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B: Big data and tax – domestic and international taxation of data driven business

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Summary and conclusions

– As for the relevant legal background applicable to big data transactions, Austria has implemented EU legislation, including the EU Database Directive, the Trade Secrets Directive and General Data Protection Regulation (GDPR). However, the Austrian legal system does not recognize a property right in data *per se*, and contractual agreement dominates the "market for data".
– In Austria, there is no specific (direct) tax legislation relating to data transactions such as "raw data transactions", "aggregated data transactions", and "big data analytics". Instead, the general rules of the Austrian Income Tax Act (*Einkommensteuergesetz*, "EStG") and the Corporate Income Tax Act (*Körperschaftsteuergesetz*, "KStG") apply. This means that the income from such transactions derived by resident taxpayers will usually qualify as ordinary business income. If the income is derived by a non-resident, it also qualifies as business income which is only subject to limited tax liability in Austria, if it is derived through a permanent establishment in Austria. Income from data transactions does not qualify as royalty income which could be taxed in Austria irrespective of a permanent establishment. This is because raw data and aggregated data do not constitute rights under copyright law, commercial know-how or other rights; consequently, payments for the use of them are not considered as royalties in terms of the EStG.
– Generally, Austria's treaty practice follows the OECD Model, so that line-drawing between business profits (articles 7), royalties (article 12), capital gains (article 13) and other income (article 21) is relevant. The UN Model, which sometimes forms a foundation for bilateral treaties, includes further provisions that may apply in the context of data transactions: technical services (article 12A) and, prospectively, automated digital services (article 12B). There is very little domestic guidance on the application of these treaty provisions to data transaction. Arguably, however, (1) the mere fact that the relevant data is collected from a particular state or the data is bought and/or used by a taxpayer in a particular state would not create nexus under existing treaty rules; (2) the mere use of server capacity does not create a permanent establishment, implying that infrastructure-as-a-service (IaaS) transactions will be treated as services (so that they are characterised as business profits for treaty purposes); (3) the Austrian tax authorities may treat user data as "equipment" in terms of article 12 UN Model; and (4) collecting,

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organizing and structuring data may be qualified as a “technical service” within the meaning of specific royalty articles in the Austrian treaty network.

- In Austria, no specific transfer pricing guidance applies for the transfer of data or for the provision of goods or services where the value or efficiency has been enhanced by an enterprise’s use of big data. Instead, the application of the arm’s length principle to such transactions has to be based on the general guidance provided in the OECD Transfer Pricing Guidelines (TPG). The Austrian tax authorities take the position that tax treaties in general are interpreted dynamically and that the OECD TPG in their latest version have to be applied. This means that currently, the OECD TPG 2017 are applicable in Austria, including the latest guidance for intangibles.
- In 2020, Austria introduced new legislation which provides for a revenue-based digital business tax of 5% on online advertising, i.e., the Digital Tax Act 2020 (*Digitalsteuergesetz 2020*). From an Austrian perspective this act is viewed primarily as an addition to the existing tax regime and not as a special tax for digital corporations, as Austria already has a corresponding “traditional” advertising tax for print, broadcasting etc. since 2000. The Digital Tax Act applies to online advertising services with effect from 1 January 2020. However, the digital tax must be regularly evaluated starting on 31 December 2021 in terms of uniformity of taxation and implementation, as well as its impact on business entities in the light of any more comprehensive measures for taxation of the digital economy at EU or OECD level. With global consensus reached, Austria has agreed to remove the digital tax; further modalities are yet to be coordinated.
- Austrian tax law provides for different tax incentives related to research and development potentially relevant in the context of big data, amongst others the research premium and relocation tax benefits. Data collection does not constitute research or experimental development for the purpose of these incentives. In contrast, software development (including data analytics tools) can qualify as research and experimental development, but only if it contributes to problem solutions that represent scientific and/or technological progress.
- There has been an intensive academic discussion in Austria if a user’s enjoyment of free digital services (e.g., use of a social media platform, a search engine, a message service, a free e-mail service etc.) in cases where the provider is able to collect user data, constitutes a barter transaction that could be recognized for Value Added Tax (VAT) purposes *de lege lata* (in light of the harmonized EU VAT regime and the respective case law of the CJEU) or should be so *de lege ferenda*. One core issue of this discussion is whether mere agreement to agreeing to a service provider’s terms and conditions results in the transmission of data being not in exchange for a service (or in lieu of monetary compensation). However, to date no court decision on that issue has been rendered and no legislative action *de lege ferenda* has been announced.
- For Austrian tax accounting purposes, expenses for internally developing intangible assets are immediately deductible and no asset is capitalised. Up to now the question if acquired “big data” qualifies as an (intangible) asset has not been discussed in Austria. However, following Austrian case law by analogy, in our opinion acquired “big data” has to be capitalised as an asset with its acquisition costs. If “big data” is transferred to a foreign permanent establishment, the hidden reserves are taxed irrespective of the data being capitalised or not (within the EU/EEA in instalments) because the Austrian exit tax rules comprise the transfer of assets and “other services”.

Introduction: Legal background

As for the relevant legal background applicable to big data transactions, we can largely refer to the general description of commercial law principles described in the general report. Despite an ongoing academic discussion, the Austrian legal system does not recognize a property right in data *per se*.[4] The potentially relevant regulatory aspects are based on EU harmonization measures: Austria has implemented the protections of the EU Database Directive[5] into domestic law: §§ 40f, 40g and 40h of the Austrian Copyright Act implement the copyright protection of 'databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation' (Chapter II of the Database Directive) and §§ 76c, 76d and 76e implement the *sui generis* right to ensure protection of any investment in obtaining, verifying or presenting the contents of a database (Chapter III of the Database Directive). Moreover, Austria has implemented the Trade Secrets Directive[6] in §§ 26a to 26j of the Act Against Unfair Competition for the protection against the unlawful acquisition, use and disclosure of trade secrets. Finally, the EU's General Data Protection Regulation (GDPR)[7] prohibits companies from processing any personal data unless a data subject has provided informed consent to data processing for one or more purposes or there is a statutory exception. There is, however, broad agreement that these legal instruments do not create a full legal framework for (the protection of) data (e.g., machine-generated data), so that contractual agreement dominates the "market for data".[8]

Part One: Basic principles: Character, source and nexus

1.1. General overview

In Austria, there are no specific laws relating to data transactions such as "raw data transactions", "aggregated data transactions", and "big data analytics". Instead, the general rules of the Austrian Income Tax Act (*Einkommensteuergesetz*, "EStG") and the Corporate Income Tax Act (*Körperschaftsteuergesetz*, "KStG") apply. The EStG defines seven categories

[4] For discussion and further references see, e.g., S. Dürager, *Sind Daten ein schutzfähiges Gut?* ÖBl 2018/80, p. 260 (pp. 262-263).

