JULY PRIVATE CLIENT GLOBAL EITE 2024

THE MONTH

SUMMER ROUND-UP

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2024 CALENDAR.

Private Client Exchange France
3 - 4 October 2024 - Château Saint-Martin & Spa, Cote D'Azur, France

An Evening with Friends Miami
23 October 2024 - Beach Bar at Soho Beach House, Miami, US

Minds of the Future
23 - 25 October 2024 - The Lygon Arms, Broadway, UK

International Private Client Forum
13 - 16 November 2024 - Villa d'Este, Lake Como, Italy

Private Client Exchange UK
28 - 29 November 2024 - Cliveden House, Berkshire, UK

Private Client Global Strategy Forum
22 - 24 January 2025 - The Gleneagles Hotel, Auchterarder, Scotland

Trust & Estates Litigation Forum
5 - 7 February 2025 - La Mamounia, Marrakesh, Morocco

Private Client Global Elite Dinner
February 2025 - Spencer House, London, UK

Private Client Forum Americas
12 - 14 March 2025 - Banyan Tree, Playa Del Carmen, Mexico

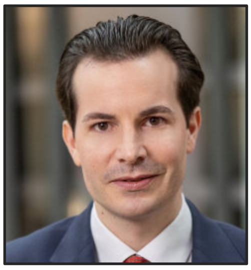
Private Client Exchange Switzerland
27 - 28 March 2025 - Guarda Val, Lenzerheide, Switzerland

Private Client Women's Day
March 2025 - The NoMad, London, UK

Scan the QR code for the 2024 events calendar and to register for any of the events

Please note that events in GOLD are residential events which include our delegates' accommodation within their membership. Please note: All dates and locations are subject to change

APPLICATION OF GERMAN FORCED HEIRSHIP LAW DESPITE CHOICE OF ENGLISH LAW OF SUCCESSION



By **Dr. Philipp Windeknecht**
Lawyer, Tax Advisor, Partner
Flick Gocke Schaumburg

The German Federal Court recently ruled that German forced heirship law is applicable even if the testator, an English national, has chosen English law to govern his succession. The last habitual residence of the testator was in Germany and hence German law of succession was generally applicable. According to the German Federal Court, the choice of English law pursuant to the EU Succession Regulation was (partially) in violation of the German ordre public since English law of succession does not provide forced heirship rights. Therefore, the choice of English law was (partially) invalid and consequently, German forced heirship law was applied.

The following article firstly provides an overview of the German statutory right of succession, testamentary dispositions as well as forced heirship rights and the article secondly discusses the (invalid) choice of law.

Statutory right of succession

Family succession is a fundamental legal principle of German law of succession. In accordance with this principle, and in the absence of any testamentary dispositions by the decedent to the contrary, the property of the decedent passes to members of the decedent's family. For the purposes of determining the respective shares of individual co-heirs in the estate, the relatives of the deceased are divided into classes according to the closeness of their kinship. First, the spouse and the closest relatives, the descendants (including children born out of wedlock provided that the paternity/maternity has been officially determined and, with certain exceptions, adopted children) of the relevant individual. Second, the parents and their descendants are appointed as legal heirs. If there are no close relatives, more remote relatives will inherit. In the first three classes of statutory heirs, the principle of representation per stirpes applies, ie any predeceased statutory heir is represented for the purpose of succession by the deceased heir's descendants.

For example if a married person died intestate, leaving behind three children and a spouse, the surviving spouse inherits one-quarter of the estate, with the rest being split evenly among the children who are kin of the first class of the deceased. Where the so-called matrimonial property regime of the community of accrued gains applies (which is the German statutory matrimonial property regime), the equalization of the accrued gains is, as a rule, achieved by increasing the statutory share of the spouse in the estate by one-quarter. Therefore, the surviving spouse will inherit not one-quarter but one-half of the estate, with the share of each child being reduced from one-quarter to one-sixth.

