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**Introduction**

As member of the Organisation for Economic Co-operation and Development (OECD), Austria subscribes to the principles contained in the OECD Guidelines on transfer pricing. In addition, the Austrian Ministry of Finance published Transfer Pricing Guidelines (*Verrechnungspreisrichtlinien 2010*, VPR 2010) in November 2010 with the intention to facilitate the implementation of the OECD Guidelines in Austria. The publication of VPR 2010 was widely anticipated since they harmonise the tax authorities’ approach regarding the assessment of transfer pricing cases. Transfer pricing is becoming increasingly important, and this is reflected by the increasing number of tax inspectors specialising in international transactions.

**Statutory rules**

Austria has general statutory rules which are aimed at dealing with transfer pricing. Consequently, the statutory authority for addressing transfer pricing issues is found in the application of general legal concepts, such as substance over form and anti-avoidance regulations, as well as the application of other regulations to deal with issues such as fictitious transactions, hidden capital contributions and constructive dividends. The requirements to apply the arm’s-length principle on inter-company dealings and for adequate documentation of transfer prices are constituted in Article 6 Item 6 Income Tax Act and Articles 124, 131 and 138 Federal Fiscal Code, respectively.

**Other regulations**

The OECD Guidelines were published in Austria as administrative decrees. Although an administrative decree does not have the force of law, this is nevertheless an important indication of the acceptance of the principles contained in the OECD Guidelines and the approach to transfer pricing that the Austrian authorities are likely to adopt.

The Austrian VPR 2010 have been published for the general public, however, they primarily aim at providing guidance to tax inspectors on how to handle transfer pricing cases by interpretation of the OECD Guidelines. As a result, VPR 2010 do not represent comprehensive guidelines on the determination and documentation of transfer prices, but refer back in many aspects to formerly published opinions of the Ministry of Finance in connection with specific questions of international tax issues, the so called Express Answer Services (EAS).

No other binding regulations concerning transfer pricing have been published. If, however, guidance is required on a particular transfer pricing problem, then a taxpayer may submit the facts of that problem to the Austrian Ministry of Finance to obtain comment on its legal aspects (an EAS inquiry and EAS reply, respectively). It should be
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noted that, although the reply of the ministry is not legally binding, these replies are published in professional journals and are referred to in practice.

**Legal cases**

Information on legal cases and the legal aspects of transfer pricing issues is set out as follows:

**Administrative High Court decisions**

Any decisions of this court are published without specific details that could identify the parties involved. Though court decisions on transfer pricing cases are scarce, some decisions are worth mentioning:

- The court ruled that a precise and detailed description of services rendered by a foreign group company to a domestic recipient is required for the service or licence fees to be tax-deductible. Thereby, the more incomprehensible the services performed are, the more detailed the documentation has to be. Specifically, consulting services, the transfer of know-how and the procurement of business contacts require a very detailed description as well as documentation for the related expenses to be deductible for tax purposes.
- The court ruled again that a precise and detailed description of the nature and market value of all inter-company services rendered to a domestic recipient is required for the fee paid for those services to be tax-deductible. A simple submission of a large set of files consisting of several (standalone or incoherent) documents cannot be accepted as sufficient. The documents have to satisfactorily demonstrate and to clearly represent in a comprehensible way the content and the market price of each service received.
- The court emphasised that inter-company service payments are tax-deductible only if a willing-to-pay test is passed. If the services could have been obtained at lower cost from third-party service providers, the willing-to-pay test is deemed to be failed.
- A German company engaged in the sales and support of software failed to allocate profits to its Austrian permanent establishment (PE). The Austrian tax authorities stated that the PE acts as a service provider and determined the arm’s-length compensation for this function based on estimations applying the cost-plus method. The Administrative High Court of Austria decided that such adjustments, especially the determination of the mark-up, made by the tax authorities cannot be based solely on vague assumptions and experience. The court stated that the tax authorities have to prove the accuracy of their assumptions and must grant access to the information on how such adjustments were computed, including the requirement to provide detailed information on the comparables used to determine the arm’s-length transfer price.