[5] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, [1996] OJ L77, p. 20 et seq., as amended by [2019] OJ L 130, p. 92 et seq.

[6] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, [2016] OJ L 157, p. 1 et seq.

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *[2016] OJ L 119, p. 1 et seq*. The Regulation as such is directly applicable in all member states but requires domestic implementation in some areas; and Austria has adopted those measures in an amendment to the Austrian Data Protection Act (see Federal Gazette (BGBl) I 2017/120).

[8] For recent analysis of various issues, including the legal framework for artificial intelligence and data generated by it, see S. Dürager, *Sind Daten ein schutzfähiges Gut?* ÖBl 2018/80, p. 260 (pp. 260-267); H. Herda, *Artificial Intelligence und Immaterialgüterrecht*, wbl 2019, p. 305 (pp. 305-314); P. Burgstaller and E. Hermann, *Urheberrechtliche Relevanz von KI-generierten sowie verschlüsselten Inhalten*, ÖBl 2020/44, p. 148 (pp. 148-155).

of income which are subject to tax (§ 2(3) and §§ 20-30c EStG). The list is exhaustive so that income not falling within any of these categories is not taxable at all. The categories are:

1. Income from agriculture and forestry
2. Income from self-employment
3. Income from commercial activities / (ordinary) business income
4. Income from employment
5. Income from capital investments
6. Income from renting, leasing and royalties
7. Other specific income

The differentiation between the categories of income is relevant because the computation of taxable income depends on it. While for categories 1 to 3 ("business income" or "profit income") the tax base is the "profit" generated from commercial activities, which is generally determined based on commercial and/or tax accounting, the tax base for categories 4 to 7 ("non-business income") is calculated based on the excess of the receipts over expenditures (§ 2(4) EStG). Categories 1 to 4 take precedence over categories 5 to 7 ("principle of subsidiarity").[9] For corporate income tax purposes, the same concept of income is used as in the Income Tax Act. However, § 7 KStG sets forth the fiction that all income of limited liability companies and stock companies as well as of other corporations required to keep books following the Commercial Code is classified as income from commercial activities ("commercial fiction").

1.2. Character, source and nexus of data transactions under general tax law

Based on the general rules described above, income from raw data, aggregated data transactions (including the access to as well as the sale of data) and from big data analytics in a purely domestic situation will usually qualify as business income, which is taxed in the same way as any other ordinary business income due to the principle of subsidiarity.

If, in case study 1, Broker Co collects data and resells certain data sets to its customers, Broker Co – if resident in Austria – would be subject to unlimited tax liability in Austria, i.e. subject to tax on its worldwide income. The income would be categorized as business income and would be calculated on a net base (profit income).

In an international context, however, the type of income has to be qualified on an isolated basis to determine if the non-resident carrying out data transactions is taxable in Austria. While for the purpose of limited tax liability the same categories apply as for unlimited tax liability, only income sourced in Austria (i.e., those with an Austrian nexus, as defined in § 98 EStG) is subject to limited tax liability (§1(3) and § 98 EStG). "Qualification on an isolated basis" means that, even if the non-resident taxpayer carries out the data transaction in the context of a foreign trade or business, the income from activities in Austria (including, e.g., data transactions) is not automatically characterized as business income, but that those activities and transactions have to be analysed separately from the business activities carried out abroad and could therefore come under categories 5 to 7, e.g., as royalty

9 This means, e.g., that even if royalty income would be covered by the definition of category 6 (income from renting, leasing and royalties), it would be taxed under category 3 (ordinary business income) if it is derived in the course of commercial activities.

income. This avoids that the mere qualification of Austrian-sourced income as business income would exclude taxation in Austria (for lack of a permanent establishment).

In general, data transactions could potentially qualify as (ordinary) business income (§ 23 EStG), which includes capital gains from the alienation of assets, or as royalty income (§ 28 EStG). As already explained above, however, royalty income in an Austrian business context is taxed as business income under § 23 EStG (which generally takes priority over § 28 EStG). However, in a cross-border context and in light of the necessary "qualification on an isolated basis", the definition of royalty income (and its distinction from business income) is still highly relevant for the taxation of non-resident taxpayers (without a permanent establishment in Austria), as the respective rule in § 98(1)(6) EStG refers to § 28 EStG. Moreover, those rules of the Income Tax Act also apply to corporate taxpayers (§§ 7, 21 KStG).

Income from commercial activities is broadly defined as income from activities that are carried out autonomously ('selbstständig'), sustainably ("nachhaltig"), with the intention to derive a profit ("Gewinnabsicht") and on a long-term basis ("Wiederholungsabsicht"), but excludes agricultural or forestry activity or professional services (§ 23 EStG).[10] In general, (ordinary) business income derived by a non-resident is only subject to tax in Austria if the business activity is carried out through a permanent establishment in Austria (§ 98(1 (3) EStG), i.e., the nexus is generally created by a domestic permanent establishment (as defined in § 29 of the Federal Tax Code, *Bundesabgabenordnung*),[11] unless the income is (also) categorized as being taxable Austrian sourced income under a different provision in § 98 EStG, such as, e.g., royalty income.

Royalty income is defined as income generated from the granting of rights on a temporary or on an indefinite basis or from permitting the exploitation of rights (§ 28(1) (3) EStG), but for resident taxpayers, due to the principle of subsidiarity, this provision only applies outside of a business context. The exploitation of rights includes, amongst other things, the granting of permissions under copyright law in the area of literature and art which enable the licensee to use the rights in the same way as the originator (i.e. the licensor),[12] but also covers commercial know-how (e.g., recipes, plans, address collections) and other rights (e.g., distribution rights, transmission rights). The alienation of such rights, however, does not constitute royalty income.[13] Further, royalties are subject to limited tax liability in Austria only if the underlying rights are entered into an Austrian register (e.g., the patent register or trademark register) or are "utilised" in an Austrian permanent establishment (§ 98(1)(6) EStG). Tax is then generally deducted at source at a rate of 20% on the gross amount (§ 99(1)(3) and § 100 EStG) unless source taxation is barred by the Austrian implementation of the EU's Interest-Royalties-Directive[14] for inter-company royalty payments (§ 99a EStG). One should note, however, that "data" is not entered into a register

[10] For agriculture and forestry or professional services there are separate categories of income, see above categories 1 and 2.

