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Questionnaire for National Reporters

Private Client and Immigration Working Session

**Movement of High Net Worth Individuals
Localisation et Délocalisation des Clients Privés Fortunés**

General Reporters/Rapporteurs généraux: Michael Wells-Greco (Speechly Bircham) and Firuza Ahmed (Kingsley Napley)

Background

As certain governments around the world struggle with fiscal deficits, their attention has turned to international tax evasion (illegal) and the perceived shortcomings of the international tax system from the point of view of tax avoidance (legal). In other regions we have seen unsettled economies combined with civil unrest. Families are seeking safer, more stable jurisdictions not just for themselves but for future generations as they look for long term security and are increasingly looking overseas for a solution.

How do our immigration, legal and tax systems cope with the realities and complexities of 21st century aging family life and the demand for economic security/stability? What are the particular challenges for practitioners in assisting these families? How does increasing governmental exchange of information and compliance requirements affect strategies for investment, tax planning and personal security. How does the global citizen manage a world of overlapping, often conflicting regulation?

1. PRELIMINARY MATTERS

We would ask that you return completed the Questionnaire and your answers to the case studies below by **Friday, 28 February 2014** (earlier if possible please).

Prior to dealing with the legal problems thrown up by the case studies, could you please deal with the following questions with reference, where relevant, to any recent case law or general practice. If you need to clarify the answer to a question, please do so. If a question is not an issue in your country, please provide an explanation as to why it is not.

If you are a delegate responding as part of the Immigration Commission, please respond **only** to sections 1.1 and 2.1.

1.1 Immigration and Nationality [for Immigration Commission only]

1.1.1 Briefly outline any immigration, residency or citizenship programmes your jurisdiction has to attract high net-worth individuals (HNWIs).

From the days of the Austrian Empire, Austria, especially its capital Vienna, has known a relatively high level of immigration.¹ While this has led to a multitude of programs concerned with the integration of immigrants, the efforts to actively attract select groups of immigrants are few and far between.

Currently Austria has no initiatives or even legislation with which to attract HNWIs or at least provide additional support once they have decided to move to Austria.

The only existing provision in Austrian law, which could be considered as being tailored towards HNWIs is Article 10 para. 6 of the Austrian Citizenship Act ("*Staatsbürgerschaftsgesetz*"). According to this provision, any individual may obtain citizenship without meeting all requirements set forth by law (e.g. 10 years of uninterrupted residency in Austria), if the government confirms that the award of citizenship is a matter of state interest due to "exceptional achievements, which have been performed or are to be expected".

While this provision was originally conceived with scientists or artists in mind, it has been widely accepted that significant financial investments may also constitute "exceptional achievements". This view has been confirmed by the Austrian courts in 2007: Two Russian businessmen, having invested in a hotel and a race driver, received the Austrian citizenship from the government then in power. As those investments were however to a certain extent related to the politician, who had proposed this "shortcut" to the citizenship in the first place, the businessmen were charged with bribery. The courts however acquitted them arguing, that the businessmen have merely followed a rule of law and received the reward set forth therein. As it was not for them to decide when the criterion "exceptional achievement" was fulfilled, they justifiably relied on the advice of the politician.²

¹ According to the 2012-census of the Statistik Austria, 1,579 million people, equaling 18,9% of the Austrian population, are to be considered as people with foreign background (http://www.statistik.at/web_de/statistiken/bevoelkerung/bevoelkerungsstruktur/bevoelkerung_nach_migrationshin_tergrund/) (17.04.2014). The definition follows the UNECE Recommendations for the 2010 censuses of population and housing (http://www.unece.org/fileadmin/DAM/stats/publications/CES_2010_Census_Recommendations_English.pdf) (17.04.2014).

² The involved politician however was found guilty of abuse of authority and sentenced to a significant fine and jail.

Today the possibility of obtaining citizenship for an indefinite investment is accepted and, unofficially, even used to attract foreign investors. In the past years between 20 and 40 persons have thus become Austrians.