**Tax Appeals Board decisions**

In one of its recent decisions, the Tax Appeals Board did not accept a flat rate remuneration for several services (marketing, financing, personnel, etc.) determined as a percentage of the Austrian service recipient’s turnover. Although the board acknowledged that the Austrian company needed the services for its operation, the actual provision of these services was not proved credibly by the taxpayer. In addition, the Austrian service recipient should be in the position to provide evidence on the actual provision of services by the group companies and the benefit arising thereof.
Replies from the Austrian Ministry of Finance (Express Answer Service replies)
EAS replies are also published without company-specific data but with a short summary of the relevant facts. Recently, several EAS replies have been significant, details of which are as follows:

• In the context of the reorganisation of an Austrian distribution company into a commission agent or commissionaire, the Ministry of Finance issued a letter ruling that deals with goodwill aspects. The Ministry stated that if the subsidiary being transformed does not receive any compensation for investments with respect to customers, this might be deemed to deprive the subsidiary of the customer base it has created throughout the past, as a result, constituting an infringement of the arm’s-length principle. This is the view conveyed by some OECD member countries in the course of an OECD working group on commissionaire arrangements. As long as these OECD working papers are not final, the Austrian Ministry of Finance, however, will not publish further general guidance on goodwill issues, but explicitly refers such cases to the local tax office.

• In connection with the reorganisation of an Austrian distribution company into a commissionaire, the Austrian Ministry of Finance stated that the Austrian distribution company downsized to a commissionaire constitutes a PE of the French parent company. Under the Austria–France Double Tax Agreement (DTA), a French production entity has a PE in Austria when it sells its products through a dependent agent that has binding authority for sales contracts. According to the ministry, the dependent status is substantiated by the fact that the Austrian subsidiary performs the sales activity for the French parent company only and it has to follow the French producer’s instructions with regard to the product sales.

• As part of a new group strategy, a Germany-based parent company closed its manufacturing subsidiary in Austria and transferred the production activity to Poland. According to the Austrian Ministry of Finance, the Austrian company should be compensated for the estimated future profit potential lost through the restructuring. To calculate the arm’s-length remuneration, it needs to be analysed which assets, tangibles as well as intangibles, were transferred to the Polish company. Furthermore, it has to be defined which entity receives the economic benefit out of the restructuring to be able to determine by whom (i.e. the German parent company, the Polish company or both jointly) the compensation has to be borne.

• In a recent EAS reply the Austrian Ministry of Finance also deals with downsizing. As a consequence of a group wide reorganisation, an Austrian sales entity will purchase the products not from its existing supplier in the group but from a Swiss principal. In addition the local marketing functions are transferred to the Swiss principal. According to the Ministry, the significant increase of the Austrian sales entity’s purchase price cannot be regarded as at arm’s length under the new structure since only the marketing functions and no other valuable functions, assets or risks are transferred. The Austrian sales entity should compensate the Swiss principal for the marketing functions to the extent of its marketing cost savings resulting from the restructuring.

• A group company acts as an intermediary reseller between an Austrian manufacturer and a processing company in Luxembourg. The reseller has the same address as the processing company and does not have any personnel. The Austrian Ministry of Finance challenged the arm’s-length nature of the profit allocated to the reseller in an EAS reply. The fact that the price paid by the reseller matches the price the processing company negotiated with third parties does not justify the
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application of CUP method. In case of the CUP method the comparison has to be conducted with third parties, however the Austrian manufacturer sold its products to related parties.

• In general, services (e.g. accounting or administrative services) rendered by a group company engaged in the insurance branch to its affiliates should be charged with a mark-up. Only if the service constitutes a mere ancillary service of the service provider a mark-up is not required. Apart from that, charging the services at cost is only possible if a cost sharing agreement is in place. The main requirement, however, is that the services are rendered in the interest and for the benefit of all pool members.

• A parent company located in the Czech Republic seconded one of its managing directors to its subsidiary in Austria, where he spends 50% of his working hours. The legal opinion of the VPR 2010 (Rz 164) concerning the lease of personnel is that the assigning parent company renders a passive service and does not create a permanent establishment in Austria. According to the Austrian Ministry this opinion applies also when a company seconds its managing director. Furthermore, the charging of secondments of managing directors is possible without any mark-up on the current costs if the secondment can be regarded as an ancillary service of the assigning party to the Austrian subsidiary.