[11] If there is a permanent establishment in Austria to which the activities are attributable, the subsidiarity principle also applies for non-residents.

[12] See Fröhlich in Doralt, Kirchmayr, Mayr and Zorn (eds), Kommentar zum EStG, 9th edition (2005), § 28 m.no. 68.

[13] Austrian Supreme Administrative Court (VwGH), 23 March 1956, 3475/53, VwSlg 1392 F/1956; VwGH, 24 November 1987, 87/14/0001, ÖStZB 1988, 327; Para. 8000 of the Austrian Income Tax Guidelines 2000 (EStR 2000).

[14] Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, [200] OJ L 157, p. 49, as amended.

so that only its utilization in an Austrian permanent establishment (e.g., of the licensee[15]) may lead to limited tax liability under § 98(1)(6) EStG.

There is, however, limited guidance as to the treatment of transactions where a non-resident taxpayer grants a resident the right to use data or data collections. In particular, it is not entirely clear if such transactions would qualify as an "exploitation of rights" in terms of § 28 and § 98(1)(6) EStG. German guidance with regard to similar taxation rules implies that it is necessary to distinguish between the right to use a database and the data, e.g., to access, read and print the data via a software application and to even pass on that research results to clients (which would not lead to royalties), and the further right to economically utilize the database, e.g., by the right to grant third parties access to the database (which would lead to royalties).[16] The Austrian tax authorities seem to take a similar position. Following the Income Tax Guidelines in respect of literature databases, it is decisive if the database is simply used as intended (i.e. to research literature and to read, download or print the contents) or if the user has further rights that go beyond this mere use (in the sense of a commercial exploitation). Only the second scenario could lead to royalty income.[17]

Similarly, there is limited guidance as to the treatment of transactions where data is transferred by a non-resident to a resident or where big data "derived" from Austria (i.e., by users who are resident in Austria) is analysed by a non-resident. However, since the alienation of rights does not qualify as royalty income in the first place, a potential gain from the alienation would be characterized as ordinary business income (only subject to limited tax liability if there was a PE in Austria). Thus, it need not be established whether the data transferred qualifies as a right in terms of § 28 EStG.

If, in case study 1, Broker Co is resident abroad and collects data from Austrian users and sells data sets to Austrian customers that make use of the data in the course of their marketing activities, Broker Co is subject to tax in Austria only if it has a permanent establishment in Austria. This is because the income derived from the sale of data sets is not considered royalty income in terms of § 28 and § 98(1)(6) EStG but rather as business income in terms of § 23 and § 98(1)(3) EStG, so that the relevant Austrian nexus is a permanent establishment of the alienator to which those transactions are attributable.

Part Two: Application of treaty principles

2.1. General overview

Austria has entered into around 90 tax treaties, and those treaties generally take priority over domestic law as *leges speciales*.[18] Consequently, the treaty provisions might modify the taxation of data transactions as discussed above (including transfer of raw data, transfer

[15] VwGH, 21 February 1964, 2007/63, ÖStZB 1964, 122; Para. 7977 EStR 2000.

[16] See the discussion with regard to databases and applications that contain current and historical stock market and currency data as well as credit ratings in the letter by the German Federal Ministry of Finance, "Beschränkte Steuerpflicht und Steuerabzug bei grenzüberschreitender Überlassung von Software und Datenbanken", IV C 5 – S 2300/12/10003 :004, paras 35 et seq.

[17] See Para. 8000 of the Austrian Income Tax Guidelines 2000 (EStR 2000).

[18] VwGH, 28 June 1963, 2312/61, ÖStZB 1963, 215; VwGH, 7 September 1989, 89/16/0085, ÖStZB 1990, 248 = VwSlg 6424 F/1989

of or access to aggregated data and big data analytics). It should be noted, though, that tax treaties only limit already existing taxing rights. Therefore, if under domestic law data transactions as described above are not subject to tax in Austria (especially in case of non-residents), tax treaties cannot establish any additional taxing rights going beyond domestic law.[19]

Austrian treaty practice is generally based on the latest OECD Model. For negotiations with developing countries, the UN Model is taken into account as well. Therefore, we can largely refer to the treaty principles as established by the OECD Model and further elaborated in the Commentaries. Most Austrian tax treaties, however, deviate from the Model Conventions in particular points. Where this is relevant for data transactions, it is highlighted in the following chapter.

2.2. Detailed comments

Generally, under the OECD and UN Models and Austrian tax treaties, business profits would be taxable in a country only if attributable to a permanent establishment located therein. In contrast, certain other types of income, such as royalties, may be subject to withholding tax in the source country independent of a permanent establishment. The characterization of a transaction as business profits or as another type of income may therefore lead to a different treatment for tax treaty purposes. In the context of data transactions as described above, the following treaty provisions of the OECD Model and the Austrian treaty network are potentially applicable: business profits (article 7), royalties (article 12), capital gains (article 13) or other income (article 21). The UN Model includes further provisions that may apply in the context of data transactions: technical services (article 12A) and, prospectively, automated digital services (article 12B).

Following Art. 7 OECD Model business profits are taxable only in the residence state of the enterprise unless the income is derived through a permanent establishment in the other state. Taxation by the source state is thus only possible if the enterprise has established a fixed place of business in terms of article 5 OECD Model or, in the case that a tax treaty follows the UN Model in that respect, if the enterprise is physically present there for at least half a year for the purpose of furnishing services (article 5(3)(b) UN Model). Following OECD guidance, it is quite uncontroversial that an enterprise that carries out the data transactions as described above would only be taxable in its state of residence assuming that it has no "traditional" PE (or physically furnishes services in another state according to article 5(3)(b) UN Model). The mere fact that the relevant data is collected from a particular state or the data is bought and/or used by a taxpayer in a particular state would not create nexus under existing treaty rules.

In the context of article 7 (and article 5) OECD Model, guidance by the Austrian tax authorities has concluded that a server (computer equipment) can create a permanent establishment if it is at the disposal of the enterprise.[20] This means that if the server or computer equipment as such is owned or rented by the enterprise, a nexus would be created in the state where the server or computer equipment is located. In contrast, if another

[19] See, e.g., VwGH 29, July 2010, 2010/15/0021, ÖStZB 2011/84, 139; VwGH 30 March 2011, 2007/13/0105, ÖStZB 2011/379, 599.