1.1.2 Are there any proposed changes to the programmes outlined in 1.1.1?

No changes, that is the introduction of programs to attract HNWI's in the first place, are proposed or to be expected in the foreseeable future.

1.1.3 Is there a dichotomy between your Government's wish to attract HNWI's as against public perception of immigration?

The short answer to this question is "Yes", the more detailed answer requires a look back in time.

Traditionally Austria has rarely tried to actively attract immigrants. The most famous effort was the initiative to attract foreign workers during the economic boom in the 1960s and 1970s. These efforts were at the same time undertaken by Germany and Austria with the common target market being Turkey. Austria additionally focused its recruiting efforts on former Yugoslavia. Both Germany and Austria have however made the wrong assumption that the foreign workers would only stay for a limited period of time, performing the occupation they have been recruited for and would then leave for their respective home countries. In reality however most of those immigrants had their families follow them to their new country of employment and would thus chose to stay rather than return to their country of origin together with their entire family.

While the consequences of this initiative are complex and can be seen and felt to this very day, for the purpose of this report it suffices to note that immigrants are to this day often perceived as people who come to Austria to work. Following this perception more people than one would like are of the opinion that immigrants should either leave once their work is done or stay away in the first place. This attitude unfortunately also manifests itself in politics.

It therefore comes as small surprise that until 2011 Austria had a strict quota-based immigration system, where residency was tied to a work permit, without regard for any requirements for specially qualified persons. In 2011, with the introduction of the EU Blue Card, Austria finally abolished this rigid system and replaced it with the qualification-based Red-White-Red-Card.³ While a step in the right direction, residency remains tied to a work permit and the proceedings to obtain the Red-White-Red-Card are much more complicated and time consuming

³ Three stripes in red, white and red are the colours of the Austrian national flag.

in practice than they appear on paper. All of this has only recently been criticized by a Deloitte-survey on the attractiveness of Austria as a business location.⁴

1.2 **Cross-border succession**

1.2.1 Is testamentary freedom a right recognised by national law or public policy?

(A) Yes (B) No

1.2.2 Can those entitled to the reserved portion (heirship entitlement), during the life of the donor, waive their rights to a reserved share?

(A) Yes (B) No (C) Not relevant to your country

If so, please briefly set out the options.

1.2.3 Can an individual resident in your country elect the law applicable to his/her succession? If relevant/applicable, please consider your answer in the context of Brussels IV (Regulation (EU) 650/2012) and/or the 1989 Hague Convention on the Law Applicable to the Estates of Deceased Persons.

(A) Yes (B) No

If yes, is this election limited to the law of the deceased's:

(A) Nationality (B) Habitual Residence (C) Other

1.3 **Personal taxation and compliance**

1.3.1 Please provide a brief summary on the current rules as to liability to tax (e.g. residence, nationality, domicile (if applicable)).

1.3.2 Have there been any changes introduced in the last 24 months to the definition of who is a "taxpayer" e.g. "resident", "habitually resident" or "domiciled" in your country?

(A) Yes (B) No

If yes, please briefly summarise the changes.

⁴ Deloitte Radar – Attraktivität des Wirtschaftsstandortes Österreich (<http://www.deloitte.com/assets/Dcom-Austria/Local%20Assets/Documents/Allgemein/Deloitte-Radar-2014-Wirtschaftsstandort-Oesterreich.pdf>) (17.04.2014)

1.3.3 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for residents?

(A) Yes (B) No

If yes, please briefly set out the key provisions.

1.3.4 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for non-residents with assets located in your country?

(A) Yes (B) No

If yes, please briefly set out the key provisions.

1.3.5 Has your country undertaken (or proposed the introduction of) any legislative steps in the last 24 months to promote transparency in tax reporting obligations and to combat international tax evasion in the context of private wealth?

(A) Yes (B) No

If yes, please briefly set out the key measures.

1.3.6 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for holding structures with assets or “beneficiaries” located in your country?

(A) Yes (B) No

If yes, please briefly set out the key measures.