Succession by testamentary disposition

The principle of testamentary freedom entitles the testator to bequeath property as the testator deems fit by means of a legal testamentary disposition. Accordingly, the testator can appoint persons as heirs who would not qualify as statutory heirs. Moreover, the testator may apportion to them any share the testator desires. This right may in principle not be limited by contract. The right to testamentary autonomy is limited merely by the legal obligation of the testator not to abuse the freedom of testamentary disposition. Consequently, the right of the testator's spouse, descendants or parents to the compulsory share (forced heirship rights) can in principle not be excluded. A testamentary disposition may be made by will or by succession agreement (including a waiver of forced heirship rights).

German forced heirship rights

Parties potentially entitled to a compulsory share in the estate are the surviving spouse, descendants and parents. They have a statutory claim against the estate to a compulsory share if they have been excluded as heirs by the testator under the testator's will. Therefore, parents and remote descendants are only entitled to a compulsory share to the extent there is no closer relative.

The compulsory share is one-half of the

value of the intestate portion. If any of these individuals inherits a share in the estate or is bequeathed a legacy which is less than the compulsory share, such an individual is entitled to a compulsory share in the amount of the shortfall. The compulsory share may be increased if the testator has made a gift to a third party within the last ten years prior to death; if the gift has been made to the spouse, the ten-year period does not start prior to the termination of the marriage. In case the donor is still able to dispose of the gifted asset, eg by retaining a usufructuary right, the ten-year period does not start prior to the waiver of the retained right. The amount by which the compulsory share will be increased depends on the number of years elapsed since the making of the gift. The value of the gift to be taken into account is reduced over the ten-year period by one-tenth of the value per year that has passed between the time of making the gift, and the death of the testator.

The testator can only completely exclude the spouse, descendants and parents from receiving the compulsory share for a very few reasons, for example, if the person entitled to the compulsory share is sentenced to prison for at least one year for a wilful criminal offence.

The statutory compulsory share has been challenged repeatedly in German courts. However, the Constitutional Court held that the relevant provisions of the Civil Code are in conformity with the Constitution, as the statutory compulsory share is an element of the constitutional guarantee to succession, thereby limiting the testamentary freedom of the decedent.

Choice of law and the decision of the German Federal Court

Pursuant to the EU Succession Regulation, the law generally applicable to the succession as a whole is the law of the state in which the deceased had their habitual residence at the time of death. However, a person may choose as the law to govern their succession as a whole the law of the state whose nationality they possess at the time of making the choice or at the time of death.

In the case presented to the German Federal Court, the deceased was an English national living in Germany for decades who had chosen English law to govern his succession. The deceased had a very strong connection to Germany. The German Federal Court held that according to the EU Succession Regulation the application of a provision of the law of any state specified by this Regulation may be refused only if such application is manifestly incompatible with German public policy (ordre public) of the forum. As the statutory compulsory share is an element of the German constitutional guarantee to succession and as the testator had a strong connection to Germany, the choice of English law of succession was invalid regarding the compulsory share since English succession law does not provide a (sufficient) compulsory share in the estate.

Hence, German forced heirship rights may not be easily avoided by a choice of foreign succession law. This should be taken into consideration in case of cross-border succession planning.

THE RIGHTS OF BENEFICIARIES: ACCESS TO TRUST INFORMATION

One of the most common topics of communication between trustees and beneficiaries concerns the provision of trust information. Therefore, it is important that all parties understand their rights and obligations. This article provides a starting point for individuals and professionals involved with trusts.


By **Sarah Moore** & **Samantha Ruston** from *Charles Russell Speechlys LLP*

Sarah Moore is Senior Associate at Charles Russell Speechlys LLP, Samantha Ruston is a Trainee Solicitor at Charles Russell Speechlys LLP

It is a fundamental right of a beneficiary to have the trust administered properly in accordance with its terms and in

compliance with the applicable principles of general law. Beneficiaries have standing to hold trustees to account and ensure that the trust is being duly administered. Therefore, there is an expectation (which may be enforced by the court) that beneficiaries will be given sufficient information about the trust to do so.