[20] See the Ministry of Finance's "Express Answer Service" (EAS) 3401 (3 April 2018), with reference to previously issued guidance in EAS 926, 1574, 1804, 1836 and 2502.

enterprise only uses server capacity without the hardware as such being at its disposal (e.g., in the case of cloud computing, infrastructure as a service), the requirements of a permanent establishment would not be fulfilled.[21] It is unclear if the Austrian tax authorities would generally treat infrastructure-as-a-service (IaaS) transactions as services (so that they are characterised as business profits for treaty purposes) and not as rentals of space on the cloud service provider's servers by others (which would characterise the payments as royalties for the purposes of treaties that include in the definition of royalties payments for rentals of commercial, industrial, or scientific equipment).

In most Austrian tax treaties, the scope of the royalties article follows article 12 OECD Model. However, in some treaties (and similar to the UN Model definition) income from the use of, or the right to use, any industrial, commercial or scientific equipment[22] or for fees for technical services are included in the scope of the royalties article.

There is no guidance in Austria whether payments for the use of or right to use (user) data could qualify as royalties in terms of article 12 OECD Model or article 12 UN Model. It can therefore largely be referred to the respective Model Commentaries. What is noteworthy, though, is the Austrian tax authorities' position on the meaning of "industrial, commercial or scientific equipment". The UN Model does not define the term "equipment" but lists several examples, including ships, aircraft, vehicles, pipelines etc.[23] Even though the Commentary on article 12 UN Model suggests that intellectual property would not be covered by the royalty definition, the Austrian tax authorities state that "equipment" is not necessarily a tangible asset but may also include intangibles, such as software.[24] In light of such a broad understanding, it generally appears to be possible that user data may be qualified as equipment in terms of article 12 UN Model.

Case study 1 addresses two types of payments that may be relevant in the context of article 12 (royalties). First, the payment of Broker Co to Website Co for the access to information gathered through traffic on its website: In this case the consideration by Broker Co is for the acquisition of or access to raw data which is not covered by article 12 OECD Model. Second, Broker Co offers access to its database so that customers can acquire specific data sets. Again, from an Austrian perspective, article 12 OECD Model would not apply because the right to access the database does not constitute a use of or a right to use a copyright. In both cases, however, the payment could potentially be covered by article 12 UN Model if the broad understanding of the Austrian tax authorities was followed in the context of data transactions.

One of the latest additions to the UN Model is article 12A regarding fees for technical services. None of Austria's tax treaties include a provision based on article 12A UN Model. However, three tax treaties include technical services in the scope of the royalties article so that the fees may be taxed in the state where the payer of them is resident.[25] These treaties cover the rendering of services of a technical nature but do not define this concept any further. However, the Commentary on article 12A UN could be an indication, noting that "technical" means "the application of specialized knowledge, skill or expertise with respect to a particular art, science, profession or occupation".[26] While that definition is not

[21] See EAS 3401 (3 April 2018).

[22] See, for example, the Austrian tax treaties with Belgium, Ireland and Luxembourg.

[23] See para. 13.2 of the Commentary on art. 12 UN Model.

[24] See EAS 971 (14 November 1996); EAS 980 (2 December 1996); EAS 1499 (26 July 1999); EAS 3393 (3 October 2017).

[25] See the Austrian tax treaties with India, Pakistan and Vietnam.

[26] See para. 64 of the Commentary on art. 12A UN Model.

specifically targeted at digital products and services, it generally includes a broad range of cloud computing services (e.g., IaaS, SaaS etc). Also, collecting, organizing and structuring data may require technical skills. However, making available and granting access to a database – like Broker Co in Case Study 1 – should in our opinion not be considered as a technical service in terms of the Austrian treaty provisions.[27]

Very recently, the Committee of Experts on International Cooperation in Tax Matters ("UN Tax Committee") has adopted a new article 12B for the UN Model that allows for source taxation of income from the rendering of automated digital services.[28] The definition in article 12B(4) UN Model would include the sale or other alienation of user data because it constitutes a "service provided on the internet or an electronic network requiring minimal human involvement from the service provider".[29] It remains to be seen if Austrian tax treaty policy will adopt this new rule.

Finally, it might be noted that consideration for the transfer of the full ownership of a right does not constitute a royalty under article 12 OECD or UN Model,[30] but will rather be qualified as ongoing business income under article 7 or a capital gain under article 13(2) of the respective Model, with Austrian practice generally applying article 7 (likely also to the transfer of data) unless the entire business is sold.[31] Finally, article 21 could be relevant for cases where users are (deemed to) have earned income from selling "their" data (e.g., in the context of taxable barter transactions).

Part Three: Transfer pricing

All Austrian tax treaties include a rule based on Art. 9 OECD Model which is the basis for the allocation of profits between associated enterprises and for the arm's length principle. To the extent that Art. 9 of a particular tax treaty leads to an upward adjustment, the primary adjustment has to be based on a domestic rule which enables the tax authorities to adjust the price of an intercompany transaction. This domestic rule is § 6(6) EStG (exit tax rule) and, according to the Austrian tax authorities, has to be interpreted in line with the arm's length principle as set forth in Art. 9 OECD Model.[32] A considerable number of the Austrian tax treaties lack a rule for corresponding adjustments in line with Art. 9(2) OECD Model. According to the Austrian tax authorities, in these cases corresponding adjustments still have to be made if the primary adjustment is in line with the arm's length principle. This is because article 9(2) OECD Model is only of a clarifying nature.

Austria relies on the OECD Transfer Pricing Guidelines (OECD TPG) for interpreting article 9 of all of its tax treaties as well as for interpreting the domestic rule that sets forth the arm's length principle (§ 6(6) EStG). This is enshrined in the Austrian Transfer Pricing

27 In this sense see para. 42 of the OECD E-Commerce Report (2001).

28 See UN Tax Committee, art. 12B of the UN Model Tax Convention, as agreed at its 22nd session, https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (last accessed 20 November 2021).

29 See paras 38 and 39 (ii) of the draft Commentary on art. 12B UN Model.

30 See para. 8.2. of the Commentary on art. 12 OECD Model.

31 See Loukota and Jirousek, Internationales Steuerrecht I/1 Veräußerungsgewinne, para. 28 (1.3.2015, rdb.at).

32 See F. Rosenberger in Aigner, Kofler and Tumpel (eds.) DBA, 2nd edition (2019), art. 9 m.no. 290.

Guidelines (Austrian TPG) published by the Austrian Ministry of Finance in the form of a decree.[33] The Austrian TPG are based on and are generally in line with the OECD TPG. They are aimed at ensuring and facilitating the application of the OECD TPG in Austria.