1.4 **Mental capacity of adults**

1.4.1 What system is in place in your country to deal with an individual who has lost capacity?

1.4.2 Does your country provide for Powers of Representation/Lasting Powers of Attorney/Mandats de protection future in relation to an incapacitated adult’s personal welfare and/or property and affairs?

(A) Personal welfare only (B) Property and affairs only (C) Both personal welfare and property and affairs

- 1.4.3 Will your country recognise and enforce a form of Power of Representation or Attorney intended to have effect after the onset of mental incapacity valid in the state in which it is prepared?
- 1.4.4 Are there proposals for legislative change in the field of mental capacity?
(A) Yes (B) No
If yes, what are the proposals?
- 1.4.5 Is your country a party to the Hague Convention XXXV for the International Protection of Adults of 13 January 2000?
(A) Yes (B) No
- 1.4.6 Is your country a party to the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol 2006?
(A) Yes (B) No

QUESTIONS FOR CASE STUDIES

2. CASE STUDY A: ROBERTA AND PAUL

Roberta and Paul married in the Netherlands in 2008. Roberta is Brazilian and Paul is Dutch. Roberta, an IT specialist, was offered a job with Pear Inc in Silicon Valley and she and Paul moved to California (USA) in 2011. The family grows with twin boys and life is good.

Roberta's mother, Gloria, who is in her 70s, wants to live with Roberta (her only child) and Paul so that she can spend more time with her grandchildren. Interested in moving to your country, Roberta and Paul come to see you for advice.

2.1 Immigration law [for Immigration Commission only]

2.1.1 Roberta and Paul are exceptionally wealthy. What immigration categories (e.g. investor type programmes) might apply to HNWI's such as Roberta and Paul to:

- (a) move firstly to the US (please omit this if you do not advise on US immigration law);
- (b) and then secondly to your country?

As outlined in 1.1.1, Austria does not have any immigration programme that is investor-friendly or targeted at investors.⁵ Thus Roberta and Paul would need to

⁵ The sole exception is Article 10 para. 6 of the Austrian Citizenship Act, which however is neither a programme nor does it constitute an immigration category.

look among the usual options offered by Austrian law for the permit that best fits their needs.

As a principle, Austrian law⁶ knows two types of residency permit: The “*Aufenthaltsbewilligung*”, which could best be translated as “residence permit” and the “*Niederlassungsbewilligung*”, which would translate into “settlement permit”. The basic difference between the two is that the former is easier to obtain but is granted only for stays in Austria of about one year while the latter is harder to obtain, sometimes even requires the former, but can satisfy long-term needs, either by granting a long term permit in the first place or a permit which might be reapplied for.

Due to the right of EU-citizens and their family members to move and reside freely within the territories of the EU Member States as set forth in Directive 2004/38/EC, Articles 51 – 54a NAG merely require such immigrants to be employed or self-employed in Austria and to be able to support themselves and their families. If residence in Austria for more than 3 months is intended, the EU-citizen and his family have to register with the residence authority within 4 months. They will then receive an “*Anmeldebescheinigung*” (registration certificate). After 5 years of permanent (i.e. not interrupted for more than 6 consecutive months) and rightful residence, permanent residence can be certified for EU-citizens and an appropriate card can be issued to their non-EU family members.

If your advice would change if Paul was not a Dutch national, please explain.

Not being an EU-citizen or married to an EU-citizen would drastically change the possibilities for immigration.

Assuming that neither considers becoming an employee in Austria, Roberta and Paul already face their first challenge: They are reduced to a single possible immigration category, namely that of “self employed key worker” (“*Selbständige Schlüsselkraft*”).

For this, they would need to apply for a Red-White-Red Card in this category and they would need to prove that their self-employed occupation in Austria would create a macroeconomic benefit beyond its own operational benefit.

