Austria

Branch Reporter
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Summary and conclusions

In Austrian tax law, tax avoidance is generally approached under the general anti-avoidance rule of §22 BAO, permitting a recharacterization if a tax planning structure or series of transactions is unusual, inadequate, and solely aims at tax avoidance, i.e. where no non-tax reasons for a specific structure or transaction exist so that it can only be explained by the purpose of avoiding Austrian taxes. This general anti-avoidance rule is supplemented by a fairly limited number of specific anti-avoidance rules, e.g. switch-over clauses to the credit method for distributions from foreign subsidiaries and look-through taxation for entities deemed to constitute a foreign investment fund. Though criticized in legal scholarship, case law and administrative practice also tend to apply these ~ domestic rules in tax treaty situations.

Austrian treaty policy has not developed specific anti-avoidance provisions. Where such provisions are, however, included in treaties this is either because they have become internationally accepted or because of a strong wish of the treaty partner state. As for internationally accepted anti-avoidance concepts, more than 50 Austrian treaties contain the concept of beneficial ownership as laid down in articles 10, 11 and 12 OECD MC, 28 treaties incorporate a distributive rule similar or identical to that foreseen in article 13(4) of the OECD MC regarding the alienation of shares in real-estate companies, and 65 Austrian treaties contain "look-through" clauses for artiste companies based on article 17(2) OECD MC. As for specific anti-avoidance clauses, however, only 4 Austrian treaties specifically allow or preserve the application of domestic anti-avoidance provisions. Likewise, a fairly limited number of treaties deal with specific issues: 12 treaties either leave residence determination of dual residence companies to mutual agreement or straightforwardly exclude such companies from residence status; 4 treaties contain specific exclusions from residency status, e.g. for certain beneficially taxed companies or under a "limitation on benefits" (LOB) clause. Further, only 8 treaties contain specific anti-avoidance rules in the area of dividends, interest and royalties, e.g. concerning carve-outs for granting tax-sparing credits.

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1. Domestic anti-avoidance provisions with an international scope

1.1. General overview

Anti-avoidance measures in the tax treaty context have not only drawn attention at the OECD[1] and UN[2] levels, but they have also frequently been touched upon by IFA.[3] From an Austrian perspective, Bendlinger and Schuch have already demonstrated the limits on the use of low-tax regimes by multinational businesses, including the limits set by anti-avoidance principles,[4] Gassner has reported on "form and substance" and the Austrian principles of economic interpretation of direct tax law which look behind the formal structuring of a transaction,[5] Jirousek has given a comprehensive survey of Austria's approach to the avoidance of double non-taxation,[6] and the reporter's own report on the attribution of income has shown that the principles of economic interpretation also stand in a close relationship to the general anti-avoidance rule of §22 BAO.[7]

Indeed, the application of domestic anti-avoidance provisions in treaty situations has been heavily discussed, especially after the OECD's report on *Double Taxation Conventions and the Use of Base Companies*[8] and the subsequent amendments to the OECD commentaries in 1992[9] and 2003.[10] Austria has not entered a reservation or an observation to these amendments,[11] since it is the long-standing position of the Ministry of Finance (MoF) that a country is entitled to protect itself against the unjustified use of tax treaties so that the mere existence of a treaty will not restrict application of domestic anti-abuse provisions.[12] It also appears that not

1 See the reports on *Double Taxation Conventions and the Use of Base Companies* (Issues in International Taxation no. 1, Paris 1987), *Double Taxation Conventions and the Use of Conduit Companies* (1986), and *Restricting the Entitlement to Treaty Benefits* (Issues in International Taxation no. 8, Paris 2002).

2 Subcommittee on Improper Use of Treaties (E/C 18/2008/CRP.2).

3 See *How Domestic Anti-Avoidance Rules Affect Double Taxation Conventions* (IFA Congress Seminar Series vol. 19c, 1995), *The Concept of Beneficial Ownership in Tax Treaties* (IFA Congress Seminar Series vol. 23a, 2000), and *Abusive Application of International Tax Agreements* (IFA Congress Seminar Series vol. 25b, 2001).

4 Stefan Bendlinger and Josef Schuch, Austria, in *Limits on the Use of Low-tax Regimes by Multinational Businesses: Current Measures and Emerging Trends*, *Cahiers de droit fiscal international*, vol. 86b (2001), pp. 371 *et seq.*

5 Wolfgang Gassner, Austria, in *Form and Substance in Tax Law*, *Cahiers de droit fiscal international*, vol. 87a (2002), pp. 119 *et seq.*

6 Heinz Jirousek, Austria, in *Double Non-taxation*, *Cahiers de droit fiscal international*, vol. 89a (2004), pp. 169 *et seq.*

7 *Bundesabgabenordnung* – Austrian Federal Tax Code; Georg Kofler, Austria, in *Conflicts in the Attribution of Income to a Person*, *Cahiers de droit fiscal international*, vol. 92b (2007), pp. 85 *et seq.*

8 *Double Taxation Conventions and the Use of Base Companies*, *op. cit.*

9 Art. 1 para. 23 of the OECD commentaries 1992.

10 Art. 1 paras. 22–22(2) of the OECD commentaries 2003.

11 Indeed, Austria's only reservation (concerning art. 26(5) of the OECD MC) was withdrawn in March 2009.

12 See e.g. Alfred Philipp, Helmut Loukota and Heinz Jirousek, *Internationales Steuerrecht* (Vienna: Manz 2008), I/1 Z 0 paras. 90–93. It might be noted that 33 Austrian treaties still specifically

only the MoF,[13] but also the Austrian Supreme Administrative Court (VwGH)[14] considers the OECD amendments as merely clarifying, as domestic anti-avoidance provisions are regularly applied irrespective of whether or not the respective tax treaty was concluded before or after the amendments to the OECD commentaries.[15] Conversely, however, Austrian treaty policy is rather to not include specific treaty-based anti-avoidance provisions; where such provisions are nevertheless found in Austrian tax treaties, such clauses have either become the international standard or Austria has conceded to the strong wish of its treaty partner.

It might also be noted at the outset that, from an administrative perspective, the domestic ordinance on double tax convention (DTC) relief[16] foresees that in cases of potential tax avoidance no relief at source is possible but rather that a refund procedure has to take place;[17] this procedure enables the Austrian tax administration to examine the structure and, in the case of abuse, deny treaty benefits.[18]

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refer to the purpose of countering tax avoidance in their titles; see the overview in the appendix to this report.

13 See Helmut Loukota, "Internationale Steuerplanung und 'Treaty-Shopping'", *ÖStZ* 1990, 2, 9–10; Philipp *et al.*, *op. cit.*, I/1 Z 0 paras. 90 *et seq.* and Z 10 para. 187.

14 VwGH, 26 July 2000, 97/14/0070 (*Treaty Shopping II*); VwGH, 9 December 2004, 2002/14/0074 (*Dublin Docks I*); VwGH, 10 August 2005, 2001/13/0018 (*Dublin Docks II*); see already VwGH, 8 March 1972, 1233/70.

15 For a critical position see Wolfgang Gassner and Michael Lang, "Treaty Shopping", in Wolfgang Gassner, Michael Lang and Eduard Lechner (eds.), *Aktuelle Entwicklungen im Internationalen Steuerrecht. Das neue Musterabkommen der OECD* (Vienna, 1994), pp. 43 *et seq.* It might generally be noted that it is under dispute which version of the commentaries may be used in interpreting a specific tax treaty: the MoF (see e.g. para. 2512 of the Income Tax Guidelines 2000 (EStR); Philipp *et al.*, *op. cit.*, I/1 Z 0 paras. 46 *et seq.*) – in line with the OECD commentaries (introduction paras. 3, 33–35) – principally considers the version available at the time of application of OECD-patterned treaties as decisive for its interpretation. Legal writing is strongly opposed to this view and only considers the commentaries that existed at the time of treaty conclusion as decisive (see e.g. Michael Lang, "Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung der Höchstgerichte Österreichs", in Michael Lang, Jörg M. Mössner and Robert Waldburger (eds.), *Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung der Höchstgerichte Deutschlands, der Schweiz und Österreichs* (Vienna: Linde, 1998), pp. 117, 123–125). Existing case law leaves a blurred picture (see, on the one hand, VwGH, 31 July 1996, 92/13/0172 (conclusion of the treaty), and, on the other hand, VwGH, 24 November 1999, 94/13/0233 (application of the treaty)). However, no fewer than 21 Austrian tax treaties contain explicit provisions that are obviously intended to declare the version of the OECD commentaries at the time of application as decisive; such clauses are included in the protocols to the treaties with Albania (para. 5), Armenia (para. I), Azerbaijan (para. 1), Croatia (para. 2), Cuba (para. 7), Denmark (para. 1), Georgia (para. 8), Germany (para. 16), Kuwait (para. 1), Kyrgyzstan (para. 5), Macedonia (para. 2), Mexico (para. 1), Moldova (para. 1), Mongolia (para. 1), Nepal (para. 1), New Zealand (para. 13), Poland (para. I), San Marino (para. 6), Ukraine (para. 1), the United Arab Emirates (para. 1) and the USA (MOU para. 1). For a critical approach towards the intended effect of these clauses from a constitutional perspective see Michael Lang, "Die im neuen DBA Österreich-Deutschland enthaltenen Auslegungsregeln", in Wolfgang Gassner, Michael Lang and Eduard Lechner (eds.), *Das neue Doppelbesteuerungsabkommen Österreich Deutschland* (Vienna: Linde, 1999), pp. 35, 73–75.