The Austrian tax authorities take the position that tax treaties in general are interpreted dynamically and that the OECD TPG in their latest version have to be applied. This means that currently, the OECD TPG 2017 are applicable in Austria, including the latest guidance for intangibles (see Chapter VI of the OECD TPG). Consequently, no specific guidance applies for the transfer of data or for the provision of goods or services where the value or efficiency has been enhanced by an enterprise's use of big data. Instead, the application of the arm's length principle to such transactions has to be based on the general guidance provided in the OECD TPG.

In order to apply the arm's length principle in the context of big data, it is necessary to understand the structural concept of how *data* mining is used by MNE groups to create value. Generally speaking, data mining is the transformation of raw information into knowledge that helps understanding the needs of customers and to accordingly adapt the services or goods supplied.[34] This process can be split between different companies within an integrated MNE group. In this case, transactions between these companies occur which have to be priced at arm's length. The main challenge in determining an arm's length price for transactions involving big data is that very often no comparable transactions between unrelated parties exist.

In Austrian literature[35] it has been suggested to first, identify the activities performed by individual entities along the value chain of the knowledge development process and second, to determine the value of the specific activities in relation to the overall value creation by *data* mining. Subsequently, a conceptual analysis of the functions and risks involved in the data mining process (focusing on the specific people functions involved) can provide benchmarks to set transfer prices in accordance with comparable market prices. Finding comparables may be difficult but recently more and more companies offer services on the market that focus on separate steps of the data mining process (such as the collection of raw data, the preparation of data, or the provision of information).

For example, in case study 1, Website Co provides raw data to Broker Co. If they are related parties an arm's length price has to be charged for this transaction. The transfer price depends on the functions performed, assets used and risks assumed by the parties to the transaction. It is assumed that Website Co only performs simple functions without using any intangible property (i.e. retrieving raw information in a standardized way) and that there are numerous other enterprises that offer services comparable to Website Co's. Consequently, the prices of these services could be used to determine an arm's length price with a one-sided method (e.g. using CUP or cost-based TNMM).

Assuming now that the activities of Website Co and Broker Co are much more integrated, both entities making unique and valuable contributions to the data mining process, jointly assuming economically significant risks.[36] For example, they jointly develop

[33] See the Austrian Transfer Pricing Guidelines of 7 October 2021, 2021-0.586.616, BMF-AV Nr. 140/2021.

[34] See Spengel and Ludwig, *Profit Allocation in Digital Businesses. The OECD's Reform Proposals and Their Impacts*, 3 TPI (2019), p. 258 (p. 259).

[35] See Spengel and Ludwig, *Profit Allocation in Digital Businesses. The OECD's Reform Proposals and Their Impacts*, 3 TPI (2019), p. 258 (p. 259).

[36] See para. 2.126 of the OECD TPG 2017 as updated by the OECD's Revised Guidance on Application of the Transactional Profit Split Method.

the data analytics software or Website Co develops the base technology which Broker Co uses to scale up the software. The accurate delineation of the transaction indicates that both entity's contributions are unique and valuable to the creation and success of the software. Under these circumstances, the transactional profit split method is likely to be the most appropriate method for determining the transfer prices between the related parties.[37]

Part Four: Special regimes

4.1. DST

In 2020, Austria introduced new legislation which provides for a revenue-based digital business tax of 5% on online advertising, i.e., the Digital Tax Act 2020 (*Digitalsteuergesetz 2020*).[38] From an Austrian perspective, this act is viewed primarily as an addition to the existing tax regime and not a special tax for digital corporations, as Austria already has a corresponding "traditional" advertising tax for print, broadcasting etc. since 2000 (*Werbeabgabegesetz*).[39]

This "expansion" of taxation beyond the traditional advertising tax was deemed necessary, as within a period of just a few years, digitalisation has created entirely new business models, thereby exposing the shortfalls of the current tax system.[40] Targeted online advertising, for instance, is based on the search behaviour and preferences of users and utilises this data. This led to the concern that Austrian advertisers conclude contracts with foreign – sometimes lowly taxed – service providers and deduct their advertising payments as business expense, whereas domestic traditional advertising is taxable in Austria under the *Werbeabgabegesetz*.

In addition to the OECD (BEPS Project), the European Commission has also recognized the need for action and in March 2018 presented a "Digital Taxation Package"[41] which, in addition to a long-term solution in the form of a "significant digital presence" (SDP),[42] also proposed a "digital services tax" (DST) of 3% on specific digital revenues.[43] One central issue of the DST was the question of what types of digital services should be included. In summary, revenues from three types of services were to be covered, i.e., online placement of targeted advertising, digital platforms facilitating interactions between users ("sharing economy"),

37 See example 5 in Annex II to Chapter II of the OECD TPG 2017 as updated by the OECD's Revised Guidance on Application of the Transactional Profit Split Method.

38 Federal Gazette I 2019/91, as amended.

39 Federal Gazette I 2000/29, as amended.

40 For detailed analysis, see, for instance G. Kofler, G. Mayr and C. Schlager, *Taxation of the Digital Economy: "Quick Fixes" or Long-Term Solution?*, 57 Eur. Taxn. 12 (2017), p. 523 et seq.; see also M. Olbert and C. Spengel, *International Taxation in the Digital Economy: Challenge Accepted?*, 9 World Tax Journal (2017), p. 3 et seq.; W. Schön, *Ten Questions about Why and How to Tax the Digitalized Economy*, 72 Bull. Int'l Tax'n (2018), p. 278 et seq.

41 See the Commission's Communication "Time to establish a modern, fair and efficient taxation standard for the digital economy", COM(2018)146.

42 See the Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018)147, and the Commission Recommendation of 21 March 3 2018 relating to the corporate taxation of a significant digital presence, C(2018)1650.

43 Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148.

and sale of user data. However, Germany and France submitted a joint declaration providing for a limitation of the tax on "targeted advertising". This "reduced" Directive should have been adopted by March 2019, but it failed to reach unanimity in the European Council.[44] As a result, some EU member states have introduced or announced to introduce unilateral measures similar to the EU's proposed DST (such as Spain, France and Italy).

It is noteworthy, however, that in contrast to most other EU member states Austria already levies a special tax of 5% on payments for "traditional" advertising since 2000 (e.g. in newspapers, on television or by direct mail). When this law, i.e., the *Werbeabgabegesetz*, was enacted in 2000, online advertising was relatively insignificant, and it was therefore not included in the list of taxable advertising services.[45] Obviously, this has changed so that an expansion to "online" advertising was effectuated in 2020. This happened in a separate act, the Digital Tax Act 2020 (*Digitalsteuergesetz 2020*), because conceptually (e.g. in terms of taxable revenue) a tax on online advertising differs significantly from the current advertising tax and moreover requires definitions of technical terms.

