are required by law to also have a supervisory board. Managing directors, as well as members of the managing board, have to be natural persons. However, as with LPs, corporations can outsource management functions to a management company, which in most cases needs to be licensed or registered as an alternative investment fund manager (AIFM) under the AIFMG (see above).

In the past, sponsors also structured vehicles in the form of LLCs or JSCs as a medium-sized business financing company (MFG) under the Corporate Income Tax Act (KStG), as this gave rise to several tax benefits. MFGs had to fulfil certain requirements, such as higher capitalisation, participation of public bodies and certain investment restrictions. As those tax benefits no longer apply for vehicles founded after 2012, and ceased to apply in respect of participations held by existing MFGs (founded before 2012) by the end of 2015 (in special circumstances, by the end of 2018), the importance of the MFG has decreased significantly. The tax benefits for MFGs were reintroduced in 2017; however, only to a limited extent. In particular, the tax benefits only apply for minority investments in early-stage enterprises.

Forming a private equity fund vehicle

- 2 | What is the process for forming a private equity fund vehicle in your jurisdiction?

All of the aforementioned private equity fund vehicles need to be incorporated in compliance with Austrian corporate law. Basically, this requires the adoption of the articles of association or the conclusion of a partnership agreement, the appointment of management and the submission by the founders of an application for registration of the vehicle with the Companies Register. Austrian law has minimum share capital requirements for LLCs (€35,000, or €10,000 in the case of a privileged incorporation) and JSCs (€70,000). There are generally no minimum capital requirements for newly incorporated partnerships. The incorporation process generally takes between two and four weeks.

Most private equity funds qualify as alternative investment funds (AIFs) under the AIFMG, which implemented Directive 2011/61/EU on alternative investment fund managers. An AIF is defined as a collective investment undertaking that raises capital from a number of investors to invest it in accordance with a defined investment policy for the benefit of those investors and which does not use the capital for a direct operational purpose. In addition to the corporate law requirements, the formation of an AIF requires the prior approval of the Austrian Financial Market Authority (FMA) if the fund is managed by a licensed AIFM, or the registration of the fund with the FMA if the fund is managed by a registered AIFM.

Regulation (EU) No. 345/2013 (as amended) on European venture capital funds (the EuVECA Regulation) was introduced to create a new pan-European designation for small AIFMs, the European Venture Capital Fund (EuVECA). Austrian-based AIFMs may register an AIF as a EuVECA provided that they comply with the EuVECA Regulation and have supplied certain information with regard to themselves and the relevant AIF to the FMA. The main advantage the AIFM gains by doing so is the option to market the relevant AIF throughout the EU under the EuVECA designation to certain categories of investors defined in the EuVECA Regulation under an EU-wide passporting regime. Passporting allows a firm authorised under an EU single market directive to market the designated fund to certain qualified investors in another EU member state, on the basis of its home state authorisation.

Regulation (EU) No. 760/2015 on European long-term investment funds (the ELTIF Regulation) was introduced in November 2015 to channel capital raised through AIFs towards European long-term investments in the real economy. Austrian-based AIFM who have received approval to manage ELTIFs may register an EU-based AIF (or a compartment thereof) as an ELTIF provided that they comply with the authorisation requirements set forth in the ELTIF Regulation and submit an application to the FMA. The main advantage of such registration is the option to market the relevant AIF throughout the EU under an EU-wide passporting regime similar to the regime under the EuVECA Regulation (see above). Additionally, the designation of an AIF as an ELTIF allows its marketing to high net-worth individuals throughout the EU.

Both the EuVECA Regulation and the ELTIF Regulation are not compulsory; if an AIFM does not want to use the EuVECA or the ELTIF designation, then it does not have to comply with the EuVECA Regulation or, as the case may be, the ELTIF Regulation for a particular fund (or at all). If the AIFM chooses not to use the EuVECA or the ELTIF designation, national laws and EU regulations apply, such as national private placement regimes.

Requirements

- 3 | **Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?**

Austrian private equity fund vehicles have to be registered in the Companies Register and have to maintain a registered office in Austria. They are required by law to keep books and records. There is no requirement under Austrian law for a private equity fund vehicle to have a corporate secretary.

Most private equity funds fall under the AIFMG, which requires the AIFM to appoint a custodian for each AIF it manages. Either a bank or a securities services provider with its seat in the European Union can serve as the custodian. AIFs with the investment objective of acquiring control of non-listed companies can also utilise escrow agents (usually, public notaries or attorneys-at-law) as custodians.