Schmidt v Rosewood Trust Ltd

This approach, which is rooted in the "supervisory jurisdiction" exercised by the court in relation to trusts, is set out in the decision of *Schmidt v Rosewood Trust Ltd.*[1] The case helps us to understand the type of information beneficiaries should be able to obtain from a trustee under normal (i.e. non-contentious) circumstances. Where there is litigation on foot concerning a trust, the rules regarding the disclosure of information are different and they hinge on the relevance of any given material to the dispute.

Beneficiaries can ordinarily expect to receive information disclosing the existence of the trust and the nature of their interest under it. This may be achieved by disclosing the trust instrument and any amending instruments. Other documents which are generally made available to beneficiaries include deeds of trustee appointments, retirements and removals (so the beneficiary knows who to direct requests and questions to); equivalent information regarding other fiduciaries involved in the governance of the trust (such as a protector); and annual financial statements or other accounting records showing realistic values and movements in trust assets.

The provision of accounting records is one aspect of a trustee's duty to account to the beneficiaries for their stewardship of trust property. This means that trustees must be ready to justify what has been done with the trust assets that they are responsible for administering. If trustees fail to account satisfactorily, a beneficiary may seek an order for an account from the court.

What information is confidential?

An important category of information that trustees are entitled to withhold is the reasons for an exercise of discretion, such as a decision about making (or not making) a distribution to a discretionary beneficiary. There are several reasons underlying this principle:

- Provided trustees exercise their discretion consistently with the terms of the trust, reasonably (taking into account all relevant matters and no irrelevant ones), and with no conflict of interest, their reasons are not impeachable. Given the ability to scrutinise reasons is limited, disclosure is commonly not required to enable the beneficiary to "police" the trust.
- Disclosure of reasons may not be in the best interests of the beneficiaries as a whole as it may lead to increased disputation.
- If trustees were required to disclose their reasons, it may dissuade them from accepting office in the first place.

A settlor's letter of wishes may also be withheld for related reasons. In many cases, the letter of wishes will form part of the trustees' considerations in exercising their discretionary powers, which is essentially a confidential process. However, there is no absolute rule, and the court has recognised that disclosure of letters of wishes may be appropriate in some circumstances.

How this applies in practice – takeaways for trustees

<u>What type of financial reporting is required?</u>

- Trustees are under a duty to keep clear and distinct accounts of the property that they administer under the trust and the trustee must be ready to provide them to beneficiaries. Failure to do so may amount to breach of trust. Trust accounts frequently take the form of annual financial statements and in addition, trustees should be able to evidence transactions with trust property, with invoices and receipts.

- The form of the accounts should be sufficient to satisfy the trustee's duty to account to the beneficiaries and this will vary depending on the nature of the trust assets. Trustees are not obliged to use accountants to prepare financial statements, but in the case of more substantial trust structures with a diverse asset base, it would be prudent to do so.

- In general, while beneficiaries may reasonably expect to be provided with trust accounts, it is not necessarily the case that they are entitled to the whole of the trust accounts. For example, if a beneficiary has a future interest in capital only, they may not be provided with accounts of income due to the fact they have no interest in income. That said, a beneficiary with an interest or right to income may still expect access to capital accounts since it is likely that the capital generates the income.

- Where a trust owns an underlying company, a beneficiary will not automatically be entitled to information concerning the company. However, a beneficiary may be able to make a case as to why such disclosure is necessary. For example, disclosure of company financial statements may be required to enable a beneficiary to understand the position of the trust where the trust accounts themselves are not full and informative.

- Accounts should be produced and disclosed to beneficiaries within a reasonable period of time. Given trustees should constantly be ready with clear and distinct accounts, this timeframe should not be prolonged.

Is it advisable to keep minutes of decisions?

- While trustees are entitled to withhold their reasons for decisions in non-contentious circumstances, they should nevertheless minute those decisions and make sure to undertake a thorough and balanced deliberation process.

1. [2003] UKPC 26; [2003] 2 A.C. 709.

- This is because a trustee's books and records may be required for reporting and regulatory processes, and they may become disclosable in court proceedings should a beneficiary seek to challenge the trustee's actions. In those circumstances, material disclosing the decision-making process will no longer remain confidential, and adverse inferences may be drawn from any gaps in the records.