The key features of the new digital tax are the following:
- Taxable item: Online advertising services in Austria
- Taxpayer: Online advertising service provider (with high revenues)
- Assessment basis: Remuneration received by the online advertising service provider
- Tax rate: 5% (same as the advertising tax)
- Entry into force: 1 January 2020

According to § 2(1) of the Digital Tax Act 2020, online service providers are business entities which render online advertising services against remuneration or which contribute to other remunerations and, within one financial year, achieve:
- global revenues of at least EUR 750 million and
- revenues in Austria from online advertising services of at least EUR 25 million.[46]

Moreover, the scope is limited to online advertising (also) directed at Austrian users in terms of content and design. The existing traditional advertising tax requires a similar "nexus" to Austria.[47] In the case of online advertising, to put it simply, a distinction can be made between individualised online advertising (tailored to the user) and banner advertising. Individualised online advertising will always be addressed to Austrian users. For instance, in the case of a German or UK online newspaper with special banner advertising for Austria ("Austria banner") this is directed at Austrian users, too. The situation is different if, on the website of a German online newspaper, a fixed banner advertisement appears for all

44 No agreement on the initial DST proposal was reached in December 2019 (Doc. 14885/18 FISC 510 ECOFIN 1148 [29 November 2018] and Doc. 14886/18 FISC 511 ECOFIN 1149 [29 November 2018]). The proposal was subsequently limited to digital advertising services in March 2019 ("DAT"; Doc. 6873/19 FISC 135 ECOFIN 242 [1 March 2019]) but then postponed in March 2019 (Doc. 7368/19 PRESSE 12 [12 March 2019]). It has been stated that the discussion might be resumed if no OECD consensus on the taxation of the digitalized economy is reached (Doc. 9773/19 FISC 281 ECOFIN 528 [7 June 2019]).

45 Due to the increasing importance of online advertising, "traditional" media considered this non-inclusion to be objectively unjustified and referred to the Austrian Constitutional Court, which however rejected their appeal. See Austrian Constitutional Court (VfGH), 12 October 2017, E 2025/2016.

46 See G. Mayr, *New Digital Business Tax on Online Advertising in Austria*, 59 European Taxation (2019), p. 350 et seq.

47 If, e.g., TV advertising intended to be received in Austria is broadcast from Germany, it is deemed to have been rendered in Austria. This, in particular, relates to the so-called "Austria advertising window" of German private broadcasters.

users/readers; such fixed banner advertising will be directed primarily at German (and not Austrian) users.

The Digital Tax Act applies to online advertising services with effect from 1 January 2020. Moreover, § 8(2) of the Digital Tax Act provides for compulsory evaluation. Starting on 31 December 2021, the digital tax must be regularly evaluated in terms of uniformity of taxation and implementation, as well as its impact on business entities in the light of any more comprehensive measures for taxation of the digital economy at EU or OECD level. Compulsory evaluation is thus fully structured and it clearly communicates the fact that Austria continues to seek an international solution with regard to taxation of the digitalized economy and will intensively advocate such an international solution, above all at the OECD level. Indeed, the removal of "unilateral measures" is an integral part of the global consensus on Pillar One which was reached in October 2021.[48] While the modality of such removal is still subject to discussion at the time of writing, it is emerging that the Austrian Digital Tax would qualify as a unilateral measure and as such will have to be withdrawn following the implementation of Pillar One.

Finally, it might be noted that recent judgments from the European Union courts in *Poland v. Commission*,[49] *Hungary v. Commission*,[50] *Vodafone*,[51] and *Tesco*[52] on progressive turnover-based taxes indicate that such unilateral DSTs would not generally infringe upon the EU fundamental freedoms, state aid rules or the VAT Directive.[53] It is, however, unclear if such taxes would violate international trade law,[54] and moreover, an investigation by the US Trade Representative (USTR) under § 301 of the Trade Act of 1974 has been opened with regard to DSTs adopted or under consideration, *inter alia*, by Austria.[55] Following the October Statement, agreement could be reached with the US regarding the treatment of the Austrian Digital Tax until full implementation of Pillar One.[56] In defined circumstances, tax liability that US companies accrue during this interim period will be creditable against future income taxes accrued under Pillar One. In return, the US will withdraw the (currently-suspended) retaliatory duties on Austrian goods.

48 OECD/G20 Base Erosion and Profit Shifting Project, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, 8 October 2021 ("October Statement").

49 General Court, 16 May 2019, Cases T-836/16 and T-624/17, *Poland v. Commission*, EU:T:2019:338 (pending before the ECJ as C-562/19 P, following the Commission's appeal of 2 July 2019, [2019] OJ C 328/29).

50 General Court, 27 June 2019, Case T-20/17, *Hungary v. Commission*, EU:T:2019:448 (pending before the ECJ as C-596/19 P, following the Commission's appeal of 6 August 2019, [2019] OJ C 348/10).

51 ECJ (Grand Chamber), 3 March 2020, Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt.*, EU:C:2020:139.

52 ECJ (Grand Chamber), 3 March 2020, Case C-323/18, *Tesco-Global Áruházak Zrt.*, EU:C:2020:140; see also the Opinion of AG Kokott, 4 July 2019, Case C-323/18, *Tesco-Global Áruházak Zrt.*, EU:C:2019:567.

53 For analysis see, e.g., the Opinion Statement ECJ-TF 2/2020 on the CJEU decision of 3 March 2020 in Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt.*,on progressive turnover taxes.

54 For an analysis of the issues see, e.g., A. D. Mitchell, T. Voon and J. Hepburn, *Taxing Tech: Risks of an Australian Digital Services Tax under International Economic Law*, 20 Melb. J. Int. Law. (2019), p. 88 et seq.

55 See 85 Fed. Reg. No. 109, 34709, regarding an investigation of the DSTs adopted or under consideration by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom. With regard to France, the USTR has already determined that "France's Digital Services Tax is unreasonable or discriminatory and burdens or restricts U.S. commerce" (84 Fed. Reg. No. 235, 66956, based on an extensive report of 2 December 2019).

56 See the press release of the Office of the United States Trade Representative, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/ustr-welcomes-agreement-austria-france-italy-spain-and-united-kingdom-digital-services-taxes (last accessed 20 November 2021).