Access to information

- 4 | **What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?**

As a private equity fund vehicle is typically registered with the Companies Register, certain information about the vehicle is a matter of public record. Besides general information available for all types of vehicles (such as registered office and authorised signatories), the level of information varies depending on the legal form. For LPs and LLCs (but not JSCs), the names of the investors and their shares are published in the Companies Register (note that in relation to LPs only a fixed liability amount (ie, the liability contribution) must be disclosed, which is usually entirely unrelated to the actual investment and can be as low as, for example, €1). LLCs and JSCs (but not LPs) also have to file their articles of association with the Companies Register, which can therefore be accessed by the public. As a consequence, vehicles structured as JSCs or LLCs typically have shareholder agreements (which need not be filed and thus are not public) besides the articles of association, to avoid public access to sensitive topics. Also, the annual financial statements (with varying levels of detail depending on the company type and size) have to be filed with, and can be inspected at, the Companies Register. Finally, each Austrian corporation or partnership is required to disclose its ultimate beneficial owners (ie, individuals holding 25 per cent or more in the entity) to the Beneficial Owners' Register, which can be publicly accessed (albeit with limited information disclosed).

In addition, if the vehicle qualifies as an AIF, the AIFM is subject to the publication requirements of the AIFMG. The AIFMG requires the submission of reports by the AIFM to investors (primarily, an annual report) and regulators (primarily, an annual report and monthly list of the AIFs under management). The AIFMG also contains specific reporting obligations for (private equity) AIFs (ie, AIFs aimed at acquiring control over non-listed companies other than SMEs and real estate special purpose vehicles). For such AIFs, the manager has to report any transaction, pursuant to which the stake of the AIF in a target

company reaches, exceeds or falls below 10, 20, 30, 50 or 75 per cent, to the target company, any known shareholders of the target company and the FMA.

Limited liability for third-party investors

- 5 | **In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?**

Investors in vehicles structured as LLCs and JSCs will only be liable for the portion of the share capital attributable to their respective shares (plus any additional predetermined contributions) as provided for in the articles of association). Austrian law does allow for the 'corporate veil' to be pierced only under specific circumstances (such as actual management of the fund by an investor).

For LPs, the liability of the limited partners is limited by the 'liability contribution', as published in the Companies Register, which usually is a nominal amount and thus substantially lower than the contributed equity. Similar to a corporation, investors in LPs will be fully liable, however, if they actually manage the LP.

Fund manager's fiduciary duties

- 6 | **What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?**

Managers of Austrian private equity funds are typically general partners of an LP or fulfil their function based on management agreements with the fund vehicle. Thus, the scope of the managers' duties and the extent of their liability as regards the private equity fund are based on the provisions of the partnership agreement or, as the case may be, the management agreement.

As most private equity funds qualify as AIFs, the fiduciary duties as set forth in the AIFMG also apply, which require the manager, inter alia, to act in the best interests of the AIF, the investors in such AIF and the integrity of the market; to introduce appropriate procedures to deal with conflicts of interest; to treat the investors in an AIF fairly; and to use the required diligence in the performance of his or her duties.

Unless the private equity fund is an AIF, it is possible to limit the liability of the fund manager as regards the investors or, respectively, the fund vehicle by contractual provisions (eg, excluding the liability for ordinary negligence). However, such contractual provision would still be subject to judicial review.

Gross negligence

- 7 | **Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?**

Austrian law differentiates between gross negligence and ordinary negligence. It is possible to exclude the liability of the manager for ordinary negligence in the partnership agreement (if the fund vehicle is an LP) or the services agreement (if the manager acts on the basis of a services agreement), unless the fund is an AIF.

Other special issues or requirements

- 8 | Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

There are various restrictions or issues of that type depending on the legal form of the vehicle and on whether it was set up as an AIF. By way of example, an Austrian AIF – unless qualified as a EuVECA or ELTIF – is only open to qualified investors. For Austrian fund vehicles, the articles of association or partnership agreement can contain restrictions on the transferability of shares or partnership interests or the expulsion of shareholders or limited partners. Also, the partnership agreement typically provides for a set procedure to remove the general partner.