• When an Austrian enterprise carries on its business through a PE in Saudi Arabia the attribution of profits to the latter should be based on the separate entity approach. Therefore, business relations between the head office and the PE have to be at arm’s length and an appropriate transfer pricing methodology has to be applied. The separate entity approach is applied with certain restrictions. Instead of using transfer pricing methodology a mere cost allocation method can be employed if the head office has incurred payments for the PE (e.g. according to such cost allocation concept, salary paid by head office to employees working for the permanent establishment are deducted in computing the profits of the permanent establishment). Additionally, executive and general administrative expenses incurred for the PE have to be allocated on an appropriated pro rata to the PE. As the cost allocation concept does not require payments between the two parts of the single enterprise it cannot entail a withholding of tax at source.

• Since the update 2010 of the OECD MTT the cost allocation concept has been abolished, this means that the arm’s-length principle prevails. This requires the establishment of accounts for internal transfer pricing receivable and transfer pricing payable which at some point in time have to be settled through real payments. However, the separate entity approach is only a fiction and cannot disregard the fact that the PE and the head office are only two parts of one single taxpayer, which is why a single entity cannot conclude real contracts with itself. Therefore, source taxation on purely internal flows of payments from one part of the enterprise to another is not permitted.

• With reference to financial activities VPR 2010 states: ‘In accordance with the general principles for determining transfer prices the comparable uncontrolled price method (CUP method) is also to be preferred to other transfer pricing methods in case of inter-company financing transactions if comparables of third parties can be found on the money or capital market. If the CUP method is applied and if independent commercial banks are referred to for this purpose, it needs to be ensured that the conditions of these financing structures are comparable or that at least adjustments for any differences are quantifiable (2.7/ 2.14 rev no. 2 OECD TPG)’.
However, a comparison without restrictions of inter-company financing transactions to those of commercial banks might generally not be possible as their goals deviate. While a commercial bank strives for investing the money received from their customers at the highest return, a group aims at identifying liquid funds and forwarding them depending on the requirements of the group so that the individual group companies achieve their goals. Banks therefore aim to generate profit by granting loans whereas group financing companies strive to secure liquidity as well as to optimise its funding and interest outcome.

As a result the credit interest rate of independent commercial banks can only be used as an upper limit of an arm’s-length interest rate. Whether this limit provides for a comparable of the deductible interest expenses depends on the individual circumstances of the case, which must be assessed in the light of all relevant conditions by the responsible tax office. Moreover, the evaluation needs to take into account factors such as currency, term, creditworthiness of borrower, inevitable currency risk, third party refinancing costs. It needs to be acknowledged that the ultimate parent company is able to directly influence the capital structure of the group companies, thus influences the creditworthiness of them. The provision of securities for loans is under the control of the ultimate parent company, too. As a consequence, according to a German Court decision only the interest rates for secured loans provide for an upper limit (BFH of 21.12.1994, I R 65/94).

If the group financing company has sufficient own liquidity, the deposit interest rate shall be used as benchmark (BFH of 28.2.1990, I R 83/87, BStBl. II 1990, 649 and BFH of 19.1.1994, I R 93/93, BStBl. II 1994, 725). In such a case it cannot be justified that the foreign related creditor earns more by investing its excess liquidity in an associated enterprise than in a bank.

In order to determine the arm’s-length range (1.45/3.55 rev OECD TPG) of interest rates a comprehensive functional analysis is necessary which also encompasses the foreign group financing company’s capital structure. However, the range between the upper limit of the credit interest rate and the lower limit of the deposit interest rate is not comparable to the range of acceptable transfer prices in terms of the OECD TPG. The range of acceptable transfer prices in terms of the OECD TPG is either in the direction to the lower or upper limit depending on the individual functional circumstances. In order to determine if the yield resulting from the difference between credit and deposit interest rate is attributable to creditor or debtor, the risk allocation within the group has to be taken into account. In case of doubt the German judicature can be followed, according to which the creditor and debtor share the range between the credit and deposit interest rate (BFH of 19.1.1994, I R 93/93, BStBl. II 1994, 725).

