

# Austrian Asset Management News Tax and Regulatory Reporting

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## *AIFMD – Impacts on Austrian Tax Rules*

### *Editorial*

*The implementation of the AIFMD will significantly change the regulatory landscape of fund distribution. In the course of the transposition of the Directive into local law, the Austrian government has also made changes to various tax regulations with the intention of harmonising the taxation of UCITS and AIF.*



*Will this one-size-fits-all approach work out in practise for all the different kinds of investment structures now to be qualified as an AIF? The discussion has just begun...*

*Steinbauer*

**Thomas Steinbauer**

Recently the Austrian Alternative Investment Fund Managers Act (“AIFMG”), which transposes the Alternative Investment Fund Managers Directive (“AIFMD”) into national law, was passed by the Austrian Parliament. In the course of the transposition the relevant sections in the Investment Fund Act (“InvFG”) and the Austrian Real Estate Investment Fund Act (“ImmoInvFG”) regulating the qualification of foreign vehicles as investment funds for Austrian tax purposes were also amended. This article gives a general overview on the qualification of foreign vehicles as investment funds under the old legal situation and under the new rules. For “plain vanilla” mutual funds the new qualification rules, which apply to financial year-ends starting after 21 July 2013, have no impact. Particularly affected are private equity funds, hedge funds, commodity funds and other alternative structures.

### *What is the old legal situation in Austria?*

According to the old definition each foreign vehicle – regardless of its legal form – investing directly or indirectly based on risk spreading (six or more investments) is generally qualified as a foreign investment fund for Austrian tax purposes. However, even if the criterion of risk spreading is fulfilled, a foreign vehicle should not be qualified as a foreign investment fund, if – according to the Austrian Investment Fund Guidelines

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- Registration of share classes, initiated but not yet launched



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– the influence on the entrepreneurial activities of the underlying company goes beyond a “pure capital safeguard character”. A capital participation of at least 25% in the underlying companies is a strong argument against there being a “pure capital safeguard character” and therefore also against the qualification as a foreign investment fund.

Under the ImmoInvFG, any foreign collective investment in real estate which is established in accordance with the principles of risk spreading is to be deemed a foreign real estate fund, irrespective of its legal form. A collective investment in real estate is defined as a vehicle that obtains – directly or indirectly – income from rent and leasing of real estate to third parties. The Austrian Investment Fund Guidelines interpret risk spreading as follows: It is intended that the collective investment in real estate acquires – directly or indirectly – at least ten real estate assets within four years after incorporation, and the investment in one real estate asset is not to exceed 20% of the collective investment’s total assets. Furthermore, a real estate investment fund will not be deemed to exist if the borrowing ratio of the collective investment in real estate exceeds 50%.

#### ***What are the proposed changes?***

Each foreign vehicle, either qualified as an Undertaking for Collective Investment in Transferable Securities (“UCITS”) within the meaning of Directive 85/611/EEC or qualified as an Alternative Investment Fund (“AIF”) within the meaning of the AIFMG is to be treated as an investment fund/real estate investment fund for tax purposes (except for foreign “AIFs in real estate”, which are comparable to an Austrian corporation). An AIF within the meaning of the AIFMG is defined as an under-

taking which collects capital from a number of investors in order to invest it according to a specified investment strategy for the benefit of these investors, with the collected capital not serving entrepreneurial activities.

Each foreign vehicle which is not an AIF within the meaning of the AIFMG is to be qualified as an investment fund/real estate investment fund for tax purposes if the principles of risk spreading are fulfilled and if one of the following criteria is met:

- The undertaking is not subject to a direct or indirect tax which is comparable to Austrian corporate income tax.
- The undertaking’s profit is subject to a tax, which is comparable to Austrian corporate income tax, but this tax is lower than 15%.
- The undertaking is subject to a comprehensive personal or material tax exemption.

We understand that under the new rules neither the number of investments (six or more) nor the influence on the entrepreneurial activities shall be the primary qualification criteria anymore (as it was under the old legal situation).

The new rules are to apply to financial years starting after 21 July 2013, irrespective as to when the foreign vehicle was set up. Grandfathering rules for vehicles set-up before 22 July 2013 were not introdu-

ced. Currently, we are faced with a number of open questions on the new rules. These questions are mainly related to the regulatory qualification as AIF and on the interpretation of the term “risk spreading”. Clarifications by the Austrian Ministry of Finance are expected.

#### ***What are the impacts?***

For “plain vanilla” mutual funds the new qualification rules have no impact. As before these funds are tax transparent and the deemed distributed income is taxable on an annual basis. Particularly affected could be private equity funds, hedge funds, commodity funds and other alternative structures, which were – due to the missing risk spreading or because of the entrepreneurial activity – not qualified as investment funds under the old regime. The consequence of being qualified as investment fund for Austrian tax purposes is that the vehicle is treated tax transparent. In this case a separate deemed distributed income calculation on an annual basis is required in order to avoid an unfavorable lump-sum taxation.



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## Update Austrian fund reporting regime – reporting to OeKB

In the course of the transposition of AIFMD into Austrian law, changes to Austrian fund taxation have also been implemented. The changes primarily affect details regarding the calculation of the fund's taxable income and the reporting to OeKB which have to be considered by the Austrian tax representative of a fund.

### **Netting rules and loss carried forward**

For funds' financial years beginning before 2013, the following rules concerning the netting of the fund's income and the loss carried forward apply: Negative ordinary income can be offset against realised capital gains, however realised capital losses cannot be offset against ordinary income. Only realised capital losses can be carried forward in future years.