Dealing with beneficiary requests for information

- Trustees should carefully consider beneficiary requests for information. Unless there is good reason not to, a trustee ought to provide the information requested. This will assist in developing a positive relationship between trustee and beneficiary. It will also ensure the trustee is not at risk of a costs order, which might occur if a beneficiary is forced to apply to the court for disclosure and is successful.

- Examples of circumstances where disclosure may not be appropriate include where a beneficiary is requesting information that is confidential to others or where the requests are incessant or disproportionately detailed.

- If a beneficiary's request for disclosure of information concerns a grievance against the trustee, this may not be a reason of itself for a trustee to deny disclosure. This is because beneficiaries have a legitimate role in enforcing the proper administration of a trust and trustees are expected to work with beneficiaries to resolve any concerns. Trustees and beneficiaries are advised to take legal advice on the appropriate approach in these circumstances.

Conclusion

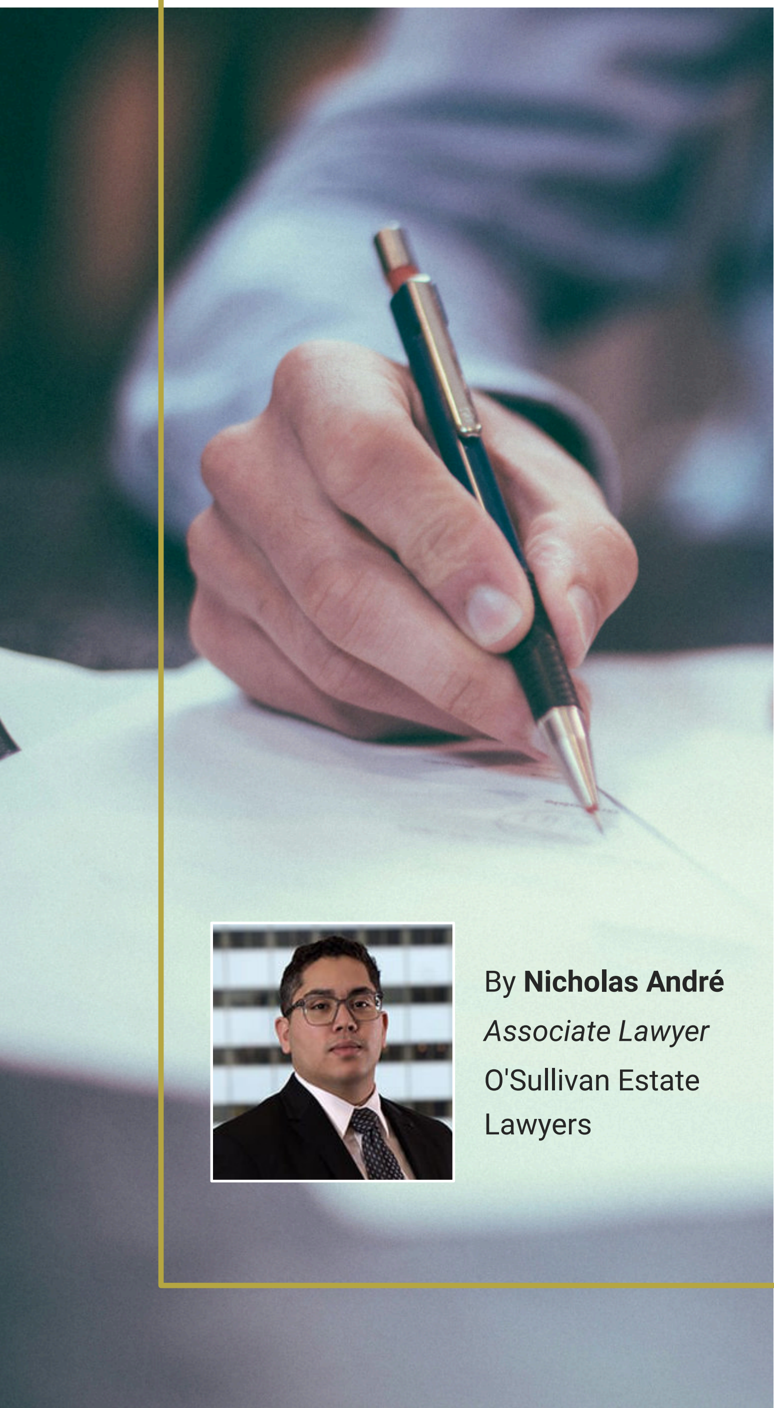
The provision of trust information provides an opportunity for trustees and beneficiaries to strengthen their relationship and it is central to the proper administration of a trust. There will occasionally be circumstances where questions or disagreements arise. In those cases, trustees and beneficiaries both have the ability to apply to the court for remedies including directions about disclosure. With advance planning and good communication, the scope for such issues will reduce and beneficiaries will have the trust and confidence they need in their trustees.