The above mentioned considerations apply to both group financing companies which are located within the territory of a tax haven and outside the territory of a tax haven. However, in case a tax haven is involved in financing transactions a suspicion of an impermissible profit shift would be more relevant compared to other financing structures. As a result, if a tax haven is involved, it needs to be ensured that the relationship is transparent and properly documented right from the beginning (VwGH of 25.05.93, 93/14/0019).

If a local group company receives funds from a foreign group financing company which is located in a tax haven and the suspicion of an impermissible profit shift cannot be disproved, the remuneration shall be based on the proven costs. For this purpose
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the proven and tax deductible refinancing costs are to be compensated as well as remuneration for the service rendered is to be made. In case of tax evasion the legal consequences according to Article 22 Paragraph 2 Federal Fiscal Code will be triggered.

If the loan is provided in a foreign currency, the interest rates of this foreign currency are to be referred to if third parties in comparable circumstances would have agreed on a loan in this foreign currency. If the foreign currency loan could have been taken out at a cheaper interest rate on another capital market, then this interest rate shall be applied to determine the arm’s-length interest rate.

If an Austrian parent company issues an interest-free loan to its foreign subsidiary and this is not qualified as a hidden capital contribution in neither of these countries, then according to the arm’s-length principle it is expected that interest is charged from the parent company to the subsidiary. If this does not happen and cannot be justified through extraordinary circumstances, Article 9 of the DTA provides for a profit adjustment in Austria and a corresponding foreign adjustment.

• According to VPR 2010 cash management is the daily transfer of current accounts’ balances of the individual group companies to a pool account of a group company which is responsible for the cash management. As a result, only the resulting balance needs to be financed (or is available for investments) for the group. The group therefore saves paying credit interest on the individual group companies’ accounts while other group companies earn low deposit interest. These synergies must be allocated to all participating group companies after appropriate costs were charged. The service rendered by the cash-management-provider can be remunerated based on the cost plus method (CP method). If the cash-management-provider has to bear actual risks (e.g. due to a constant and substantial refinancing obligation at an independent third party) this needs to be remunerated adequately.

• Regarding framework agreements for inter-company transactions, transfer prices dictated by the parent company may be considered to be at arm’s length, provided this is properly documented. This documentation has to contain details concerning the comparability with third party arrangements. The Austrian provisions imply that a proper documentation of the transactions should be prepared at the latest when the tax returns are filed. The Ministry recommends further that a provision obliging the parent company to assist in providing information requested during a tax audit should be included in the framework agreement.

• With respect to the method selection, sales companies engaging in comparable transactions with third parties in their home markets may use the gross or net profit margin of these transactions as internal comparables. In case a local company only pursues inter-company buying and selling in foreign markets, internal comparables obtained from the home market may be used if necessary adjustments are feasible. If the distribution chain involves several group companies with routine functions, the resale price method may also be used for the whole chain. The CP method, however, is not regarded as adequate in such situations.

• Sarbanes Oxley (SOX)-related costs arising in connection with the implementation of an internal control system in a US-based group are deemed not to be deductible with the Austrian subsidiary. The Austrian Ministry of Finance stated that SOX-related costs have to be seen in connection with the control function of the US parent company. Such costs can be borne by the Austrian subsidiary only if (and to that extent) it benefits from the internal control system. Such benefits have to be specifically measurable.
• The Austrian Ministry of Finance has interpreted a similar view in relation to costs incurred through the implementation of a new software system within the whole group. These costs are not a priori tax-deductible in Austria. The company has to prove that changing its software system is needed and directly benefits from the company. Incidental benefits of the group-wide implementation such as an increasing efficiency or synergy effects do not constitute such direct benefits. As already described previously, the benefits of the Austrian group entity have to be specifically measurable.

• The Austrian Ministry of Finance recently commented on the EU-Masterfile approach, which is generally accepted for transfer pricing documentation purposes in Austria. Specifically, the Ministry referred to the fact that the Austrian local file should be prepared in German. However, the tax authorities could have already asked for a certified German translation before this EAS reply was issued due to a provision in the Federal Fiscal Code. In practice such requests are rarely the case and English local files are generally accepted.