The following applies for funds' financial years beginning 2013: Realised capital losses can also be offset against positive ordinary income. The balance of positive/negative ordinary income and realised capital losses/gains can be carried forward in future years.

Furthermore, the Austrian Ministry of Finance clarified the offset of prior losses carried forward: Since 2001, 20% of the realised capital gains from equities were taxable for private investors. Realised capital losses

could be carried forward into future years. From 2011 onwards, this percentage was increased stepwise. In the end, for financial years beginning 2014, realised capital gains from bonds and equities will be taxable for private investors at a rate of 60%. Therefore, the Austrian Ministry of Finance introduced a blended rate of 25% for the netting of prior losses carried forward with funds' capital gains realised from 2014 onwards. This clarification should ensure a consistent utilisation of prior losses carry forward.

### **Distribution reporting**

Currently, if distribution reporting is carried out, only the pay date can be reported to OeKB. To make the distribution settlement easier for Austrian banks, the ex date can also be reported to OeKB by the Austrian tax representative in addition to the pay date of the distribution.

### **Postponement of further extensions of the fund reporting regime**

In contrast to foreign funds, with domestic funds numerous details on the fund's income, such as dividend income per country, refundable and creditable withholding taxes, etc., are published. Foreign funds are also to have the opportunity to publish these details. A relevant ordinance should regulate the publication details for foreign funds, but the coming into effect of the new ordinance was postponed by one year.



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### **Latest News:**

End of last week, OeKB has published a list with new reporting codes which shall implement the described changes. We are happy to inform you that these codes are relevant for the tax representative for the annual and distribution reporting only. No action is required on your side.

## Registration of share classes, initiated but not yet launched

Since 1 April 2012, a new process has been in place for the registration of share classes as reporting share classes with Oesterreichische Kontrollbank (OeKB). For these share classes core data (e.g. ISIN code, share class name) have to be sent to the OeKB by email together with a so-called 'declaration of intent'. With attainment of the tax reporting status in Austria, the delivery of the annual DDI (deemed distributed income) figures by an Austrian tax representative becomes obligatory.

### What is the issue?

How can the Austrian tax reporting status be maintained for share classes which have already been initiated and registered with OeKB, with a launch date before the next financial year-end, but which have not yet issued any fund shares? This is a question we have encountered in the course of the last few weeks.

**Example:** A share class was registered with OeKB within the Financial Year running from 1 January 2012 to 31 December 2012 with a launch date before 31 December 2012. The share class was already initiated at the time of registration, but did not issue any fund shares until 31 December 2012. Thus, no income is allocated to this share class; consequently it is not included in the financial statement of the fund as at 31 December 2012. Nevertheless, as the share class was registered with OeKB within the Financial Year 2012 with a launch date before

31 December 2012, annual reporting as at 31 December is obligatory to maintain the Austrian tax reporting status of the share class, even though there is no income for the Financial Year 2012.

### How to maintain the Austrian tax reporting status

According to information from OeKB, annual tax figures amounting to zero have to be reported to OeKB for those share classes which are already registered with OeKB but not yet launched in order to maintain the tax reporting status in Austria.

### What this means for you

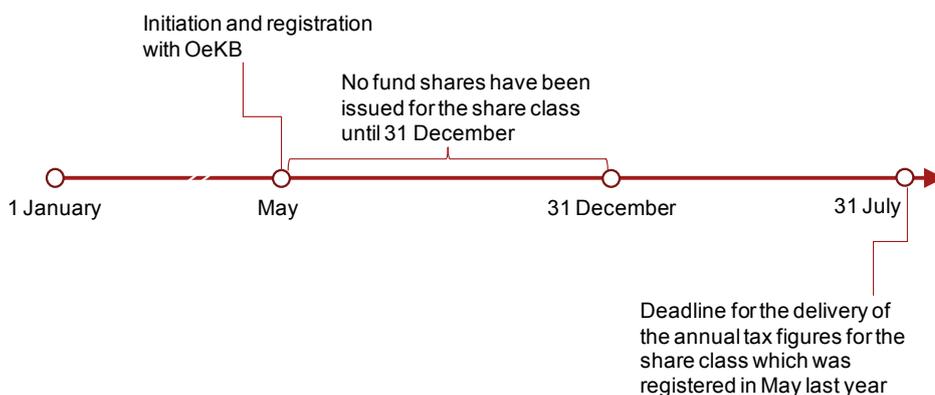
It should be taken into account that annual reporting entails costs on the part of both the Austrian tax representative and the fund administrator. Thus, a new share class should only be registered with OeKB when fund shares of the share class have also been issued.

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### Example: Timeline registration with OeKB



## Who we are and how our Asset Management team can assist you

We are the Austrian market leader with regards to the tax representation of foreign funds in Austria. Thus, our clients are benefiting from our extensive experience with the calculation of the annual DDI and distribution figures as well as the reporting process itself.

This includes also support with the implementation, analysis and testing of technical tax and regulatory reporting requirements for funds and fund management companies.

We use high-end technical infrastructure for data processing and have a dedicated team of eight senior staff and about six junior level staff to support you with your business challenges. Since two year's we have broaden our service with a separate Consulting branch, also working closely together with the Asset Management team of PwC Germany.

Our Asset Management Consulting services include transformation and distribution services, clearing, depositary and custodian issues, portfolio and collateral management as well as regulatory consulting.

## Our Asset Management Team

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