16 *DBA-Entlastungsverordnung*, Federal Gazette III 2005/92, III 2006/44.

17 This is, *inter alia*, the case if the purported recipient is a corporation or taxed as a corporation in its residence state and did not furnish a statement to the effect that the recipient (a) exercises an activity that goes beyond mere asset management; (b) has employees; and (c) has its own operating facilities.

18 See e.g. EAS 2996 = *SWI* 2008, 411.

1.2. General anti-avoidance provisions with international focus or effect

Apart from the rarely applied rules on sham transactions[19] and fiduciary agreements,[20] Austrian tax law contains a general anti-avoidance rule in §22 BAO. Despite the freedom of taxpayers to arrange their matters in a tax efficient manner,[21] §22(1) BAO provides that abuse of legal forms and arrangements under civil law cannot reduce or circumvent tax liability. If such abuse exists, under §22(2) BAO taxes must be levied in accordance with a legal structure appropriate to the economic transactions, facts, and circumstances. Decade-long disputes surrounding the interpretation of §22 BAO have resulted in to two main schools of thinking.[22] The prevailing opinion in legal scholarship argues that §22 BAO is merely an expression of an economic approach of taxation, leading to a specific focus on systematic and teleological interpretation (so-called *Innentheorie*).[23] The contrary position is taken by the Austrian tax administration and Austrian courts, viewing §22 BAO as a provision that supplements other substantive provisions (so-called *Aussentheorie*).[24] Under the latter interpretation, §22 BAO allows for a recharacterization if a tax planning structure or series of transactions is unusual, inadequate, and solely aims at tax avoidance, i.e. where no non-tax reasons for a specific structure or transaction exist so that it can only be explained by the purpose of avoiding Austrian taxes.

§22 BAO applies to domestic and cross-border situations alike and hence has international effect. As such, it serves as an "anchor" for other rules,[25] permeates the Austrian discussion on tax avoidance[26] and has been rather frequently applied to cross-border transactions in the past few years:

19 For a recent focus on § 23 BAO, which deals with sham transactions, see Michael Tanzer, "Einkünftezurechnung an ausländischer Basis- und Finanzierungsgesellschaften", *GesRZ* 2005, 59 *et seq.* and 115 *et seq.*

20 See e.g. Loukota, *op. cit.*, pp. 2, 7.

21 For this generally accepted principle see recently VwGH 22 September 2005, 2001/14/0188 (*Jersey*).

22 See e.g. Gassner, *op. cit.*, pp. 119 *et seq.*

23 Fundamentally Wolfgang Gassner, *Interpretation und Anwendung der Steuergesetze* (Vienna: Orac, 1972); for further references and an extensive discussion see Georg Kofler, *Die steuerliche Abschirmwirkung ausländischer Finanzierungsgesellschaften* (Vienna: Linde, 2002), pp. 210 *et seq.*

24 See e.g. EAS 1410 = *SWI* 1999, 149, and VwGH, 27 September 1995, 93/13/0095, *ÖStZB* 1996, 146.

25 §94a EStG, which implements the anti-avoidance provision of art. 1(2) of the EC Parent–Subsidiary Directive, includes a switch-over from source exemption to a refund of withheld taxes in certain specified cases so that the tax administration may closely evaluate the structure in light of §22 BAO during the refund procedure.

26 For recent and comprehensive analyses see Michael Tumpel, "Steuerumgehung im DBA-Recht und EG-Grundfreiheiten", in Michael Lang and Heinz Jirousek (eds.), *Praxis des internationalen Steuerrechts. Festschrift for Helmut Loukota* (Vienna: Linde, 2005), pp. 585 *et seq.*; Nikolaus Zorn, "Die Zurechnung von Einkünften unter dem Aspekt der Zwischenschaltung von Auslandsgesellschaften", in Reinhold Beiser, Sabine Kirchmayr, Gunter Mayr and Nikolaus Zorn (eds.), *Ertragsteuern in Wissenschaft und Praxis. Festschrift for Werner Doralt* (Vienna: LexisNexis 2007), pp. 527 *et seq.*; Stefan Bendlinger, "Steueroasen und Offshore-Strukturen", in Hans Hammerschmied (ed.), *Steuerberatung und Wirtschaftsprüfung in Europa. Festschrift for Alfred Brogyányi* (Vienna, Linde 2008), pp. 525 *et seq.*; Eduard Lechner, "Steuerliche Anerkennung ausländischer Gesellschaften", in Hans Hammerschmied (ed.), *Steuerberatung und Wirtschaftsprüfung*

- Outbound investments: as for Austrian residence taxation, in the recent decisions in *Dublin Docks I*[27] and *II*,[28] *Hong Kong*,[29] *Jersey I*[30] and *II*,[31] *Guernsey I*[32] and *II*[33] and *Luxembourg*[34] the VwGH has taken the position that shifting passive income to a foreign subsidiary for tax saving and without a valid non-tax reason is abusive under §22 BAO and income will be reattributed to the Austrian shareholders on a second level, irrespective of whether an applicable tax treaty contains an explicit anti-abuse provision,[35] or whether a company resident in another EU Member State is concerned.[36] This was, for example, the case when Austrian investors transferred monies to preferentially taxed Irish Dublin Docks companies and such funds were invested in risk-free Austrian government bonds,[37] or when a Jersey-resident "letterbox company" was interposed for granting a loan to a German subsidiary to transform into tax-exempt dividends what would have been taxable interest income in case of a direct loan.[38]
- Inbound investments: some focus has been on tax planning schemes to avoid Austrian source taxation, especially in the *Treaty Shopping I* and *II* cases, invoking both the general principles of income attribution[39] and the general anti-avoidance rule of §22 BAO,[40] without sufficiently explaining the difference in approaches. The *Treaty Shopping II* case dealt with a Swiss holding company that was purportedly interposed by residents of a non-treaty partner state to receive withholding tax benefits under the Austrian-Swiss treaty. The

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in Europa. Festschrift for Alfred Brogyányi (Vienna, Linde 2008), pp. 513 *et seq.*; Alexander Stieglitz, "§22 BAO und Gemeinschaftsrecht. Kritik der Rechtsprechung des VwGH zum Einsatz von Auslandsgesellschaften in Niedrigsteuerländern", in Friedrich Fraberger, Andreas Baumann, Christoph Plott and Kornelia Waitz-Ramsauer (eds.), *Handbuch Konzernsteuerrecht* (Vienna: LexisNexis 2008), pp. 485 *et seq.*; Birgit Stürzlinger, "'Treaty Shopping' und seine Grenzen in der österreichischen Rechtsprechung", in Michael Lang, Josef Schuch and Claus Staringer (eds.), *Die Grenzen der Gestaltungsmöglichkeiten im Internationalen Steuerrecht* (Vienna: Linde, 2009), pp. 129 *et seq.*

27 VwGH, 9 December 2004, 2002/14/0074 (*Dublin Docks I*).

28 VwGH, 10 August 2005, 2001/13/0018 (*Dublin Docks II*).

29 VwGH, 19 January 2005, 2000/13/0176 (*Hong Kong*).

30 VwGH, 22 September 2005, 2001/14/0188 (*Jersey I*).

31 VwGH, 24 July 2007, 2007/14/0029 (*Jersey II*).

32 VwGH, 18 October 2006, 2003/13/0031 (*Guernsey I*).

33 VwGH, 3 September 2008, 2007/13/0031 (*Guernsey II*).

34 VwGH, 29 November 2006, 2003/13/0026 (*Luxembourg*).

35 See extensively EAS 2184 = *SWI* 2003, 54. For a recent discussion of objections to this position see Michael Lang, "VwGH zur Anwendung des § 22 BAO auf irische IFSC-Gesellschaften", *SWI* 2005, pp. 67, 76 *et seq.*; Christine Obermair and Patrick J. Weninger, "Treaty Shopping and Domestic GAARs in the Light of a Recent Austrian Decision on Irish IFS Companies", *Intertax* (2005), pp. 466 *et seq.*

36 See below section 3.

37 VwGH, 9 December 2004, 2002/14/0074 (*Dublin Docks I*); VwGH, 10 August 2005, 2001/13/0018 (*Dublin Docks II*).

38 VwGH, 22 September 2005, 2001/14/0188 (*Jersey I*).

39 VwGH, 10 December 1997, 93/13/0185 (*Treaty Shopping I*). For a discussion of this case see e.g. Helmut Loukota, "Das erste Treaty Shopping Urteil des VwGH", *SWI* 1998, pp. 105 *et seq.*; Kofler, *op. cit.*, pp. 85, 92.