Limited partnerships formed in other jurisdictions can in principle be converted into Austrian limited partnerships. Foreign private equity funds incorporated as corporations within the EU can be 'transferred' to Austria through either a cross-border merger or a migration. While the prior statements related to relocating the vehicles as such, sometimes only the place of effective management is transferred to Austria.

Fund sponsor bankruptcy or change of control

- 9 | With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

Austrian law does not require private equity funds to have an institutional sponsor. Provided that an institutional sponsor does not fulfil any function related to the operation of the private equity funds (such as custodian for an AIF), the bankruptcy of, or change of control in, the sponsor does not have any legal or regulatory consequences for the private equity fund. Obviously, any Austrian private equity fund associated with a certain institutional sponsor (which can be observed frequently) would face a reputational impact, if such sponsor had to file for bankruptcy.

REGULATION, LICENSING AND REGISTRATION

Principal regulatory bodies

- 10 | What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

Private equity funds established as alternative investment funds (AIFs) and their managers are subject to the ongoing supervision by the Financial Market Authority (FMA). The FMA has a wide range of inspection and audit rights both with respect to the AIFM and the respective AIF.

Private equity funds that are not AIFs are not subject to designated ongoing regulatory supervision (except by the competent tax office). For such private equity funds, investors only benefit from the information rights set forth in the articles of association or partnership agreement of the fund vehicle and the reporting obligations under accounting and corporate law (mainly, the disclosure of the annual financial statements).

Governmental requirements

- 11 | What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

Private equity funds established as AIFs and managed by a registered alternative investment fund manager (AIFM) need to be registered with the FMA. Private equity funds established as AIFs and managed by a licensed AIFM need to be approved by the FMA. Special registration requirements apply to AIFs designated as European Venture Capital Funds (EuVECA) or European long-term investment funds (ELTIFs).

Private equity funds not established as AIFs require no special registration, except for the registration with the Companies Register upon incorporation.

Registration of investment adviser

- 12 | Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

Private equity funds established as AIFs need to be managed by an AIFM. Austrian law distinguishes between AIFMs that require licensing by the FMA, and AIFMs that only have to register with the FMA. Licensed AIFMs do not need any additional licences for their management activities for the fund. Registered AIFMs may require a trade permit for asset managers. Special registration requirements apply for managers of ELTIFs.

Different licensing requirements apply for the promotion of interests in the funds.

Investment advisers typically require an MiFID licence, unless they are solely providing 'corporate finance advice' as further defined in the (still applicable) Committee of European Securities Regulators guidelines, in which case they would still require a trade licence if they are providing those services in Austria.

Fund manager requirements

- 13 | Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

Austria-based AIFMs generally require a licence of the FMA. There is a de minimis exception for managers of small AIFs with assets of less than €100 million (where leverage is used) or less than €500 million (where no leverage is used). Managers of such small AIFs are only subject to a few regulations of the Alternative Investment Manager Act (AIFMG). They do not require a licence and only need to register with the FMA.

A licensed AIFM needs to have a minimum capital of €125,000, if it is an external manager of AIFs. If the AIFM is the internal manager of an AIF, the minimum capital requirement is €300,000.

In addition, the AIFM needs to have sufficient equity to cover 25 per cent of its annual running costs.

Increased equity requirements apply for licensed AIFMs, if the assets under management exceed €250 million; in any case, the minimum capital is capped at €10 million.

The persons tasked with the management of the AIFM need to be sufficiently experienced and have to pass a 'fit and proper' test by the FMA, if so requested. At least two persons must be appointed by the AIFM as its managers.

In the application, the AIFM needs to provide information on shareholders holding qualified participations in the AIFM (ie, shareholdings exceeding 10 per cent), on any closely related entities (ie, a third party that holds a stake of more than 20 per cent of the AIFM or that controls the AIFM, or is controlled by the AIFM or in which the AIFM holds a stake

of more than 20 per cent), its business plan, its remuneration policy, its investment strategies, a description of any competencies delegated to third parties and information on the contractual basis pursuant to which it manages its AIFs.

The decision of the FMA regarding the licensing of an AIFM has to be passed within three months upon submission of the required documentation. If the AIFM intends to register an AIF as an ELTIF, he or she must apply to the FMA for prior approval.

Political contributions

14 Describe any rules - or policies of public pension plans or other governmental entities - in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

There are no such rules applying to managers or investment advisers (or their respective employees) in Austria. However, political parties are required to report any donation exceeding €50,000 to the Court of Audit, which will publish this information on its website. Additionally, Austrian political parties are barred from accepting donations over €2,500 from foreign entities or nationals. Of course, anti-bribery laws apply as well.