4.2. Incentives

There are no specific tax incentives in Austria for big data development or exploitation. However, more generally, Austrian tax law provides for different tax incentives related to research and development potentially relevant in the context of big data, amongst others:

- a tax credit for self-conducted and contracted research and development ("research premium"); and
- tax privileges in case of a relocation to Austria that benefits science or research ("relocation tax benefits").

§ 108c EStG offers the possibility of a tax credit of 14% of R&D expenses ("research premium" or "Frascati premium"). This tax credit is available to most taxpayers (including those subject to the corporate income tax act) and can be obtained regardless of whether the R&D activity performed is successful or not or abandoned before the final stage. In the context of the research, premium R&D is defined as research and experimental development, which is performed systematically and with the aid of scientific methods in order to increase the state of knowledge and to develop new applications of the knowledge.[57] Research and experimental development covers basic research, applied research and experimental development.[58] The name "Frascati premium" can be traced back to the OECD's Frascati manual from 2002 which provides the basis for statistics on R&D expenditures and personnel for OECD countries and also defines R&D for OECD purposes.[59]

Data collection does not constitute research or experimental development in terms of § 108c EStG.[60] In contrast, software development can qualify as research and experimental development, but only if it contributes to problem solutions that represent scientific and/or technological progress.[61] For example, a data broker who develops data analytics software for the purpose of collecting data through a website may qualify for the research premium if he can substantiate that the data analytics software solves problems in a novel, progressive way. This would be the case if the software development brings about general advances in the field of collection, transmission, storage, retrievability, processing, integration and display as well as the protection of data; and has to be analysed on a case-by-case basis.[62]

§ 103 EStG offers different tax privileges for persons relocating their residency to Austria, if this relocation benefits science or research ("relocation tax benefits"). Following § 103(1) EStG, the person can apply for the elimination of additional tax burdens on foreign income resulting from having a permanent home in Austria.[63] The additional tax burden is eliminated by applying an average flat-rate on income derived by the person abroad. The second tax privilege (§ 103(1a) EStG) is a tax exemption for 30% of the income derived by the person from domestic or foreign scientific activities. The tax privileges can be claimed by scientists or researchers of all fields, however their activities have to be in the public interest of Austria. The definition of eligible R&D is the same as in the context of the research

[57] See § 108c(2)(1) EStG.

[58] See Part A, para. 1 in Annex I of the Ordinance on the Research Premium ("Forschungsprämienverordnung").

[59] See Seydl in Wiesner, Grabner and Wanke, EStG § 108c para. 9a (1 January 2016, rdb.at); Lenneis in Jakom, EStG 2020, 13th ed. 2020, § 108c para. 5.

[60] See Part B, para. 1 in Annex I of the Forschungsprämienverordnung.

[61] See Part B,pPara. 14 in Annex I of the Forschungsprämienverordnung.

[62] See ibid.

[63] This also applies if the relocation benefits arts or sports.

premium. In addition, only highly skilled researchers or scientists who assume a higher degree of responsibility (e.g. project leaders) are eligible for the relocation tax benefits.[64]

For example, an individual relocates to Austria for the purpose of carrying out research in the field of predicting animal migration. She is highly skilled in her field and was therefore appointed as the project leader. In the course of the project, she collects data and develops a data analytics tool that depicts the migration. The data collection per se would not qualify as R&D for the purpose of the relocation tax benefits. However, if the development of the data analytics tool contributes to problem solutions that represent scientific and/or technological progress, the relocation tax benefits may be granted.

4.3. Barter treatment

There has been an intensive academic discussion in Austria if a user's enjoyment of free digital services in cases where the provider is able to collect user data constitutes a barter transaction that could be recognized for Value Added Tax (VAT) purposes *de lege lata* (in light of the harmonized EU VAT regime and the respective case law of the CJEU) or should be so *de lege ferenda*. The focus of this discussion is on situations where users enter in a legal relationship with service providers (e.g., by accepting the terms and conditions) and "free" services (e.g., use of a social media platform, a search engine, a message service, a free e-mail service etc.) are rendered to them, but they have agreed in those terms and conditions that their data (e.g., location data, personal registration data, search terms, social media content etc.) be collected and utilized by the service providers. Assessing those business models, some have argued (*de lege lata*) that agreeing to those terms and conditions, which also permit the usage of data, already results in a (taxable) barter transaction, where the provider supplies a "free" services (e.g., use of a platform etc) and the user "pays" with data;[65] this perspective, of course, results in subsequent questions of how to determine the tax base, if users could become taxpayers themselves, and where and how to tax the supply. Others, however, have argued that no taxable exchange exists in these situations as the transmission of data is – from the perspective of the user – not in exchange for a service (or in lieu of monetary compensation), and that, moreover, taxation would be at odds with the aim of a VAT as a general consumption tax;[66] also, from a practical perspective, similar business models in the "real" world do not trigger VAT consequences, such as benefits under loyalty programs etc. However, to date no court decision on that issue has been rendered and no legislative action *de lege ferenda* has been announced.

[64] See para. 8202e EStR 2000.

[65] S. Pfeiffer, *VAT on "Free" Electronic Services?* 27 International VAT Monitor (2016), p. 158 et seq.; T. Ehrke-Rabel and S. Pfeiffer, *Umsatzsteuerbarer Leistungsaustausch durch „entgeltlose" digitale Dienstleistungen*, 92 SWK (2017), p. 532 et seq.

[66] D. Aigner, P. Bräumann, G. Kofler and M. Tumpel, *Digitale Leistungen ohne Geldzahlungen im Internet*, 92 SWK (2017), p. 349 (pp. 349-357); H. G. Ruppe and M. Achatz, Umsatzsteuergesetz (5th edition, 2018) § 1 m.no. 68/1; M. Tumpel, *Umsatzsteuer bei „unentgeltlichen" Onlinediensten*, in: S. Kirchmayr, G. Mayr, K. Hirschler, G. Kofler and T. Ehrke-Rabel (eds.), Digitalisierung im Konzernsteuerrecht (Linde, 2018), p. 57 (pp. 57-70).

Part Five: Indirect tax

Austria levies VAT in accordance with EU law. Under the EU rules, data transactions would usually qualify as the supply of a service. If the services are rendered to business customers, no special rules for this kind of data transactions exist so that the general rule for business-to-business services applies. This means that VAT is levied in the state where the recipient of the service carries out his business (destination principle). If the services are rendered to private customers (B2C transaction), the specific place of supply rule for e-services and telecommunication services applies following which the supply is taxable in the country of destination.