40 VwGH, 26 July 2000, 97/14/0070 (*Treaty Shopping II*).

VwGH's decision implies that the domestic principles of income attribution and also reattribution under §22 BAO are not affected by the existence of a treaty, unless perhaps the treaty provides for specific attribution rules. As in the reverse situation of avoiding residence state taxation, the *Treaty Shopping II* case is viewed as suggesting that the mere existence of a treaty will not restrict application of domestic anti-abuse principles by the source country.[41]

1.3. Specific anti-avoidance provisions with international focus or effect

The Austrian tax system contains a fairly limited number of specific anti-avoidance provisions with international focus or effect. Apart from a rather comprehensive exit tax regime,[42] which is, however, not intended to serve anti-avoidance purposes but rather as a generally applicable mechanism for an appropriate delimitation between taxing jurisdictions, and anti-abuse provisions introduced in implementing EC direct tax directives,[43] two provisions serve specifically to counter what is conceived as cross-border tax avoidance.

1.3.1. Switch-over clauses

If the interposition of a foreign company is not challenged under §22 BAO,[44] dividends received from such company by a company resident in Austria are in principle exempt from taxation if either (a) a minimum holding requirement (10 per cent) and a holding period (one year) are fulfilled (so-called "international participation exemption") or (b) the dividends are received from EU companies or from qualified EEA companies,[45] irrespective of any minimum holding requirements (exemption for "portfolio dividends" from EU and EEA countries); the latter exemption was introduced by the Budget Supplementary Act 2009,[46] which yielded

41 See also EAS 1075 = *SWI* 1997, 333; EAS 2361 = *SWI* 2003, 487. For a critical position in respect of §22 BAO see Michael Lang, "VwGH zu Treaty Shopping", 8 *SWI* 216 *et seq.* (1998); Michael Lang, "VwGH zur Verweigerung der Abkommensberechtigung", *SWI* 2000, pp. 423, 427 (referring to the specific situation in the *Treaty Shopping II* case created by art. 28(7) of the 1974 Austrian-Swiss DTC).

42 See §6(6) EStG (appreciation in transferred branches and business property), §31(2)(2) EStG (appreciation of substantial shareholdings), §37(8)(6)EStG (accrued interest) and related provisions in the Reorganization Tax Act.

43 See §94a EStG (implementing the EC Parent–Subsidiary Directive for outbound dividends) and §99a EStG (implementing the EC Interest and Royalties Directive).

44 The participation exemption provided for in §10 KStG can only apply if it is indeed established that the foreign distributing company has been the subject of attribution of the distributed income under general principles and §22 BAO. See VwGH, 10 August 2005, 2001/13/0018 (*Dublin Docks II*) and EAS 1410 = *SWI* 1999, 149; EAS 1485 = *SWI* 1999, 407; EAS 3054 = *SWI* 2009, 214. See also Kofler, *op. cit.*, pp. 85, 87–90.

45 I.e. with comprehensive exchange of information and recovery of tax claims, which is currently only the case with Norway. For portfolio dividends from third countries the treatment remains unchanged, i.e. they are subject to corporate income tax at the rate of 25 per cent.

46 Federal Gazette (BGBl) I 2009, no. 52; for a discussion of the draft legislation see Georg Kofler and Clemens Ph. Schindler, "Finance Ministry Targets Participation Exemption Regime", 53 *Tax Notes Int'l* (30 March 2009), pp. 1163–1165.

to European law requirements.[47] However, both provisions are equipped with anti-abuse reservations. The "international participation exemption regime" is accompanied by a provision designed to prevent resident companies from benefiting from the exemption if the focus of the non-resident subsidiary's business operations consists directly or indirectly in deriving interest income, income from the leasing of assets or the sale of participations ("passive income") and has been subject to low taxation (i.e. a foreign tax burden of less than 15 per cent); in such a case §10(4), (6) KStG foresees a switch-over to the indirect credit method. The exemption for "porfolio dividends" from EU and EEA countries is accompanied by a rather novel anti-abuse approach in §10(5) KStG, which is exclusively based on foreign "low taxation", irrespective of whether or not the distributing company derives active or passive income;[48] in these cases, the dividends are not exempt from taxation, but rather an indirect foreign tax credit for the underlying corporate tax will be granted under §10(6) KStG.

1.3.2. Foreign investment funds regime

Even though the Austrian tax system lacks specific CFC-type legislation, the tax treatment of foreign investment funds may be utilized as a tool to counter sheltering of passive income in a foreign subsidiary. §42 InvFG[49] contains specific rules as to the tax treatment of income derived from a foreign legal entity that is considered an investment fund. Without regard to the legal form of the entity, a foreign investment fund is deemed to exist if the foreign entity by law, statute, or fact structures its investments under the principle of risk diversification. Income earned by such a foreign fund is deemed to be income of the owners of the fund, which is technically achieved by taxing fictitious distributions of retained profits. Giving this provision a tinge of CFC-type legislation,[50] the Austrian tax administration adheres to the view that a foreign corporation can be viewed as a foreign investment fund under §42 InvFG if it follows a risk-spreading investment strategy, even though it is wholly owned by a single parent company.[51] This may even be the case when a foreign holding company is interposed between the deemed investment fund and the Austrian parent company, as the principle of risk diversification can also be fulfilled "indirectly".[52] Conversely, recent Austrian practice also applies §42 InvFG when it comes to Austrian source income received by foreign companies that are deemed to be foreign investment funds; in such a case treaty relief for

47 See below section 3.

48 "Low taxation" of the foreign distributing company is assumed if (a) the distributing company is not effectively being subject to a corporate income tax comparable to the Austrian corporate income tax; or (b) the nominal foreign corporate income tax applicable is lower than 15 per cent; or (c) the foreign distributing company enjoys far-reaching exemptions from tax (unless they are comparable to Austria's exemptions for dividends and capital gains).

49 *Investmentfondsgesetz* 1993 – Investment Funds Act 1993.

50 See explicitly EAS 1980 = *SWI* 2002, 110.

51 EAS 984 = *SWI* 1997, 90; EAS 1155 = *SWI* 1997, 535; EAS 1485 = *SWI* 1999, 407; see also EAS 1980 = *SWI* 2002, 110; EAS 2476 = *SWI* 2004, 440.

52 See Helmut Loukota, "Einkünftezurechnung im Internationalen Steuerrecht", 15 *ÖJT* III/2 (2004), pp. 101, 119 *et seq.*

the fund's Austrian source income will only be granted insofar as the final recipients are entitled to treaty benefits.[53]

1.4. The relationship between the domestic anti-avoidance provisions and tax treaties

Austrian administrative practice[54] and jurisprudence[55] put the focus on whether provisions of tax conventions may prevent the application of the anti-abuse provisions in domestic law. Coinciding with the general statement introduced in the 1992 OECD commentaries, Austria's MoF – like the majority of OECD member states – considers the existing domestic anti-abuse provisions as "part of the basic domestic rules set by national tax law for determining which facts give rise to a tax liability", which "are not addressed in tax treaties and are therefore not affected by them".[56] From this perspective, the 2003 changes to the commentaries[57] are considered to merely reflect Austria's long-standing position in this matter.[58] This position can be analysed as follows.

1.4.1. General anti-abuse provisions

While the application of §22 BAO in tax treaty situations is disputed by legal writing,[59] the recent judgments in *Treaty Shopping II*[60] and *Dublin Docks I*[61] and *II*[62] – in broad concurrence with the MoF's perspective[63] – have indicated that even if the specific tax treaty does not contain an anti-abuse provision, Austria is nevertheless entitled to protect itself against the unjustified use of tax treaties so that the mere existence of a treaty will not restrict application of domestic anti-abuse principles.[64] To reach this result, the VwGH referred to the object and purpose of the treaty within the meaning of article 31 of the Vienna Convention on the Law of

53 See para. 54 Investment Fund Guidelines 2008 (InvFR), EAS 3012 = *SWI* 2009, 8, and EAS 3044 = *SWI* 2009, 162.

54 See e.g. EAS 1410 = *SWI* 1999, 462; EAS 1485 = *SWI* 1999, 407; EAS 2184 = *SWI* 2003, 54.

55 See e.g. VwGH, 26 July 2000, 97/14/0070 (*Treaty Shopping II*).

56 Art. 1 para. 23 of the OECD commentaries 1992.

57 Art. 1 paras. 9(1) through 9(5) and 22 through 22(2) of the OECD commentaries 2003.

58 See explicitly EAS 1410 = *SWI* 1999, 462, and EAS 2184 = *SWI* 2003, 54.

59 See e.g. Michael Lang, "'Treaty Shopping'. Der Missbrauch von Doppelbesteuerungsabkommen", *SWI* 1991, 55, 58; Gassner and Lang, *op. cit.*, pp. 43, 58–59; Michael Lang, "Neue Strategien gegen den internationalen Gestaltungsmissbrauch", 13 *ÖJT* III/2 (1999), pp. 9, 19–23; Obermair and Weninger, *op. cit.*, pp. 466, 469.