**Burden of proof**
As a matter of principle, the tax authorities carry the burden of proof. If the tax authorities challenge a tax return, the taxpayer does not have to prove the accuracy of the return; rather, the tax authorities would have to prove the contrary. However, based on the fact that tax authorities are entitled to ask for the documentation of transfer pricing, if an accurate documentation is not provided, the burden of proof switches to the taxpayer. In addition, in international tax cases, the taxpayer bears a special liability of cooperation (see Tax audit procedures).

**Tax audit procedures**
In Austria, it is not usual for the tax authorities to carry out an audit specifically in respect of transfer prices alone. However, recent experience shows that already at the beginning of a tax audit, inspectors request a description of the transfer pricing system in place. Typically, transfer prices represent one part of a tax audit. If transfer pricing or benchmarking studies exist, they have to be provided to the tax auditors. The tax authorities have special experts who are retracing and reviewing the correctness and comparability of such studies.

**Selection of companies for audit**
The tax authorities aim at auditing companies exceeding certain size thresholds on a three- to five-year basis.

For smaller companies, there are three possible ways for a company to be selected for a tax audit:

1. Time – Those companies that have not been audited for an extended period are likely to be selected.
2. Industry group selection – Tax authorities might focus on certain industries from time to time.
3. Individual selection – Some companies are selected individually, based on ‘professional judgement’ or exceptional fluctuations in key ratios.
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The provision of information and duty of the taxpayer to cooperate with the tax authorities

The taxpayer has a general duty to cooperate with the tax authorities, although decisions of the Administrative Court indicate that there is a limit to this duty insofar as the tax authorities cannot demand impossible, unreasonable or unnecessary information from the taxpayer.

There is an increased duty to cooperate where transactions with foreign countries are involved. Under this increased duty to cooperate, the taxpayer has a duty to obtain evidence and submit this to the tax authorities. The possibility of administrative assistance from other (foreign) tax authorities does not suspend the duty of the taxpayer to cooperate with the Austrian authorities.

The audit procedure

There is no special procedure for transfer pricing investigations, which are seen as part of a normal tax audit. In this procedure, the tax auditors visit the company’s premises, interview the relevant company personnel and inspect the company’s books and records. As far as transfer pricing is concerned, tax inspectors increasingly request a summary of the transfer pricing system applied, and ask for the transfer pricing documentation.

It should be noted that the conduct of the taxpayer during the tax audit can significantly affect both the outcome of the inquiry and the amount of any adjustment. If the taxpayer is able to maintain an objective approach and can provide good documentary evidence to support the transfer pricing scheme in place, he or she will have a much better chance of defending it against any adjustments proposed by the tax authorities.

Revised assessments and the appeals procedure

After the end of a tax audit, the tax inspector usually issues a ‘list of findings’, which is discussed with the company and/or the tax adviser. If the company agrees to the findings, the list forms the basis for the revised assessments covering the audited years. If, however, agreement could not be reached on any particular issues, then the tax office would still issue revised assessments in accordance with the inspector’s findings but the company could file an appeal against the assessments.

If an appeal is filed by the company, it will be heard by the Tax Appeals Board (Unabhängiger Finanzsenat). The company may file a further appeal against a decision of the Tax Appeals Board with the Administrative High Court (Verwaltungsgerichtshof).

Additional tax and penalties

Despite the focus on structures aiming at tax evasion, there are no specific transfer pricing penalties stipulated in VPR 2010. However, transfer pricing adjustments have a direct effect on the corporate income tax base and late payment interest may also be assessed if corporate taxes are not paid by the statutory deadline. If, however, the tax liability relating to past years is increased as a result of a tax audit, interest will be charged on the difference between the tax paid and the final tax assessed. The period for which interest is levied starts from October following the assessment year and lasts for 48 months at a maximum. The interest rate amounts to 2% above the base interest rate. If tax is paid late, a late payment surcharge will be imposed, amounting to 2% of the unpaid amount. An additional surcharge of 1% would be levied if tax is not paid.
within three months as of the date it has become due and an additional 1% in case of late payment of the second surcharge. This surcharge is not tax-deductible, and no supplementary interest will be charged.

In addition, with the amendment of the Act on Tax Offences 2010, the regulations for infringement of tax law covering fines and imprisonment have been tightened. According to the Act of Tax Offences 2010 fines and imprisonment charges may be assessed in cases of tax evasion and tax fraud. Moreover, fines are assessed on negligent and minor tax offences. Further, a tax offence is not only committed by the perpetrator, but also by anyone who incites another person to commit an offence.