Our Expertise

We specialise in handling all varieties of domestic and international disputes for private individuals, family businesses, trustees (both individuals and trust companies) and other fiduciaries, such as executors, protectors, deputies and attorneys. We pride ourselves on being able to provide practical, long-term solutions that meet our clients' needs. For more information, please contact Emma Johnson in our relationships team.

HEADS UP: PITFALLS OF DYING INTESTATE WITH MINOR CHILDREN

When a person dies without leaving a valid will, they have died “intestate”. A valid will can provide for who should administer the estate, who should benefit from the estate, and the terms on which the beneficiaries inherit. If you die without a will in place, your estate will be governed by intestacy laws which may not reflect your wishes.



By **Nicholas André**
Associate Lawyer
O'Sullivan Estate Lawyers

For example, in Ontario the Estates Act R.S.O. 1990, c. E.21 provides to whom administration of an intestate estate should be granted (the married spouse or person who was in a conjugal relationship with the deceased immediately prior to his or her death, or next-of-kin) and the Succession Law Reform Act, R.S.O. 1990, c. S.26 governs who is entitled to inherit from the estate (typically a division among your spouse and/or children, as applicable).

What happens to a minor's inheritance?

Minors cannot be paid funds or be transferred property until they reach the age of majority, including gifts from an estate, regardless of whether there is a will, or proceeds payable from a life insurance policy or registered plan.

Typically, a will provides that a minor’s share in the estate is to be held in trust by named trustees along with other terms as to when or for what reason payments from the trust may be made for the minor’s benefit. The trust may also continue after the minor beneficiary attains the age of majority to protect against a young adult coming into significant amounts of money before they are financially mature enough to manage it.

However, an intestacy presents unique complications for a minor beneficiary. If a minor inherits on an intestacy the above trust structure does not exist, and because the inheritance cannot be paid or transferred directly to the minor, few options are available.

Inheritance under $10,000

In Ontario, if the inheritance or gift is equal to or less than $10,000 the funds can be paid to the minor's parent or guardian. In doing so, the executor of the estate is no longer liable for what happens to the funds.

Funds paid into court

For amounts greater than $10,000, a minor's inheritance can be paid into court and held by the Accountant of the Superior Court of Justice until the minor reaches the age of majority, which is 18 years in Ontario. The Accountant will invest the money at a rate to be determined dependent on current market conditions. For minors, money is automatically invested in the Office of the Public Guardian and Trustee's ("OPGT") Fixed Income Funds and interest is credited to the minor's account each month at a prescribed interest rate that is based on its earnings.

Notably, the returns from such investment may be less than what could have been earned if invested in the market by a trustee with the benefit of professional investment advice. Further, money held by the Accountant is charged 3.0% for each of monthly receipts and disbursements on capital and income and a Care and Management Fee of 3/5 of 1% (0.6%) of the average annual value of the trust is charged monthly.

If the minor requires money before they reach 18, a request can be made to the Accountant for consideration, with the approval of the Children's Lawyer, whose Office represents the minor's interest in such matters. Approval is dependent on providing proof that the money paid out will be used for the direct benefit of the child, that the parents or caregivers are unable to meet the needs of the child without assistance, and submission of supporting documentation. While this is an established process, it is far more arduous, time-consuming, and expensive than having a trustee disburse funds in their discretion under a trust.