60 VwGH, 26 July 2000, 97/14/0070 (*Treaty Shopping II*).

61 VwGH, 9 December 2004, 2002/14/0074 (*Dublin Docks I*) (by way of reference to *Treaty Shopping II*).

62 VwGH, 10 August 2005, 2001/13/0018 (*Dublin Docks II*) (by way of reference to *Dublin Docks I*).

63 See e.g. EAS 38; EAS 401; EAS 466; EAS 644 = *SWI* 1995, 285; EAS 650; EAS 747; EAS 1336 = *SWI* 1998, 548; EAS 2165 = *SWI* 2003, 51; EAS 2184 = *SWI* 2003, 54; EAS 2817 = *SWI* 2007, 104; see also Loukota, *op. cit.*, pp. 2, 4–9.

64 For a recent analysis of this line of case law see Stürzlinger, *op. cit.*, pp. 129, 134–137 and 137–139.

Treaties (VCLT) and – indirectly[65] – to the case law of the German *Bundesfinanzhof* on base companies[66] and the majority opinion of OECD member states in the 1987 OECD report on *Double Taxation Conventions and the Use of Base Companies*,[67] implying that the OECD's statements to this effect are to be considered as merely clarifying.[68] This position, though quite profoundly criticized in legal writing,[69] is also shared by the MoF.[70] If, however, §22 BAO is regarded merely as a provision for the attribution of income,[71] the result found by the VwGH seems in any event to be justified, as tax treaties do not deal with the attribution of income so that treaty benefits are generally only available to the taxpayer who is the subject of attribution under domestic principles.[72] Hence, a foreign corporation which is not a subject of attribution of income from an Austrian perspective will not be entitled to treaty withholding tax benefits,[73] even if – as it was the case in *Treaty Shopping II* – the foreign company had been issued a certificate of residency by the other taxing jurisdiction.[74]

1.4.2. Switch-over clauses

As a number of Austrian tax treaties include participation exemptions for inbound inter-company dividends,[75] the question arose whether the switch-over to the credit method as foreseen in §10 KStG may be applied to decline exemption without infringing the respective tax treaty. It is undisputed that, if a treaty contains a specific reference to the requirements laid down in Austrian domestic law or an anti-avoidance reservation, the switch-over clauses may be applied;[76] this is indeed the case for most treaty-based participation exemption regimes.[77] Some older treaties, however, do not contain such a reference to domestic law or an anti-avoidance reservation.[78] In such situations prevailing opinion in legal writing argues that, in order to avoid a treaty override, the respective treaty exemption takes

65 Via a citation to Loukota, *op. cit.*, pp. 2 *et seq.*

66 See e.g. BFH, 21 January 1976, I R 234/73; BFH 16 January 1976, III R 92/74.

67 *Double Taxation Conventions and the Use of Base Companies*, *op. cit.*

68 See section 1.1 above; see also e.g. EAS 1410 = *SWI* 1999, 462.

69 For discussions of objections to this position see Lang, *op. cit.*, pp. 9, 14–19 and 19–23; Michael Lang, "VwGH zur Anwendung des § 22 BAO auf irische IFSC-Gesellschaften", 15 *SWI* 67, 76–77 (2005); Obermair and Weninger, *op. cit.*, pp. 466 *et seq.* (2005); Stürzlinger, *op. cit.*, pp. 129, 146–148.

70 See e.g. EAS 2184 = *SWI* 2003, 54.

71 For a discussion see Kofler, *op. cit.*, pp. 85, 86–90.

72 See also EAS 2996 = *SWI* 2008, 411; Obermair and Weninger, *op. cit.*, pp. 466, 471–472; Stürzlinger, *op. cit.*, pp. 129, 136, with further references.

73 See also EAS 2294 = *SWI* 2003, 421; EAS 2467 = *SWI* 2004, 430; EAS 2470 = *SWI* 2004, 431.

74 See also Helmut Loukota, "Das zweite Treaty-Shopping-Erkenntnis des VwGH", *SWI* 2000, pp. 420 *et seq.*

75 For an overview see the appendix to this report.

76 See e.g. Michael Lang, "§10 Abs 3 KStG und abkommensrechtliches Schachtelprivileg", *SWI* 1994, 346, 351; Klaus Hirschler, *Rechtsformplanung im Konzern* (Vienna, Linde 2000), p. 671.

77 See the overview in the appendix to this report.

78 This is currently the case in the treaties with Brazil (art. 23(6)), Ireland (art. 8(4)), Israel (art. 10(4)), Malaysia (art. 22(2)(a)), Malta (art. 23(3)) and Thailand (art. 24(3)). The "old" treaty with

precedence and the switch-over clauses may not be applied.[79] Conversely, however, the MoF[80] and case law[81] on the switch-over clause in §10(4) KStG deem this clause to be applicable even if the treaty contains no relevant anti-abuse reservation; again, this result is based on article 31 VCLT, the considerations in the OECD commentaries[82] and the OECD report on *Double Taxation Conventions and the Use of Base Companies*,[83] while arguments that neither article 31(3)(b) VCLT nor the OECD commentaries may justify a treaty override are thereby implicitly rejected.[84]

1.4.3. Foreign investment funds regime

For lack of an OECD-wide solution, Austrian ruling practice extends the look-through taxation under §42 InvFG to the treaty level, deeming the Austrian shareholders as subjects of attribution of income earned by a foreign corporation that is classified as an investment fund under §42 InvFG.[85]

1.5. Abuse of the tax treaty itself: domestic law principles or interpretation of the treaty?

The Austrian approach of an economic interpretation, including application of §22 BAO, also permeates the interpretation of tax treaties,[86] as a treaty's object and purpose is taken as a starting point for the conclusion that contracting states did not intend to lose the ability to fight international tax-avoidance.[87]

cont.

Turkey (art. 10(3)) also contains no reference to domestic law, but will be replaced by a new treaty containing such a reference (art. 22(1)(c)) from 2010 onwards.

79 Lang, "Neue Strategien", *op. cit.*, pp. 9, 23–27; Hirschler, *op. cit.*, pp. 671–672, with further references.

80 Para. 583 of the Corporate Tax Guidelines 2000; EAS 558 = *SWI* 1995, 73; EAS 644 = *SWI* 1995, 285; EAS 1410 = *SWI* 1999, 462; EAS 1485 = *SWI* 1999, 407; EAS 1509 = *SWI* 1999, 462; EAS 2101; see also Philipp *et al.*, *op. cit.*, I/1 Z 00 para. 94 and Z 10 paras. 187 *et seq.*

81 UFS, 15 March 2006, RV/0334-S/02; see also in this direction also VwGH, 26 July 2000, 97/14/0070 (*Treaty Shopping II*), VwGH, 9 December 2004, 2002/14/0074 (*Dublin Docks I*), and VwGH, 10 August 2005, 2001/13/0018 (*Dublin Docks II*).

82 Art. 1 para. 22 and 22(1) of the OECD commentaries 2003.

83 *Double Taxation Conventions and the Use of Base Companies*, *op. cit.*

84 See for this discussion e.g. Thomas Bieber and Georg Kofler, "Der Methodenwechsel nach §10 Abs 4 KStG", in Friedrich Fraberger, Andreas Baumann, Christoph Plott and Kornelia Waitz-Ramsauer (eds.), *Handbuch Konzernsteuerrecht* (Vienna: LexisNexis 2008), pp. 171, 190–191, with further references.

85 See EAS 2409 = *SWI* 2004, 322, and EAS 2517 = *SWI* 2005, 2 (concerning §42 ImmoInvFG); see also EAS 1485 = *SWI* 1999, 407.

86 For a detailed analysis of attribution issues see Kofler, *op. cit.*, pp. 85, 90–92 and 95–102.

87 Philipp *et al.*, *op. cit.*, I/1 Z 0 paras. 90 *et seq.* and Z 1 para. 27; see also EAS 644 = *SWI* 1995, 285.

2. General and specific anti-avoidance provisions in tax treaties

2.1. General overview

Specific anti-avoidance clauses found in international treaty practice have the advantage that treaty benefits may be denied without far-reaching investigations whether or not the specific transaction or structure serves an avoidance purpose; they, however, have the disadvantage that situations not covered by such specific clauses may be deemed in any event to be legal, hence excluding the application of domestic anti-avoidance provisions; further, to cover all potentially abusive transactions, such clauses have to be comprehensive and complicated, deter investment and face the inherent disadvantage that if they are not included in every treaty, distortions of competition may result. Based on these reasons, Austrian treaty policy has not developed specific anti-avoidance provisions; where such provisions are, however, included in treaties this is either because they have become internationally accepted or because of a strong wish of the treaty partner state.[88]

It might also be noted that even though more than 50 Austrian treaties contain the concept of "beneficial owner" (*Nutzungsberechtigter*)[89] as laid down in articles 10, 11 and 12 OECD MC, there is little guidance as to its interpretation. The Austrian tax administration considers this concept as merely clarifying, since income attribution under domestic law already follows economic principles;[90] the beneficial ownership concept is, however, also deemed to comprise the concepts of abuse under §22 BAO, sham transactions under §23 BAO, and economic ownership of the income-producing assets under §24 BAO.[91]

2.2. Specific treaty provisions allowing application of domestic anti-avoidance provisions

Only four Austrian treaties contain specific tax treaty provisions that allow or preserve the application of domestic anti-avoidance provisions. In the treaty relations

88 *Ibid.*, I/1 Z1 0 paras. 27–28.