**Resources available to the tax authorities**
Within the tax audit department, there are units that specialise in international transactions including transfer pricing. The staff in these units receives special training, which includes participating in audits and training courses in other countries. Indeed, the number of these specialised auditors has been constantly increasing in recent years: In a recent reorganisation within the tax audit department, a specialist division consisting of 17 experts has been formed, whereof seven persons are responsible for international transactions, including transfer pricing. Inquiries are normally undertaken by tax inspectors from the tax audit department without the assistance of lawyers, economists or other kinds of experts. The tax authorities have access to the Orbis/Amadeus database. Mutual agreement procedures are conducted by the Ministry of Finance.

**Use and availability of comparable information**

**Use**
According to the VPR 2010 the taxpayer has to prepare reasoned documentary evidence of the issues that were considered when determining the transfer prices. This documentation should be prepared before any transactions occur using those transfer prices.

The Austrian tax authorities have gained much experience lately by increasing the number of transfer pricing audits. They have recently formed a strict view on what constitutes a reasonably reliable process for using databases to provide comparable data on arm’s-length margins or profits. Critical elements of the search strategy are independence criterion (25% preferred), start-ups, loss-makers, geographic region (EU (27) plus Switzerland, Norway and Island are generally accepted), size, consolidated data and intangibles. In line with the increased focus on comparability in the OECD Guidelines’ updated chapters I-III, VPR 2010 stipulate that each of the five comparability factors needs to be considered in detail. Although the VPR 2010 do not refer to the nine-step process introduced in the update of the OECD Guidelines, this process is generally considered required for preparing benchmarking studies from 2010 on.

Similarly to the revised OECD Guidelines, VPR 2010 state that the application of interquartile ranges to narrow the range of transfer prices is an internationally accepted approach. By contrast, however, VPR 2010 provide for an adjustment to the median if a taxpayer’s transfer prices deviate from the acceptable range of transfer prices.
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**Availability**
If a company is legally obliged to publish its financial statements (such a requirement exists for all companies other than very small partnerships and individual enterprises), then there is access to the financial information contained therein; otherwise, access to such information is not normally publicly available.

If the transfer pricing policy of a company were being investigated by the tax authorities, it would be possible for advisers to use information on comparable companies in defence of the policy of the investigated company. Such information is, however, extremely difficult to obtain. Furthermore, tax advisers are bound to keep confidential any information obtained on other clients in the course of their work. Tax authorities certainly have access to more information than advisers, and this would be obtained through investigations into other taxpayers’ transfer pricing policies; however, the tax authorities are bound to keep this information confidential.

**Risk transactions or industries**
There are no particular transactions that run a higher risk of being attacked than any other transactions. However, it can be stated that transactions with group companies based in low-tax jurisdictions, cross-border transfer of functions, assets or risks, financing transactions as well as inter-company services and licensing are regularly examined.

**Limitation of double taxation and competent authority proceedings**
If a DTA exists that contains provisions for mutual agreement procedures, it is very likely that these procedures would be used to avoid double taxation. According to information obtained from the Ministry of Finance, there are only a few cases where such an agreement between the tax authorities involved could not be reached. In such cases or where there is no DTA, settlement could be achieved under the Arbitration Convention (the convention re-entered into force retroactively as of 1 January 2000). Currently the convention is applicable between Austria and the 14 other pre-2004 European Union Member States except Greece. Otherwise, Article 48 of the Austrian Fiscal Code and a decree of the Ministry of Finance provide unilateral measures to avoid double taxation where no DTA is applicable. Taxpayers subject to taxation on Austrian-sourced income may file an application for a double taxation relief to the Ministry of Finance, and it may be granted at the Ministry’s discretion.

The competent authority procedure may be initiated by the taxpayer, too. In case no competent authority procedure clause is given under the respective DTA, double taxation may be avoided by administrative assistance proceedings (EC Administrative Assistance Directive and EC Administrative Assistance Act) carried out by the tax audit authorities.