According to the Austrian Act on the Employment of Foreigners (“*Ausländerbeschäftigungsgesetz*”, AuslBG) this may e.g. be the case if

⁶ More precisely the *Niederlassungs- und Aufenthaltswilligungsgesetz* (Austrian Settlement and Residence Permit Act, NAG), in which all such permits are regulated.

- the intended occupation involves a sustained transfer of investment capital to Austria
- the intended occupation creates new jobs or secures existing jobs in Austria or
- the settlement of the key worker involves the transfer of know-how or the introduction of new technologies or
- the key worker's company is of considerable significance for the entire region.

For self-employed key workers, there is no points system, unlike for all the other categories in the Red-White-Red Card systems, however an expertise by the Public Employment Service ("*Arbeitsmarktservice*", AMS) on the macroeconomic benefits is required. This usually takes 3 weeks. In case of a positive expertise and if all other requirements are met, the residence authority issues a Red-White-Red Card.

Applications for a Red-White-Red Card must be submitted at the competent Austrian representation in the applicant's home country or country of residence. Only persons entitled to visa-free entry to Austria and persons already holding a valid residence title may submit their application directly with the competent residence authority in Austria.

After the application has been granted, the Austrian representation informs the applicant accordingly. However persons who need a visa to enter Austria then have to apply for a visa D in order to retrieve their residence title from the residence authority. Therefore being allowed to enter Austria without a visa helps tremendously.

The Red-White-Red Card is issued for 12 months and entitles its holder to fixed-term residence and the pursuit of the self-employed occupation as described in the application. After 12 months, a "*Niederlassungsbewilligung*" (settlement permit) may be applied for, which would be granted for an additional 12 months. After this term, the "*Niederlassungsbewilligung*" would be issued for a period of 3 years.

2.1.2 What immigration options does Gloria have to move to your country on a long term basis?

While Gloria is related to the spouse of an EU-citizen in direct line, it is unfortunately in descending line, not ascending. Thus she does not qualify as a family members as defined in Article 52 NAG.

As an "other relative", she could nevertheless be treated as a family member, if she had already been supported by Roberta and Pauls in Brazil or if she had already lived in the same household with Roberta and Paul in the Netherlands or

if she was in need of care due to serious health conditions. However there are no indications that any of these three conditions are met, though the first could be argued.⁷ Therefore Gloria will unfortunately not be able to obtain any residence permit according to the NAG.

However she is rather fortunate to be the mother of a very wealthy woman and mother-in-law of a very wealthy man. If Roberta and Paul can spend \$ 20 million on an apartment, then they should also be able to make an investment which would constitute an “exceptional achievements” according to Article 10 para. 6 of the Austrian Citizenship Act, thereby creating a shortcut to Austrian citizenship. As Austrians Roberta and Paul will then be easily able to have Gloria join them.

2.1.3 What, if any, are the residency requirements for a long term move to your country for Roberta, Paul and Gloria?

Apart from the possibility of acquiring Austrian citizenship within a short period of time, Roberta and Paul would merely need to register with the residence authority within 4 months, should they desire to stay longer than 3 months. After 5 years of permanent (i.e. not interrupted for more than 6 consecutive months) and rightful residence, they will obtain a certificate of permanent residence and after 10 years they may apply for citizenship.

For Gloria however to permanently enjoy her family and grandchildren in Austria, Roberta and Paul would need to go straight for citizenship.

2.1.4 Are there are any long term requirements that the family should be aware of in order to maintain their immigration status in your country?

As EU-citizens or spouses of EU-citizens, the family only needs to make sure that none of them leaves the country for more than 6 consecutive months (though exceptions exist e.g. for studies abroad). While usually immigrants would also need to take care stay employed for most of their stay, this is not a factor for Roberta and Paul.

2.1.5 Will any of the members of the family be able to acquire citizenship of your country?

Yes, any of them can become Austrian citizens after 10 years of permanent and rightful residence in the country. However for Roberta and Paul an Article 10 para. 6 “instant”-citizenship seems more tempting and likely.