Appointment as guardian of property

Alternatively, an individual can apply to court to become guardian of the minor's property and can then receive the inheritance on the minor's behalf. However, this process is not merely a formality— a court application is required to obtain a court order appointing the person to be the legal guardian. Importantly, a minor's parent is not at law automatically considered the guardian of their minor child's property and must make a court application to be appointed.

The guardianship application process can be lengthy, costly, and quite cumbersome. The parents of a child are equally entitled to be appointed as guardians, however, when there is conflict the court considers the ability of the applicant to manage the property, the merits of the proposed management plan for the investment of the minor's funds and the views of the child in coming to a decision. Further, for a large inheritance, the court may require that an insured professional, like a trust company, act as guardian.

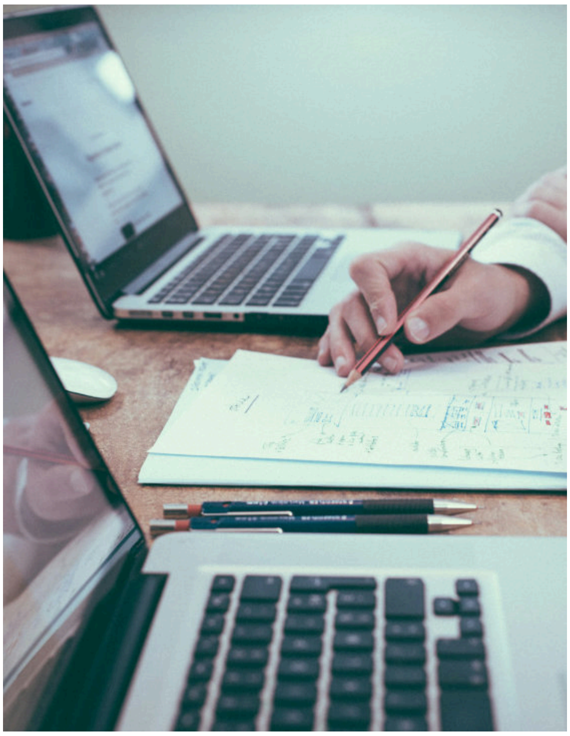
Guardianship applications require a management plan in a prescribed court form. The management plan sets out a detailed financial plan and a proposal of how the guardian will manage the minor's money. The Children's Lawyer must review and approve of the plan. Family members of the minor must also be served as part of the application, which may result in a dispute and litigation if multiple individuals seek guardianship. During this process, the minor's funds cannot be accessed which can be prejudicial and cause hardship to the child if such funds are needed immediately.

Moreover, the work does not stop when the guardian for property is appointed. The guardian must follow the approved management plan and can only spend the minor's money as directed in the court order or approved management plan.

Guardians also function as fiduciaries, and must keep detailed records of their accounts, and often are required to pass their accounts periodically before the court. If the guardian wants to deviate in any significant way from the approved management plan, court approval is necessary.

In the case of an intestacy, whether the funds are paid into court or if a guardian is appointed, when the minor reaches 18 years of age, their inheritance (or what remains) is not subject to any protective trust provisions and is paid to the minor in full to do with as they wish. That could mean a trip around the world, purchasing a luxury car, or paying for university tuition—what would you have done at 18?

As you can see, dying intestate when there are minor children or other beneficiaries creates serious problems and expense. Proper planning is critical to ensure that the financial safety net you leave behind for minor beneficiaries is properly structured; including provisions in your will or an insurance trust for insurance policy proceeds where a minor is a beneficiary.



THE TAX REGIME OF THE INCENTIVE TO THE CAPITALIZATION OF COMPANIES

By **Rogério Fernandes Ferreira, Marta Machado de Almeida, Álvaro Silveira de Meneses, Miriam Campos Dionísio, João de Freitas Jacob, José Nuno Vilaça,** and **Joana Fidalgo Barreiro**

RFF Lawyers

The Tax Regime of the Incentive to the Capitalization of Companies was introduced by the 2023 State Budget Law and has since been amended in the 2024 State Budget Law. The aim of the creation and subsequent amendment of the scheme is to promote the capitalization of companies, encouraging the use of equity instruments to raise the capital necessary for the financial health and promotion of business investment.