89 The joint German translation of the OECD model for Austria, Germany and Switzerland refers to the "beneficial owner" as *Nutzungsberechtigter*, deliberately avoiding translating the term as *wirtschaftlicher Eigentümer* ("economic owner"), as the latter concept was already used by Austrian and German domestic law; see Jürgen Killius, "The Concept of 'Beneficial Ownership' of Items of Income under German Tax Treaties", *Intertax* (1989), 340, 341.

90 Jirousek, *op. cit.*, pp. 169, 182 *et seq.*; Philipp *et al.*, *op. cit.*, I/1 Z1 0 para. 48; see also EAS 406 = *SWI* 1994, 138; EAS 2288 = *SWI* 2003, 324. For a detailed analysis see Kofler, *op. cit.* pp. 85, 91 and 95–102.

91 EAS 1040 = *SWI* 1997, 277; Helmut Loukota, "Die aktuelle österreichische DBA Politik", 48 *ÖStZ* pp. 249 *et seq.* (1995). See also EAS 1035 = *SWI* 1997, 188 (referring to §24 BAO), EAS 1075 = *SWI* 1997, 333, EAS 1092 = *SWI* 1997, 338, EAS 1113 = *SWI* 1997, 428, EAS 1143 = *SWI* 1997, 486, EAS 1155 = *SWI* 1997, 535, EAS 2415 = *SWI* 2004, 165, EAS 2476 = *SWI* 2004, 440. For a critical analysis see Tatjana Polivanova-Rosenauer, "Das Konzept des Nutzungsberechtigten aus abkommensrechtlicher Sicht", *SWI* 2001, pp. 257 *et seq.*

with Belgium,[92] Mexico[93] and the United States[94] it is explicitly stated that more specific treaty-based provisions do not exclude the application of domestic anti-avoidance provisions. However, no administrative or judicial guidance exists on these clauses, and it stands to be assumed that they are intended to merely clarify a general principle. Indeed, as the US Technical Explanations note, such a clause "makes clear that both Contracting States agree that the explicit anti-abuse provisions of the Convention do not limit the applicability of statutory anti-abuse provisions of the Contracting States".[95] Likewise, article 28(2) of the DTC with Germany provides that the state of residence shall be entitled to apply its domestic anti-tax avoidance provisions in order, *inter alia*, to counter abusive legal structurings. The protocol clarifies – very much in the spirit of the general anti-avoidance rules of §22 BAO in Austria and §42 AO in Germany[96] – that "abusive legal structurings" refer to structures, which, in view of the pursued economic objective, are unusual and inappropriate and find their explanation in the purpose of tax avoidance, and that it exists in cases where the selected structuring does not seem reasonable or is simply incomprehensible if the tax saving effect is disregarded.[97] This provision was introduced to accommodate Germany's wishes, while the Austrian delegation took the position that the application of domestic anti-avoidance provisions is generally permissible also without a specific clause to that effect.[98] However, and unlike Germany, Austria takes the position that this clause only covers "real" abuses that are determined on a case-by-case basis.[99] The wording of article 28(2), which refers only to the residence state, may furthermore suggest that the source state may conversely not rely on

92 Art. 27(4)(1) of the DTC with Belgium states that nothing in the convention shall be construed so as to prevent a contracting state from applying the provisions of its national law for the prevention of fiscal evasion and fiscal fraud.

93 Pt 2 of the protocol to the DTC with Mexico explicitly notes that "[s]pecial provisions of the Convention designed to curb abusive international transactions and to exclude them from treaty benefits are not to be understood as preventing a Contracting State from applying a substance over form evaluation of facts or its internal legislation designed to counteract tax avoidance and evasion in other cases not particularly covered by a specific anti-abuse clause of the treaty".

94 Pt 16 of the Memorandum of Understanding with the USA provides that "[s]pecial provisions of the treaty designed to curb abusive international transactions and to exclude them from treaty benefits, like Article 16 [on limitation on benefits], are not to be understood as preventing a Contracting State from applying a 'substance over form' evaluation of facts in other cases not particularly covered by a specific anti-abuse clause of the treaty". The phrase "substance over form" is understood to "refer to the process of looking at the economic substance of a transaction or event rather than solely at its legal form. This process also encompasses the notion of taking into account the economic consideration that underlies the transactions or event". See Technical Explanation to the 1996 treaty with Austria on art. 16 (1996).

95 Technical Explanation to the 1996 treaty with Austria on art. 9 (1996).

96 See also Michael Lang and Markus C. Stefaner in Helmut Debatin and Franz Wassermeyer (eds.), *Doppelbesteuerung*, art. 28 Österreich para. 15.

97 Pt 15 of the protocol.

98 *See* Helmut Loukota, "Das neue DBA Österreich-Deutschland im Lichte der österreichischen Abkommenspolitik", in Wolfgang Gassner, Michael Lang and Eduard Lechner (eds.), *Das neue Doppelbesteuerungsabkommen Österreich Deutschland* (Vienna: Linde, 1999), pp. 35, 50.

99 See pt. 1 of the Decree AÖF 2007/11 (concerning look-through taxation in Germany with respect to income of Austrian private foundations).

domestic anti-avoidance provisions to counter abuses,[100] which would, however, be at odds with the Ministry's general construction of tax treaties.[101]

2.3. General anti-avoidance provisions in tax treaties

General treaty-based anti-avoidance provisions are principally not found in Austrian tax treaties. The only provision that may entail such an approach is part 2 of the protocol to DTC Mexico, according to which "[t]he Contracting States may deny the benefits of this Convention when transactions have been entered into with the purpose of abusing the provisions contained in it".

2.4. Specific anti-avoidance provisions in tax treaties

As noted before, there is no stringent Austrian tax treaty policy on negotiating specific anti-avoidance clauses. It is, however, noteworthy that Austria's treaty policy largely follows the OECD MC when it comes to specific anti-avoidance clauses; hence no fewer than 28 Austrian DTCs incorporate a distributive rule similar or identical to that included in article 13(4) of the OECD MC regarding the alienation of shares in property companies,[102] and 65 Austrian treaties contain "look-through" clauses for artiste companies based on article 17(2) OECD MC.[103] Apart from "subject to tax" clauses and provisions with similar effect,[104] the specific anti-avoidance clauses that do not follow the OECD MC may be grouped as follows:

- Exclusions from a treaty's personal scope for dual resident companies (DRCs) – several Austrian DTCs do not contain an automatic tie-breaker for dual resident companies. Rather, 11 DTCs leave residence determination of DRCs to mutual agreement,[105] and one DTC straightforwardly excludes such companies from residence status.[106]
- Specific exclusions from a treaty's personal scope – only four Austrian DTCs contain specific exclusions from residency status. According to the "subject to tax" clause in article 4(4) of the DTC with Switzerland, an individual is not deemed to be a resident of a contracting state if "he is not subject to the taxes generally imposed in accordance with the tax law of that State on income which has its source in the other Contracting State"; further, under article 28(7), companies which are not entitled to treaty benefits under domestic law[107] are

100 So Lang and Stefaner, *op. cit.*, art. 28 Österreich para. 14. For a detailed analysis see Wolfgang Gassner, "Anwendung des Abkommens in bestimmten Fällen (Art 28 DBA-Entwurf)", in Gassner *et al.* (eds.), *Das neue Doppelbesteuerungsabkommen Österreich Deutschland*, *op. cit.*, pp. 269, 280–284.

101 See above section 1.4.

102 For the characterization of these provisions as anti-avoidance clauses see Philipp *et al.*, *op. cit.*, I/1 Z1 1 para. 27.

103 For an overview see the appendix to this report.

104 For a recent overview see Jirousek, *op. cit.*, pp. 169, 185 *et seq.*

105 See art. 4(3) of the DTCs with Azerbaijan, Belarus, Canada, Estonia, Finland, Latvia, Lithuania, Mexico, the Philippines, Tunisia and Turkey.

106 See art. (4)(1)(b) of the DTC with Liechtenstein, which includes in residency status only a company "which has its seat and its place of effective management in that State".