**Advance pricing agreements**
There has been a formal procedure for obtaining unilateral advance pricing agreements (APAs) in Austria since 1 January 2011. The Austrian Ministry of Finance published the decree to the new advance ruling regulation on the 2 May 2011. The Ministry issued a law that enables taxpayers to ask for binding APAs regarding certain issues in taxation such as transfer pricing. These regulations allow taxpayers for the first time to apply for binding, unilateral APAs in Austria. Bilateral agreements remain possible under the mutual agreement procedure clause of the applicable DTA.
applying for binding rulings regarding transfer prices, such applications are also possible for reorganisations and group taxation. Taxpayers wanting to have a binding ruling must submit a written application which includes the relevant facts, the critical assumptions as well as a legal assessment of the facts. Administrative fees between Euro (EUR) 1,500 and EUR 20,000 will be charged for the processing of the application of such APAs depending on the company’s size.

Anticipated developments in law and practice
No significant changes in law are expected in the near future. In practice, due to VPR 2010 and the formal APA legislation, the increasing importance of transfer pricing issues with the tax authorities is noticeable.

Liaison with customs authorities
Tax authorities and customs authorities may exchange information. Experience suggests, however, that different authorities do not in fact deal very closely with each other where transfer prices are concerned.

Transfer pricing adjustments for direct tax purposes are not normally reflected in declarations and assessments, respectively, for customs or any other indirect taxes. The VPR 2010 state that in case of transfer pricing adjustments, the respective VAT and input VAT also have to be adjusted. However, they may remain undone if they have no effect on the national tax revenue.

OECD issues
Austria is a member of the OECD. In our experience, the Austrian Ministry of Finance is very inclined to follow the positions of the OECD as expressed in the Model Commentary and the various OECD reports (e.g. partnership report, report on the attribution of profits to a PE). The new VPR 2010’s stated objective is to facilitate and ensure the application of the OECD Guidelines and to allow for a dynamic interpretation, that is, to consider further developments by the OECD.

Joint investigations
A joint investigation by Austria and other countries’ tax authority is possible on a bilateral basis by referring to a clause in an applicable DTA as well as on a bi- or multilateral basis through multilateral controls. The latter possibility is available through Austria’s participation in the EU’s Fiscalis 2013 programme. This programme aims at improving the functioning of the tax system in the EU by strengthening cooperation between participating countries, their administrations and any other bodies. Multilateral controls have become standard procedures in Austria and take on average one and a half years. The legal basis for multilateral controls varies depending on the type of tax involved and can include one or more of the following sources:

- Regulation 1798/2003 for VAT (Art 12-13).
- DTAs and OECD Convention on Mutual Administrative Assistance in Tax Matters.
- Decision No. 2235/2002/EC.
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**Thin capitalisation**

There are no statutory rules on permissible debt equity ratios. As a rule of thumb, debt to equity ratios of 3:1 would in principle not be challenged by tax authorities, provided the terms of the debt are otherwise at arm’s length. A recent decision of the Tax Appeals Board indicates that even a much higher debt to equity ratio could be permissible provided that the ability of the company to pay the interest rates and to repay the loan principal at maturity date are supported by a business plan that is based on realistic assumptions. However, it is not clear whether the Administrative High Court will confirm this position. Where, e.g. the interest rate is higher than an arm’s-length rate, the consequences are that a deduction would be denied for the excessive interest, that corresponding amount would be qualified as a constructive dividend and withholding tax would also be payable (there is normally no withholding tax on interest payments to foreign lenders, whether related or unrelated, unless the loan is secured by real estate).

**Management services**

Where the amount of a management charge has been calculated on an arm’s-length basis, the management fee would normally be tax-deductible. The following issues should, however, also be considered where management services agreements are being concluded:

- A detailed contract should be drawn up.
- The terms of the agreement should not be retroactive.
- Documentary evidence to substantiate the provision of services and its benefits to the recipient should be maintained.

Further, the VPR 2010 includes a list of intragroup activities that are regarded as shareholder activities, and are therefore non-deductible. These comprise e.g. costs of the management board, costs that concern the legal organisation of the affiliated group, incidental benefits. In contrast, the VPR 2010 also state a number of management services that generally may be charged, as e.g. consulting services concerning the economic and legal affairs of the group company, training and education of the personnel on behalf of the group company, costs for a continuous audit as long as these release the subsidiary from its audit expenses.