Framework

Enshrined in the State Budget Law for 2023 and inspired by the proposal for a Directive on the debt-equity bias reduction allowance (DEBRA), the tax incentive scheme for the capitalization of companies (ICE Scheme) allows for a deduction from taxable income of a percentage of the net increase in equity realized in the period in question.

It should be remembered that the approval of this scheme meant the revocation of two previously existing tax benefits, the Conventional Remuneration of Share Capital (RCCS) and the Deduction for Retained and Reinvested Profits, which the ICE Scheme aims to replace.

With the approval of the State Budget Law for 2024, the ICE Scheme was amended, namely with regard to the amount and limit of the annual deduction allowed, as well as its temporal application.

At the end of this newsletter, we present a summary table comparing the ICE (2023 and 2024) and RCCS schemes.

Eligible Beneficiaries

Eligible beneficiaries are commercial or civil companies in commercial form, cooperatives, public companies and other legal persons governed by public or private law, with their registered office or effective management in Portuguese territory.

However, it is necessary that, in the financial year in question, these entities:

- are principally engaged in commercial, industrial or agricultural activities;
- are not entities subject to supervision by the Bank of Portugal or the Insurance and Pension Funds Supervisory Authority, or branches in Portugal of credit institutions, other financial institutions or insurance companies;
- have properly organized accounts;
- its taxable profit is not determined by indirect methods; and
- have their tax and social security situation in order.

The Benefit

The benefit translates into the possibility of deducting, from the entity's taxable profit, an amount to be determined in accordance with the rules of the scheme, determined by applying a rate to the amount of eligible net increases in equity.

The use of this tax benefit is made via the CIT Model 22 declaration for the financial year in question. The amount of the benefit must be entered in field 774 of table 07, and the data relating to its calculation, among other things, must be reported, as illustrated below.

Increases In Eligible Own Capital

As mentioned, the benefit is applicable at company level by applying a rate to the net increase in its eligible equity. This means that it is not simply a matter of applying a rate to the value of a capital increase, as in previous regimes, but that it is necessary to validate, in each financial year, whether this increase represents a net increase, by checking the balance of the transactions eligible to the scheme in the period.

The law foresees that the following operations are eligible increases:

- contributions, made in cash, as part of the incorporation of companies or an increase in the share capital of the beneficiary company
- contributions in kind by converting loans into capital
- share premiums, and
- the application to retained earnings, reserves or capital increases of accounting profits that in that year may be distributed, in accordance with

corporate legislation.

Eligible withdrawals/decreases are those made, in cash or in kind, in favor of the owners of the capital, by way of capital reduction, sharing of assets, and distributions of reserves or retained earnings.

A balance of eligible increases and withdrawals in a given period is made in order to determine the amount to which the ICE scheme rate will apply, and the resulting figure is the incentive amount to be deducted in that year to the taxable income. If the balance is negative, the amount of net increases in eligible equity for the year is zero.

Non-Eligible Increases In Equity

In order to combat possible abusive or difficult-to-control practices, the legislator established the exclusion, as eligible increases, of contributions to the incorporation or capital increase of companies, when financed by increases in eligible equity capital in another entity, or cash contributions made by an entity that is not resident for tax purposes in a Member State of the European Union, or in the European Economic Area or in another State with which Portugal has not entered into an international double taxation treaty, bilateral or multilateral agreement providing for the exchange of information for tax purposes.

Eligible increases in equity are not considered to be those resulting from cash contributions made in the form of loans granted by the taxable person or entities with which they have a special relationship. However, an exception is made if the taxable person proves that these loans were for other purposes.