107 This provision was introduced in light of the Swiss "Bundesratsbeschluss vom 14. Dezember 1962 betreffend Massnahmen gegen die ungerechtfertigte Inanspruchnahme von Doppelbesteuerungsabkommen des Bundes", *AS* 1962 1622. The respective assessment is made by the Swiss tax

excluded from the treaty's personal scope.[108] Under its article 26, the DTC with Liechtenstein does (partially) not apply to exempt Liechtenstein companies and trusts.[109] Article 26 of the DTC with Luxembourg contains an explicit exclusion of "1929 holding companies".[110] Finally, the LOB clause in article 16 of Austria's DTC with the United States excludes persons from all treaty benefits unless they qualify under a list of "unsuspicious" entities or treaty benefits are granted under the subjective clause.

- Anti-avoidance limitations for passive income – apart from beneficial ownership requirements[111] some Austrian treaties contain specific anti-avoidance rules in the area of dividends, interest and royalties.
- Source state – from the source state's perspective, a number of treaties attach additional conditions for source tax reductions or exemptions. The DTC with Japan[112] includes a minimum holding period for dividend withholding tax reduction, and the protocols to the DTCs with Poland[113] and San Marino[114] include tax-avoidance carve-outs for withholding tax exemptions. The protocol to the DTC with Greece contains a tax avoidance carve-out for articles 11 and 12, should the interest-bearing debt claim or the royalty-bearing property have been created or assigned mainly for taking advantage of the respective article and not for commercial reasons. Similarly, the protocol to the DTC with Mexico provides that, "[i]n the case of abusive transactions,

cont.

authorities but does not have binding effect on Austria in the sense that even if the Swiss company had been issued a certificate of residency and was thus deemed to be a resident by Switzerland, Austria may nevertheless deny treaty benefits based on domestic income attribution principles and §22 BAO. See VwGH, 26 July 2000, 97/14/0070 (*Treaty Shopping II*), and EAS 2294 = *SWI* 2003, 421; EAS 2467 = *SWI* 2004, 430; EAS 2470 = *SWI* 2004, 431. See also Loukota, "Das zweite Treaty-Shopping-Erkenntnis", *op. cit.*, pp. 420 *et seq.*

108 According to this provision, residents of one of the contracting states, who, in accordance with the regulations of that state, are not eligible for the reliefs provided for in DTCs cannot claim the relief from tax in the other contracting state granted in this convention or the relief from tax in the state in which they are resident granted in art. 23 of the treaty.

109 Art. 26 provides that the provisions of the treaty shall apply to companies and trusts, which are exempt under Liechtenstein tax legislation from capital, income and corporation taxes (under arts. 83 and 84 of the Tax Law of 30 January 1961) only to the extent that individuals, resident in Liechtenstein and companies, foundations and *Anstalten* of Liechtenstein public law are directly interested in or benefit from such companies and trusts.

110 According to this provision, the treaty shall not apply to holding companies within the meaning of the special Luxembourg laws (currently the Acts of 31 July 1929 and 27 December 1937). Nor shall it apply to income derived from such holding companies by a resident of Austria or to shares in such companies, belonging to such a person.

111 See section 2.1 above.

112 Art. IX(1) (minimum holding period of 12 months).

113 Pt III of the protocol provides that "[s]ub-paragraphs (c) and (d) of paragraph 3 [of Art. 11] do not apply in the case of debt-claim created or assigned mainly for purposes of taking advantage of those sub-paragraphs and not for bona fide commercial reasons, as well as in the context of thin capitalisation". Art. 11(3) of the treaty provides that interest shall be only taxable in the residence state if the recipient is the beneficial owner of the interest and if such interest is paid in connection with the sale on credit of any industrial, commercial or scientific equipment (c) or on any loan of whatever kind granted by a bank (d).

114 Art. 10 of the treaty with San Marino makes the withholding tax exemption for inter-company dividends contingent on "the conditions provided for in the domestic legislation" and clarifies in pt 2 of the protocol that this reference to domestic law "relates to domestic anti-abuse provisions".

interest paid on back to back loans and thin capitalization will be taxed in accordance with the domestic law of the Contracting State in which the interest arises".[115]

- Residence state – from the residence state's perspective, the protocols to the DTCs with Mongolia,[116] Nepal[117] and Turkey[118] contain general tax-avoidance carve-outs for granting tax sparing credits.

3. Relationship with EC law

There has been some considerable focus on the tension between anti-avoidance provisions and the fundamental freedoms of the EC Treaty and the EEA Agreement. The respective issues that have been raised so far may be summarized briefly.

3.1. General anti-abuse provisions

Since §22 BAO is not similarly applied in purely domestic settings as it is in cross-border settings, it has been argued that this would result in a discriminatory treatment and doubted whether such discrimination may be justified as a measure to prohibit "purely artificial arrangements".[119] The VwGH, however, has so far ruled that neither argument prevents application of §22 BAO in a European context.[120]

3.2. Switch-over clauses

Since inter-company dividends in domestic settings are always tax exempt at the parent level, it has been argued that a switch-over to the credit method for cross-border inter-company dividends under §10(4) to (6) KStG might be prohibited as a

115 Pt 10 of the protocol.

116 According to pt 2 of the protocol "[i]t is understood that the provisions of that subparagraph will not apply if the form of a transaction giving rise for the application of those provisions was mainly chosen with a view to avoid taxes". Art. 24(1)(c) states that "[f]or the purpose of the credit referred to in subparagraph (b) of this paragraph the Mongolian tax shall be deemed to be 10 per cent of the gross amount in the case of income referred to in Article 10 paragraph 1 subparagraph (b), Article 11 paragraph 2, Article 12 paragraphs 2 and 3".

117 According to para. 4 of the protocol "[i]t is understood that [the the tax-sparing credit provision of Art. 22(4), relating to tax reductions based on tax incentives] will not apply if the form of a transaction giving rise for the application of those provisions was mainly chosen with a view to avoid taxes".

118 According to pt 4 of the protocol "[i]t is understood that [the tax-sparing credit provision of Art. 22(1)(e), relating to passive income] will not apply if the form of a transaction giving rise for the application of those provisions was mainly chosen with a view to avoid taxes".

119 For recent discussions of these issues see Alexander Stieglitz, "§22 BAO und Gemeinschaftsrecht. Kritik der Rechtsprechung des VwGH zum Einsatz von Auslandsgesellschaften in Niedrigsteuerländern", in Friedrich Fraberger, Andreas Baumann, Christoph Plott and Kornelia Waitz-Ramsauer (eds.), *Handbuch Konzernsteuerrecht* (Vienna: LexisNexis 2008), pp. 485 *et seq.*; Stürzlinger, *op. cit.*, pp. 129, 149–150. See also e.g. BFH, 25 February 2004, I R 42/02, BFHE 206, 5, BStBl 2005 II 14.

120 VwGH, 10 August 2005, 2001/13/0018 (*Dublin Docks II*); see also VwGH, 24 July 2007, 2007/14/0029 (*Jersey II*).

disproportionate anti-avoidance measure which exceeds what is strictly required for the purpose of countering tax avoidance.[121] However, these doubts have largely been removed when the VwGH, based on the ECJ's decisions in *FII Group Litigation*[122] and *Columbus Container Services*,[123] held that discriminatory treatment of cross-border inter-company portfolio dividends, in comparison to equivalent domestic dividends indeed constitutes a prohibited restriction of the free movement of capital, but that granting an indirect foreign tax credit could cure a breach of EC law.[124] The discussion has since moved to questions surrounding a discrimination-free application of the indirect credit method.[125]

3.3. Foreign investment funds regime

If a foreign company serves as a vehicle for spreading investment risks it may be deemed to be a foreign investment fund under §42 InvFG, leading to the fiction that all income of such a subsidiary was earned directly by its parent company.[126] Since domestic companies with risk-diversifying investments are not equally treated as transparent, it has been argued that such look-through taxation without the specific aim of preventing tax avoidance on a case-by-case basis may infringe the freedom of capital movement.[127] The MoF has so far rejected this line of reasoning, arguing that Community law does not prevent a state to consider foreign entities as transparent under §42 InvFG.[128]

121 Georg Kofler and Gerald Toifl, "Austria's Differential Treatment of Domestic and Foreign Inter-Company Dividends Infringes the EU's Free Movement of Capital", *ET* 2005, pp. 232, 238–239; Katharina Haslinger, "Die Besteuerung von Dividenden – EuGH bestätigt Kritik an geltender Rechtslage", *SWI* 2007, pp. 175, 183 *et seq.*

122 ECJ, 12 December 2006, C-446/04, *FII Group Litigation*, [2006] ECR I-11753.

123 ECJ, 6 December 2007, C-298/05, *Columbus Container Services*, [2007] ECR I-10451.

124 VwGH, 17 April 2008, 2008/15/0064; for a discussion see Thomas Bieber, Werner Haslehner, Georg Kofler and Clemens Ph. Schindler, "Taxation of Cross-Border Portfolio Dividends in Austria: The Austrian Supreme Administrative Court Interprets EC Law", *ET* 2008, pp. 583 *et seq.*, with further references). This position was also adopted by the Austrian Federal Ministry of Finance (BMF-010216/0090-VI/6/2008, published on 13 June 2008, and available in German at http://findok.bmf.gv.at, and was reprinted in FJ 2008, 274, in *ÖStZ* 2008, 270, and in *SWK* 2008, pp. 528 *et seq.*), but the foundations as well as the details of this solution were subsequently referred to the ECJ by the Tax Senate (UFS) of Linz in C-436/08, *Haribo*, and C-437/08, *Österreichische Salinen* (a brief discussion of these references see Georg Kofler and Clemens Ph. Schindler, "*Haribo*: Request for a preliminary ruling in Austrian case on foreign participation", *H&I* 2009, pp. 59 *et seq.*). The legislator of the Budget Supplementary Act 2009 enacted, with retroactive effect for all open cases, an exemption for dividends from EU and qualifying EEA companies, but foresaw a far-reaching switch-over clause. See section 1.3 above.