If, in example 1, Website Co carries out its business in Austria, the service by Broker Co (gathering of information through APIs) is supplied in Austria so that VAT becomes due in Austria at the standard VAT rate of 20%. The tax is levied through the reverse charge mechanism. The supply of data sets to the (business) customer of Broker Co also constitutes a service which is taxable where the customer carries out its business; if this is abroad, no VAT becomes due in Austria.

Part Six: Tax accounting

6.1. General overview

For the income categories 1 to 3 ("business income" or "profit income") the tax base is the profit generated from commercial activities, which is generally determined based on commercial and/or tax accounting rules (§§ 4 and 5 EStG). According to § 4(1) EStG expenses associated with internally developing intangible fixed assets are immediately deductible as business expenses so that such assets are not reflected on the balance sheet. The idea behind this rule is that their value is uncertain. In contrast, if intangible fixed assets are acquired against payment, they have to be capitalized with the acquisition costs. There is a similar rule in the Austrian Commercial Code (§ 197(2) UGB) and also, for example, in the German Income Tax Act (§ 5(2) EStG).[67] This applies to natural persons with business income in the same way as to corporations.

In comparison, IAS 38.51-52 provides a framework for the recognition of internally generated intangible assets that should help identifying whether and when there is an identifiable asset that will generate expected future economic benefits, and determining the cost of the asset reliably. To facilitate this process, IAS 38 classifies the generation of the asset into a research phase and a development phase. Although the theoretical concept seems understandable, in practice this regulation is very complex.[68]

The Austrian tax accounting rules are attractive for the development of, for example, automated digital services, software, deployment of sophisticated data analytic tools

[67] See Weber-Grellet in Schmidt (ed.) EStG-Kommentar[39] § 5 no. 161; in the German Commercial Law (§ 248 Abs. 2 HGB) there is an option to capitalize (but not for brands or customer lists), critical to this differentiation Mayr in Hey (ed.) Deutsche Steuerjuristische Gesellschaft Volume 34, 327 (337).

[68] According to IAS 38.18,21 an intangible asset is – in general – recognised when it meets all of the following criteria: identifiability, probability of future economic benefits, control over the future economic benefits and reliable measurement of cost.

or pharmaceuticals because the expenses are immediately deductible. However, in the past this led to undesired tax planning schemes because Austria did not have any exit tax rules for internally developed intangibles. Following these schemes, the intangibles were transferred abroad, in particular to a foreign permanent establishment, where the foreign tax accounting rules allowed the capitalization of intangible assets. Consequently, the intangible assets were depreciated and in this way the expenses for the development of the intangibles were effectively deducted twice, once in Austria where they were expensed, once in the PE jurisdiction through amortization deductions. This "loophole" was first closed in 2007[69] and then, in 2015, Austria implemented an entirely new exit tax regime.[70] Since then the transfer of intangible assets (including internally developed ones) abroad leads to the immediate realisation of hidden reserves (built-in gains). Upon application, the tax can be paid in instalments (initially over seven years, since 2019: over five years), if the intangible assets are transferred to an EU/EEA country.[71]

6.2. Tax accounting and "big data"

What does this mean in the context of "big data"? In the course of digitalization big data has got an enduring impact on the collection, use, application, marketing and above all on the analysis of digital data. A critical element of big data commercialization is the development and deployment of sophisticated data analytic tools, including algorithms, which allow the business to determine relationships and tendencies within very large data sets and derive insights therefrom.

The accumulated expenses for internally collecting data and for internally developing tools for the analysis of the data collected are deductible in Austria. The developer of these big data tools can deduct the expenses irrespective of whether these tools could be qualified as an intangible asset or not. When the Austrian developer sells (raw or aggregated) data, the price forms part of his revenues and is of course subject to tax (net taxation). In contrast, for the purchaser it does make a difference if the tools or the data acquired are qualified as an intangible asset or not because only if it is considered an intangible asset, does it have to be capitalized.

Up to now the question if "big data" qualifies as an (intangible) asset has not been discussed in Austria. However, in our opinion, the lines of argument by the Austrian Administrative Supreme Court in relation to market positions like pharmacy concessions[72] can be applied by analogy to data. Consequently, acquired data can be characterized as an independent asset which has to be capitalized with its acquisition costs.

Assuming that acquired data qualifies as a (fixed) asset, a related question is whether it is depreciable. The right of depreciation of an asset has to be analysed on a case-by-case basis. In general, it is decisive, if the use of the asset is only temporary for either legal or

69 See Atzmüller, Hammerl and Mayr, *AbgSi 2007: Wichtiges zur Einkommensteuer*, ÖStZ (2007), p. 748.

70 In the course of the Tax Amendment Act ("Abgabenänderungsgesetz") 2015, Austrian Law Gazette I No. 163/2015.

71 The reduction of the instalment-period from seven to five years was based on the EU-ATAD-Directive. See Mayr, Wegzugsbesteuerung gem art. 5 Anti-BEPS-RL, in Kirchmayr, Mayr, Hirschler, Kofler (eds.), Anti-BEPS-Richtlinie (Linde 2017), p 61.

72 See Mayr in Doralt (ed.) EStG-Kommentar[13] § 6, no. 8.

economic reasons.[73] In Austria, e.g., acquired goodwill or trademark rights are depreciable over 15 years.[74] However, "big data" is different. Although the "owner", of course, has to maintain or develop the acquired "big data" – similar to a trademark – and although related expenses are deductible, the use of "big data" by itself does not seem to be temporary. As a result, in our opinion the acquisition costs for "big data" are not subject to regular depreciation.

If "big data" is transferred to a foreign permanent establishment, the hidden reserves are taxed (within the EU/EEA in instalments).[75] The Austrian exit taxation comprises assets and 'other services' (§ 6(6) EStG), so the taxation of the transferred "big data" does not depend on whether or not the data has been capitalized as an asset. It is not absolutely clear if the legal wording "other services" also comprises the temporary use of assets or "big data". However, the Austrian tax authorities and most legal commentators consider the legal wording in a broader understanding.[76]

73 See Tiedchen in Herrmann, Heuer and Raupach, EStG-KStG-Kommentar[285] § 5 no. E 327.

74 For goodwill see § 8(3) EStG, for trademark rights see Para. 3195 EStR 2000.

75 The transfer of intangibles from the head office to the permanent establishment is subject to an actual change in economic ownership; the attribution of intangible assets within an enterprise follows the Authorized OECD Approach (see para. 195 Austrian TPG 2010).

76 See Mayr in Doralt (ed.) EStG-Kommentar[13] § 6, no. 382.

International Fiscal Association