Use of intermediaries and lobbyist registration

15 Describe any rules - or policies of public pension plans or other governmental entities - in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund's investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

Austria introduced special legislation concerning the registration of lobbyists in 2012, which also requires companies utilising the services of lobbyists to register in a publicly accessible register maintained by the Federal Ministry of Justice. However, this legislation does not cover activities such as the marketing of a private equity fund.

Bank participation

16 Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

There are no such rules in Austria.

TAXATION

Tax obligations

17 Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

For the purposes of this question it is assumed that the fund vehicle is structured as a partnership, rather than as a corporation. Austrian partnerships are typically viewed as transparent for tax purposes, provided that the following is true:

- the partnership's sole activity qualifies as asset management for tax purposes; and
- it is not deemed to conduct a business or commercial operation.

Any income derived by the partnership is instead allocated to its investors and taxed at their level in accordance with the rules of the tax regime applicable to the respective investor.

Domestic individual investors are taxed as follows:

- capital gains are subject to a preferred tax rate of 27.5 per cent; and
 - dividends are subject to withholding tax at a rate of 27.5 per cent.
- Domestic corporate investors are taxed as follows:
- capital gains are taxed at a rate of 25 per cent if they relate to an Austrian-resident portfolio company and may be tax exempt if they relate to a foreign-resident portfolio company in which a minimum shareholding of 10 per cent is (indirectly) held for an uninterrupted period of at least one year (section 10 Corporate Income Tax Act (KStG)); and
 - dividends are tax-exempt if they related to an Austrian-resident portfolio company or an EU-resident portfolio company and may be tax-exempt if they relate to another foreign portfolio company (section 10 KStG).

Foreign individual investors are taxed as follows:

- capital gains are only taxable (at a rate of 27.5 per cent as of 1 January 2016) if the percentage of the investor's (weighted) shareholding in the Austrian portfolio company (through the partnership) has been at least 1 per cent during the previous five years. Double tax treaties usually restrict Austria's right to tax such capital gains (article 13, paragraph 5 of the OECD Model Tax Convention on Income and on Capital (MTC)); and
- dividends are subject to withholding tax at a rate of 27.5 per cent as of 1 January 2016 (subject to reduction under applicable double tax treaties).

Foreign corporate investors are taxed as follows:

- capital gains are only taxable (at a rate of 25 per cent) if the percentage of the investor's (weighted) shareholding in the Austrian portfolio company (through the partnership) has been at least 1 per cent during the previous five years. Double tax treaties usually restrict Austria's right to tax such capital gains (article 13, paragraph 5 of the MTC); and
- dividends are subject to withholding tax at a rate of 25 per cent in the case where the exemption for foreign investors that are corporations resident in an EU member state is not applicable (but will usually be subject to reduction under applicable double tax treaties).

Local taxation of non-resident investors

18 Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

If the fund is structured as a limited partnership not deemed to conduct a business, non-resident investors are generally not required to file tax returns in Austria, subject to the following rules. If a capital gain is subject to taxation in Austria, the investor will be obliged to file a tax return, whereas in the case of dividends no reporting obligation is triggered. A refund, an exemption or a reduction concerning withholding taxes will also require filings with the tax authorities. Special forms provided by the Austrian tax authorities are used for the proof of residence outside Austria (and further substance requirements), which have to be submitted along with the filing with the tax authorities.

Local tax authority ruling

19 | Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

While it is certainly desirable to obtain a ruling from the Austrian tax authorities with respect to the tax treatment of the fund vehicle, the tax authorities are, however, rather reluctant to grant such tax rulings. Such rulings are generally not binding, unless governed by the ruling regime (which covers reorganisation, tax groups and transfer pricing, aspects of international law (beginning 1 January 2019), VAT law (beginning 1 January 2020) and a potential application of the abuse of law provisions (beginning 1 January 2019)). The taxpayer may, however, be protected by the principle of equity and good faith. Based thereon, an assessed tax shall be waived if the party has made dispositions or transactions in reliance on the tax ruling and the following is true:

- the ruling has been rendered by the competent tax authority;
- the ruling is not evidently incorrect; and
- the incorrectness of the ruling was not easily noticeable for the party.

There are no special tax rules relating to investors that are tax residents in Austria.