125 See e.g. Christian Massoner and Birgit Stürzlinger, "Gleichwertigkeit von Anrechnungs- und Befreiungsmethode aus gemeinschaftsrechtlicher Sicht: (An-)Rechnung ohne den Wirt?", *SWI* 2009, pp. 280 *et seq.*

126 See section 1.3 above.

127 For the prevailing opinion, see Michael Tumpel, "Ist die Durchgriffsbesteuerung bei Kapitalgesellschaften gem § 42 Abs 1 InvFG gemeinschaftsrechtswidrig?", *SWI* 2004, pp. 501 *et seq.*; Georg Kofler, "Missbrauch bei Einschaltung einer Dublin Docks Gesellschaft", ecolex 2005, pp. 321, 324; Walter Loukota, "Neue Steuerentlastung für Outbound-Dividenden an EU/EWR-Körperschaften", *SWI* 2009, pp. 432 *et seq.*

128 EAS 3012 = *SWI* 2009, 8. The potential impact of the ECJ's judgment, 18 June 2009, C-303/07, *Aberdeen Property Fininvest Alpha Oy* (concerning discriminatory taxation of dividend payments

3.4. Exclusions from a treaty's personal scope

In the light of the ECJ's decisions in the *Open Skies* cases,[129] doubts have been raised as to the compatibility of the ownership test in the LoB clause in the DTC with the USA with the EC fundamental freedoms;[130] while no Austrian case law exists on this point, it may be noted that the ECJ has so far not shared these doubts for a similar provision in the Dutch-UK DTC.[131] Along the same lines it has been questioned whether article 26 of the DTC with Liechtenstein, which excludes exempt Liechtenstein companies from residency status insofar as their shares are not held by Liechtenstein resident individuals and public law bodies, is in line with EEA non-discrimination principles; the MoF has so far rejected this approach, arguing that countering tax avoidance is a legitimate aim under the EEA fundamental freedoms.[132]

Appendix: Anti-avoidance provisions in Austrian tax treaties

Table 1 provides an overview of anti-avoidance provisions in the Austrian treaty network as of 15 October 2009. For each country, the respective columns indicate whether (a) the purpose of countering tax-avoidance is part of the DTC's title, (b) there are specific clauses excluding DRCs either from an automatic tie-breaker rule or from residency status, (c) the beneficial ownership concept for dividends, interest and royalties is laid down in the DTC, (d) specific provisions dealing with property companies similar or identical to article 13(4) OECD MC exist, (e) specific provisions dealing with artiste companies similar or identical to article 17(2) exist, and (f) treaty-based participation exemption regimes either refer to domestic law or have treaty-based anti-avoidance carve-outs (provisions in square brackets indicate that neither a treaty-based participation exemption regime without reference to domestic law nor a specific anti-avoidance carve-out exists). The last column indicates other treaty-based anti-avoidance provisions or references to domestic anti-avoidance principles.

cont.
by a Finnish company to a Luxembourg SICAV), on the Austrian approach is yet to be determined. See also Loukota, "Neue Steuerentlastung", *op. cit.*, pp. 432 *et seq.*

129 See *inter alia*, ECJ, 5 November 2002, C-466/98, *Commission* v. *United Kingdom*, [2002] ECR I-9427.

130 See Georg Kofler, "Treaty Shopping, Quota Hopping und Open Skies: Die gemeinschaftsrechtliche Problematik von Limitation on Benefits Klauseln in Doppelbesteuerungsabkommen mit den Vereinigten Staaten", in Michael Lang and Heinz Jirousek (eds.), *Praxis des Internationalen Steuerrechts. Festschrift für Helmut Loukota* (Vienna: Linde 2005), pp. 213 *et seq.*

131 ECJ, 12 December. 2006, C-374/04, *ACT Group Litigation*, [2006] ECR I-11673, paras. 89–91. For an analysis and critique see Georg Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Vienna: Linde 2007), pp. 500 *et seq.*

132 See EAS 944.

Table 1. Anti-avoidance provisions in Austrian tax treaties

	Federal gazette	Title	DRC	Beneficial ownership (arts. 10, 11, 12)	Art. 13(4)	Art. 17(2)	Participation exemption	Other anti-avoidance provisions/ reference to domestic law
1 Albania	BGBl III 2008/107	✓	—	✓	—	✓	—	—
2 Algeria	BGBl III 2006/176	—	—	✓	—	✓	Art. 23(2)(c)	—
3 Armenia	BGBl III 2004/29	—	—	✓	✓	✓	Art. 23(2)(c)	—
4 Australia	BGBl 1988/480	✓	—	✓	✓	✓	—	—
5 Azerbaijan	BGBl III 2001/176	✓	✓	✓	✓	✓	—	—
6 Barbados	BGBl III 2007/40	✓	—	✓	—	✓	—	—
7 Belarus	BGBl III 2002/69	—	✓	✓	—	✓	Art. 23(1)(c)	—
8 Belgium	BGBI 1973/415	—	—	—	—	—	—	Reference to domstic provisions for the prevention of tax avoidance and evasion (art. 27(4)(1))
9 Belize	BGBl III 2003/132	—	—	✓ (Arts. 10, 12), ~ (Art. 11)[a]	—	✓	—	—
10 Brazil	BGBl 1976/431	—	—	—	—	~	[Art. 23(6)]	—

Table 1. Anti-avoidance provisions in Austrian tax treaties (cont.)								
	Federal gazette	**Title**	**DRC**	**Beneficial ownership (arts. 10, 11, 12)**	**Art. 13(4)**	**Art. 17(2)**	**Participation exemption**	**Other anti-avoidance provisions/ reference to domestic law**
11 Bulgaria	BGBl 1984/425	—	—	—	—	—	—	—
12 Canada	BGBl 1981/77 III 2001/2	✓	✓	✓	✓	✓	Art. 23(2)(b)	—
13 China	BGBl 1992/679	✓	—	✓	✓	✓	Art.24(2)(d)	—
14 Croatia	BGBl III 2001/119	—	—	✓	—	✓	Art. 23(1)(c)	—
15 Cuba	BGBl III 2006/149	✓	—	✓	—	✓	—	—
16 Cyprus	BGBl 1990/709	—	—	~ (Arts. 10, 11)[a], ✓(Art. 12)	✓	✓	—	—
17 Czech Republic	BGBl III 2007/39	✓	—	✓	—	✓	—	—
18 Denmark	BGBl III 2008/41	—	—	✓	—	✓	—	—
19 Egypt	BGBl 1963/293	✓	—	—	—	—	—	—
20 Estonia	BGBl III 2003/11	—	✓	✓	✓	✓	Art. 23(1)(e)	—

Table 1. Anti-avoidance provisions in Austrian tax treaties (cont.)