⁷ Furthermore, once Roberta and Paul get to know Austrians better they may find out that Austrian doctors can be very flexible, sometimes even creative in their diagnosis of serious medical conditions, even though this is mostly seen in relation to the ability of the patient to work. Nevertheless there is a chance that Gloria might thus develop a serious medical condition, even if only on paper.

Now settled into the hustle and bustle of life in your capital city, Roberta and Paul (who are very happy together and, incidentally, exceptionally wealthy), having purchased rental properties in Brazil and invested wisely in stocks and bonds, they are looking to buy a US\$ 20 million Penthouse Duplex in the hipster district of your capital city. They believe it is time to consider tax and estate planning opportunities and come to see you.

During the meeting you are also told that:

- Roberta is likely to inherit family assets - principally artwork - from Gloria. The family want to ensure that upon Gloria's death, the family assets will not be considered a "matrimonial asset" and that the assets, to the extent possible, can pass to the grandchildren (**the Inheritance**).
- Paul's father has been diagnosed with a degenerative medical condition, which may lead to a loss of mental capacity. Paul has been told that the condition is likely to be hereditary.

2.2 Real estate planning

What structuring and/or tax planning opportunities should Paul and Roberta consider with respect to the purchase of the Penthouse Duplex (i.e. to mitigate taxation in your country)?

2.3 Succession law and mental capacity

2.3.1 What would you advise with respect to the Inheritance?

2.3.2 What steps can Paul take to ensure that Roberta has full authority to take decisions on his behalf and deal with their assets in the event that Paul loses his mental capacity?

2.3.3 More generally, with a shared wish to keep matters "simple", what estate and succession planning opportunities should Roberta and Paul consider?

3. QUESTIONS FOR CASE STUDY B

3.1 Case Study B: Bruce and Megan

Bruce, who has been given your contact details from an AIJA member, comes to see you for advice. Bruce gives you his background:

- 30 years old;
- Australian resident, national (and, if relevant to your country) "domiciled in a state of Australia";
- Single;

- Commodities trader;
- Family wealth from mining opals;
- Bruce has an Aus\$15 M portfolio in Switzerland;
- Bruce also has shares in family mining company in Australia.

Bruce is looking to move to your country for 3-5 years.

3.2 **Pre-arrival planning**

3.2.1 What pre-arrival tax planning opportunities would you advise?

3.2.2 What are Bruce's tax, residence or other reporting obligations upon becoming resident in your country?

When you next meet Bruce 3 years later, life is looking good. He has met fellow Australian Kylie and they are expecting their first child (Jason). Bruce is looking to start his own commodities business and wants to know whether he can invest part of his foreign income or gains in the target company.

Bruce also tells you that his grandfather died in 2011 and that he (together with his 3 cousins) is a beneficiary of a trust structure with a bank account in a sun kissed jurisdiction. The bank account has not been reported in his tax return and he now wonders whether it should have been.

3.3 Lifetime matters

3.3.1 With respect to the commodities business, how would you advise Bruce in relation to:

- (a) the most tax efficient way to make the inward investment?
- (b) any planning and structuring opportunities (including the use of double tax treaties) that Bruce should consider in order to minimise any tax leakage?
- (c) eventually exiting the business. In particular, are there any structuring or other opportunities that Bruce should consider either at the inception of the business or in the run-up to an exit?

3.3.2 As to the unreported bank account:

- (a) what would you advise Bruce?
- (b) what are the Trustee's reporting obligations in your country?

Tragically, some years later still resident - and wealthy - in your country, Bruce dies without making a Will.

3.4 Succession law

3.4.1 Do Kylie and Jason have a financial claim against Bruce's estate?

3.4.2 What inheritance or estate tax (if any) is to be paid and by whom? What steps could Bruce and Kylie have taken in order to mitigate/reduce this tax charge?

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Please return by email to:

Michael Wells-Greco
michael.wells-greco@speechlys.com
[for Private Client Commission Delegates]

Firuzah Ahmed
fahmed@kingsleynapley.co.uk
[for Immigration Commission Delegates]