Organisational taxes

20 | Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

If the partnership is structured with no individual (but only a corporation) as general partner, as is usually the case, equity contributions had generally been subject to capital duty in the amount of 1 per cent. The same was true for fund vehicles structured as corporations. Since 1 January 2016, capital duty has no longer been levied. Another area to consider is stamp duties, in particular in relation to guarantees that the formation documentation may entail. In this context, it should be noted that surety agreements (including any form of assumption of a debt as joint debtor) are subject to stamp duty of 1 per cent of the secured amount provided that the surety is of an accessory nature, which means that the guarantor may avail itself not only of all defences that it personally has against the creditor, but also of all defences that the debtors of the secured debt have against the creditors. If the guarantee, however, is of an abstract nature, which means that the guarantor has to pay upon first demand and has recourse only to those defences that arise from the guarantee itself, then such transaction is not subject to stamp duty. Therefore, guarantee wordings explicitly stating that a specific guarantee is meant to be abstract are commonly used.

Special tax considerations

21 | Describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

'Carried interest', which is defined as a compensation of a partner of an asset management partnership received because of outstanding contributions to a successful management of the investments, is included in the investment income according to the Department of International Taxation of the Austrian Ministry of Finance (EAS 3280 as of 14 May 2012; EAS 2698 as of 6 February 2006 and BMF 15 December 2008 (BMF 010221/3364-IV/4/2008)). Income qualifying as investment income received by an individual who is subject to unlimited taxation in Austria is taxable at the special tax rate of 27.5 per cent (as of 1 January 2016).

Despite this administrative guideline, a case-by-case analysis is recommended, as the line between (self-)employed income and investment income is a rather unclear one.

The management fees received by a partner of an asset management partnership are not subject to VAT. According to the Austrian tax authorities, the general partner of a partnership is not an entrepreneur; his or her services are supplied in the exercise of a corporate function and not as a result of an exchange of services. If the fund vehicle is a corporation, however, the fees of a managing shareholder will usually be subject to VAT, unless the manager is employed by the corporation.

Tax treaties

22 | List any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

Austria has entered into 90 tax treaties (as of 1 January 2020). According to the established practice of the Austrian tax authorities, a fund vehicle structured as a tax-transparent partnership is generally not entitled to treaty benefits. Rather, the investors themselves may rely on the tax treaty directly. If the fund vehicle is structured as a corporation, tax treaties will generally apply to the corporate fund vehicle itself.

Other significant tax issues

23 | Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

There are no other significant tax issues relating to private equity funds. However, there is a special tax regime for investment funds in Austria. A private equity fund should normally not be subject to this regime.

SELLING RESTRICTIONS AND INVESTORS GENERALLY

Legal and regulatory restrictions

24 | Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

Offers and sales of interests in private equity funds formed in Austria are subject to the following selling restrictions, which depend on the category of the private equity fund:

- alternative investment funds (AIFs) managed by a licensed alternative investment fund manager (AIFM):
 - interests in the fund may only be offered or sold after the AIF is approved by the Financial Market Authority (FMA); and
 - interests in the fund may be offered or sold to private investors, if the prerequisites of sections 48 and 49 Alternative Investment Manager Act (AIFMG) are met, except if the fund is registered as follows:
 - as a European Venture Capital Fund (EuVECA): in this case, it may be offered to private investors subject to certain restrictions (in particular, a minimum investment commitment of €100,000 and a written acknowledgment of the risks associated with the investment by the private investor); or
 - as a European long-term investment fund (ELTIF): in this case, it may be offered to private investors subject to certain restrictions (in particular, an offer is only possible to private investors having an investment portfolio of at least €100,000 after such investor has received appropriate investment advice);

- AIFs managed by a registered AIFM:
 - interests in the fund may only be offered after the AIF is notified to the FMA; and
 - interests in the fund may not be offered or sold to private investors, except if the fund is registered as an EuVECA; in this case, it may be offered to private investors subject to certain restrictions (in particular, a minimum investment commitment of €100,000 and a written acknowledgment of the risks associated with the investment by the private investor); and
- private equity funds outside of the AIFMG:
 - any public offer of interests in private equity funds outside of the AIFMG requires the publication or approval of a prospectus by the FMA, or both, unless a private placement exemption applies;
 - the private placement exemption applies, in particular, for the following:
 - offers to qualified investors only;
 - offers with a minimum investment amount of €100,000; and
 - offers to less than 150 investors; and
 - even if the private placement exemption applies, the intended offer has to be notified to the issue register, maintained by the Austrian Control Bank.