	Federal gazette	Title	DRC	Beneficial ownership (arts. 10, 11, 12)	Art. 13(4)	Art. 17(2)	Participation exemption	Other anti-avoidance provisions/ reference to domestic law
21 Finland	BGBl III 2001/42	✓	✓	—	~	✓	Art. 23(1)(b)	—
22 France	BGBl 1994/613	✓	—	✓	✓	✓	—	Validation of French thin capitalization rule (pt 8 protocol)
23 Georgia	BGBl III 2006/60	—	—	✓	—	✓	—	—
24 Germany	BGBl III 2002/182	—	—	✓	✓	✓	Art. 23(2)(c)	Reference to domestic anti-tax avoidance provisions in order to counter abusive legal structurings (art. 28(2) and para. 15 of the protocol)
25 Greece (from 2010)	BGBl III 2009/16	—	—	✓	—	✓	—	Tax avoidance carve-out for arts. 11 and 12 (protocol)
26 Hungary	BGBl 1976/52	—	—	—	—	—	—	—
27 India	BGBl III 2001/231	✓	—	✓	✓	✓	—	—
28 Indonesia	BGBl 1988/454	✓	—	✓	—	✓	—	—

Table 1. Anti-avoidance provisions in Austrian tax treaties (cont.)								
	Federal gazette	**Title**	**DRC**	**Beneficial ownership (arts. 10, 11, 12)**	**Art. 13(4)**	**Art. 17(2)**	**Participation exemption**	**Other anti-avoidance provisions/ reference to domestic law**
29 Iran	BGBl III 2004/81	—	—	✓	—	✓	—	—
30 Ireland	BGBl 1968/66, 1989/12	—	—	~ (Art. 8, Imputation credit)[a]	✓	—	[Art. 8(4)]	—
31 Israel	BGBl 1971/85, III 2008/31	—	—	—	—	—	[Art. 10(4)]	—
32 Italy	BGBl 1985/125	✓	—	~	—	✓	—	—
33 Japan	BGBI 1963/127	—	—	—	—	—	—	Minimum holding period for dividend withholding tax reduction (art. IX)
34 Kazakhstan	BGBl III 2006/69	—	—	✓	—	✓	Art. 23(2)(c)	—
35 Kuwait	BGBl III 2004/30	✓	—	~ (Art. 10)[a], ✓(Arts. 11, 12)	—	✓	—	—
36 Kyrgyzstan	BGBl III 2003/89	✓	—	✓	✓	✓	—	—
37 Latvia	BGBl III 2007/76	—	✓	✓	✓	✓	Art. 24(1)(e)	—

Table 1. Anti-avoidance provisions in Austrian tax treaties (cont.)

	Federal gazette	Title	DRC	Beneficial ownership (arts. 10, 11, 12)	Art. 13(4)	Art. 17(2)	Participation exemption	Other anti-avoidance provisions/ reference to domestic law
38 Liechtenstein	BGBl 1971/24	—	✓	—	—	✓	—	• Exclusion of DRCs (art. 4(1)(b)) • (Partial) exclusion of exempt Liechtenstein companies and *Treuhandvermögen* (art. 26)
39 Lithuania	BGBl III 2005/209	—	✓	✓	✓	✓	Art. 24(1)(e)	—
40 Luxembourg	BGBl 1964/54, 1993/835	—	—	—	—	—	Art. 10(4)	Exclusion of "1929 holding companies" (art. 26(1))
41 Macedonia	BGBl III 2008/9	✓	—	✓	—	✓	Art. 22(1)(c)	—
42 Malaysia	BGBl 1990/664	✓	—	✓	—	✓	[Art. 22(2)(a)]	—
43 Malta	BGBl 1997/294	—	—	—	—	✓	[Art. 23(3)]	—
44 Mexico	BGBl III 2004/142	✓	✓	✓	✓	✓	—	• General anti-avoidance reservation (pt 2 protocol) • Anti-avoidance carve-out for art. 11 (pt 10 protocol)

Table 1. Anti-avoidance provisions in Austrian tax treaties (cont.)								
	Federal gazette	**Title**	**DRC**	**Beneficial ownership (arts. 10, 11, 12)**	**Art. 13(4)**	**Art. 17(2)**	**Participation exemption**	**Other anti-avoidance provisions/ reference to domestic law**
45 Moldova	BGBl 2004/160	✓	—	✓	—	✓	—	—
46 Mongolia	BGBl III 2004/92	—	—	~ (Art. 10)[a], ✓(Arts. 11, 12)	—	✓	Art. 24(1)(d)	Tax avoidance carve-out for tax-sparing credit (pt 2 protocol)
47 Morocco	BGBl III 2006/168	✓	—	✓	✓	✓	—	—
48 Nepal	BGBl III 2002/26	✓	—	✓	—	✓	—	Tax avoidance carve-out for tax-sparing credit (pt 4 protocol)
49 Netherlands	BGBl 1971/191, 1991/18, III 2003/14	—	—	—	—	✓	—	—
50 New Zealand	BGBl III 2007/127	—	—	✓ Definition in art. 3(2)	✓	✓	—	—
51 Norway	BGBl III 1997/1, III 2006/181	✓	—	✓(Art. 10), ~ (Arts. 11, 12)[a]	—	✓	—	—
52 Pakistan	BGBl III 2007/40	—	—	✓	✓	✓	Art. 24(1)(c)	—
53 Philippines	BGBl 1982/107	✓	✓	✓	✓	✓		—

Table 1. Anti-avoidance provisions in Austrian tax treaties (cont.)

	Federal gazette	Title	DRC	Beneficial ownership (arts. 10, 11, 12)	Art. 13(4)	Art. 17(2)	Participation exemption	Other anti-avoidance provisions/ reference to domestic law
54 Poland	BGBl III 2005/12, III 2008/161	—	—	✓	✓	✓	Art. 24(2)(c)	• Tax avoidance carve-out for withholding tax exemption (pt III protocol)
55 Portugal	BGBl 1972/28	—	—	—	—	—	—	—
56 Romania	BGBl III 2006/29	✓	—	✓	✓	✓	Art. 24(2)(c)	—
57 Russia	BGBl III 2003/10	—	—	✓	—	✓	Art. 23(1)(c)	—
58 San Marino	BGBI III 2005/208	—	—	✓	✓	✓	—	• Tax avoidance carve-out based on domestic anti-abuse provisions for dividend withholding tax exemption (pt 2 protocol)
59 Saudi Arabia	BGBl III 2007/62	✓	—	✓	✓	✓	—	—
60 Singapore	BGBl III 2002/248	✓	—	✓	✓	✓	Art. (22)(1)(c) and pt 3 protocol	—
61 Slovakia	BGBl 1979/34, 1994/1046	—	—	—	—	✓	—	—

Table 1. Anti-avoidance provisions in Austrian tax treaties (cont.)								
	Federal gazette	**Title**	**DRC**	**Beneficial ownership (arts. 10, 11, 12)**	**Art. 13(4)**	**Art. 17(2)**	**Participation exemption**	**Other anti-avoidance provisions/ reference to domestic law**
62 Slovenia	BGBl III 1999/4, III 2007/126	—	—	✓	—	✓	—	
63 South Africa	BGBl III 1997/40	—	—	✓(Art. 10), ~ (Arts. 11, 12)[a]	—	✓	—	—
64 South Korea	BGBl 1987/486, III 2002/68	✓	—	✓	✓	✓	—	—
65 Spain	BGBl 1967/395, 1995/709	—	—	—	—	—	Art. 24(1)(c)	—
66 Sweden	BGBl 1960/39, 1970/341, 1993/132	—	—	✓(Art. 10), ~ (Art. 11[a], art. 1(3) of the agreement BGBl 1972/298)	—	—	Art. 10(6)	—
67 Switzerland	BGBl 1975/64, 1995/161, III 2001/204, III 2007/22	—	—	✓ (Art. 12) – "Right to use" concept in art. 2 of the agreement BGBI 1975/65	—	✓	—	• Subject to tax clause for residency determination in art. 4(4) • Exclusion of persons from treaty entitlement based on Swiss domestic law (art. 28(7))

Table 1. Anti-avoidance provisions in Austrian tax treaties (cont.)

	Federal gazette	Title	DRC	Beneficial ownership (arts. 10, 11, 12)	Art. 13(4)	Art. 17(2)	Participation exemption	Other anti-avoidance provisions/ reference to domestic law
68 Tajikistan	BGBl 1982/411, III 1998/4	—	—	—	—	—	—	—
69 Thailand	BGBl 1986/263	✓	✓	~ [a]	~ [a]	✓	[Art. 24(3)(d)]	—
70 Tunisia	BGBl 1978/516	—	—	—	—	✓	—	—
71 Turkey (from 2010)	BGBl III 2009/96	—	✓	✓	—	✓	Art. 22(1)(c)	• Tax avoidance carve-out for matching credit (pt 4 protocol)
72 Turkmenistan	BGBl 1982/411 (AÖF 1999/178)	—	—	—	—	—	—	—
73 Ukraine	BGBl III 1999/113	✓	—	✓	✓	✓	Art. 23(1)(c)	—
74 United Arab Emirates	BGBl III 2004/88	—	—	~ (Art. 10)[a], ✓(Arts. 11, 12)	—	✓	—	—
75 United Kingdom	BGBl 1970/390, 1978/585, 1994/835	✓	—	✓	—	✓	—	—

Table 1. Anti-avoidance provisions in Austrian tax treaties (cont.)								
	Federal gazette	**Title**	**DRC**	**Beneficial ownership (arts. 10, 11, 12)**	**Art. 13(4)**	**Art. 17(2)**	**Participation exemption**	**Other anti-avoidance provisions/ reference to domestic law**
76 USA	BGBI III 1998/6	✓	—	✓	✓	✓	—	• LOB clause (art. 16) • Special treaty rules do not prevent domestic application of substance over form evaluation of facts (pt 6 MOU)
77 Uzbekistan	BGBI III 2001/150	✓	—	✓	—	✓	Art. 23(3)	—
78 Venezuela	BGBI III 2007/33	✓	—	✓	✓	✓	Art. 24(2)(c)	—

[a] The tilde indicates a concrete rule that is approximately the same as in the OECD model.