Types of investor

- 25 Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

There are no additional restrictions on the types of investors that may participate in private equity funds.

Identity of investors

- 26 Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

For fund vehicles established as limited partnerships or limited liability companies, any change in the shareholders has to be notified to the Companies Register. No such requirement exists with respect to joint stock companies, provided that there is more than one shareholder. Should this change result in a change of the ultimate beneficial owner, the change has to be notified to the Beneficial Owners' Register.

Licensed AIFMs are required to report any changes to their legal status of the time when their licence was granted, in particular any changes in the management or any change in qualified owners (ie, owners holding more than 10 per cent of the capital or voting rights in the AIFM).

Otherwise, there are no special requirements only applicable to private equity funds as regards the notification of the identity of investors or the composition of ownership.

Licences and registrations

- 27 Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

There are licence requirements for persons offering interests in an Austrian private equity fund. The actual licence required depends on the legal category of the private equity fund. Different licences are required depending on whether the private equity fund is an open-ended AIF, a closed-ended AIF or a non-AIF private equity fund.

Open-ended AIFs can be offered by banks, securities firms or securities services firms.

Closed-ended AIFs (as well as non-AIF private equity funds) can be offered by banks, securities firms or persons or entities with a trade permit for asset managers.

Money laundering

- 28 Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

The provisions of the Financial Market Anti-Money Laundering Act, which will be amended shortly to implement the provisions of the fifth EU Anti-Money Laundering Directive, also apply to AIFMs. Consequently, AIFMs have to comply with enhanced customer due diligence requirements (on a risk-based approach) to identify the investors (and their beneficial owners) in the fund.

For managers of private equity funds that are not AIFs, no specific money laundering rules exist, unless the managers themselves are registered as, for example, securities services providers, in which case they also are subject to the Financial Market Anti-Money Laundering Act.

EXCHANGE LISTING

Listing

- 29 Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

Only shares of a joint stock company (JSC) (but not equity interests in a limited liability company or a limited partnership) can be listed on a regulated market of the Vienna Stock Exchange. In our experience, it is not customary to list private equity funds in Austria.

Restriction on transfers of interest

- 30 To what extent can a listed fund restrict transfers of its interests?

A listing of a private equity fund is not common in Austria. Transfer restrictions of shares of a JSC can – and typically are – only included in connection with rights offerings.

PARTICIPATION IN PRIVATE EQUITY TRANSACTIONS

Legal and regulatory restrictions

- 31 Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

Restrictions primarily apply to private equity funds established as medium-sized business financing companies. Also, private-equity funds established as an alternative investment fund (AIF) will typically be subject to the post-investment restrictions of section 28 of the Alternative Investment Manager Act for a period of 24 months following the acquisition of control of a (listed or unlisted) target. Also, certain investment restrictions apply to AIFs designated as European long-term investment funds.

There are no other restrictions specific to private equity funds.

Compensation and profit-sharing

- 32 Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

If the sponsor has an equity interest in the fund, any compensation or profit-sharing arrangement would have to be on an arm's-length basis. Otherwise such compensation or profit-sharing arrangement would be deemed to violate the prohibition of the return of equity, and is at risk of being declared null and void.

UPDATE AND TRENDS

Key developments of the past year

- 33 What are the most significant recent trends and developments relating to private equity funds in your jurisdiction? What impact do you expect such trends and developments will have on global private equity fundraising and on private equity funds generally?

Following general elections in 2019, a new Austrian government took office in January 2020 and announced its intention to implement a programme to provide incentives for private equity investment into start-ups and small and medium-sized enterprises, which includes potential tax incentives as well as a new corporate form (akin to a Luxembourg SICAV) for alternative investment funds. Given the effects of the covid-19 pandemic, not much headway was made in this respect. There is an expectation that this programme will be rekindled in 2021, to support capital-raising efforts by Austrian companies to combat the effects of the current economic downturn.

Coronavirus

- 34 What are some of the significant developments and initiatives relating to the covid-19 pandemic that have impacted private equity fund formation?

There have not yet been any developments and initiatives relating to the covid-19 pandemic that have impacted private equity fund formation. It remains to be seen whether the Austrian government will rekindle the previously announced initiative for private equity investments in 2021.

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