The Applicable Ice Scheme Rate

With the entry into force of the 2024 State Budget Law, the annual deduction from taxable income provided for in the ICE Regime is now calculated with reference to a rate resulting from a variable rate, corresponding to the average of the 12-month Euribor rate in the tax period, accrued by a spread of 1.5 percentage points (p.p.) - which is 2 p.p. in the case of a small mid cap or MSME.

It should be noted that this incentive is increased in the first years of its validity, with the rate being increased by 50%, 30% and 20% in 2024, 2025 and 2026, respectively.

Limits Of The Tax Incentive

The above deduction may not exceed, in each tax period, the higher of the following limits:

- € 4,000,000 (previously € 2,000,000); or
- 30% of earnings before depreciation, amortization, net financing costs and taxes.

However, in the event that the deduction exceeds the limit of 30% of the result before depreciation, amortization, net financing costs and taxes, the excess part is reportable and deductible in one or more of the five subsequent tax periods, after the deduction for that relevant period and respecting the applicable limit in that year.

Reference Period

Under the terms of the State Budget Law for 2024, for the purposes of calculating the tax benefit, the amount of eligible net increases in equity now includes the increases and withdrawals from the financial year itself and the previous six periods (previously, the same period and the last nine).

CIT Model 22 (Relevant Considerations)

Among other that may need to be filled, we highlight the following:

Field 437 of Table 04 of Annex D of Model 22

Annex D applies to the 2011 and subsequent periods and is to be filled in by taxpayers who obtain exempt income or enjoy other tax benefits under CIT.

Regime fiscal de incentivo à capitalização das empresas [(ICE) art.º 43.º-D do EBF]	437	

04-C	Campo 437 - INFORMAÇÃO ADICIONAL [(ICE) art.º 43.º-D do EBF]							
04-C1	Apuramento do benefício do período							
1 N.º de linha	2 Período	3 Aumento dos capitais próprios elegíveis (al. a) do n.º6 do art.º43.º-D)	4 Saídas elegíveis em dinheiro ou em espécie (Subalínea ii) da alínea b) do n.º 6 do art.º 43.º-D)	5 Aumentos líquidos dos capitais próprios elegíveis do período (alínea b) do n.º 6 do art.º 43.º-D) (coluna 3 - coluna 4)	6 Somatório dos valores apurados (n.º 3 do art.º 43.º-D)	7 Benefício fiscal potencial (coluna 6 x taxa)	8 30% do EBITDA (al. b) do n.º 4 do art.º 43.º-D)	9 Benefício fiscal no período (n.º 4 do art.º 43.º-D)

04-C2	Apuramento da dedução do período					
10 N.º de linha	11 Excesso do período a reportar (n.º 5 do art.º 43.º-D)	12 Reporte de períodos anteriores (n.º 5 do art.º 43.º-D)	13 Discriminação do reporte utilizado por período e montante (n.º 5 do art.º 43.º-D)		14 Dedução do período	15 Saldo a reportar
Discriminação do reporte utilizado por período e montante			13.1 Período	13.2 Montante		

In field 437, enter the amount of the tax incentive for the capitalization of companies, which should correspond to the amount calculated in column 14 of sub-table 04-C of the said annex, as shown below.

Therefore, entities subject to tax benefits should ensure that the relevant fields in Model 22 are correctly filled in, namely field 774 of table 07 and field 437 of table 04 of Annex D. Considering the recent legislative changes and the importance of the tax incentive to capitalize companies, it is prudent to evaluate these provisions carefully.

Conclusions

The ICE scheme should be seen in the context of a set of measures aimed at capitalizing companies and ensuring that taxation is neutral in companies' financing decisions, approximating the tax regimes for debt and for equity financing.

Comparing the new ICE regime with the previous regime in force last year, we note that it now provides for a deduction by applying a variable rate indexed to the average Euribor 12 rate, accruing a spread of 1,5% or 2% depending on the size of the company. This deduction is also increased by 50%, 30% and 20% in the 2024, 2025 and 2026 tax periods, respectively.

The comparison between the ICE scheme and the other benefits it replaced is not clear, and we will have to wait and see how the ICE scheme evolves and, in practice, near the beneficiaries, assess its success or failure.

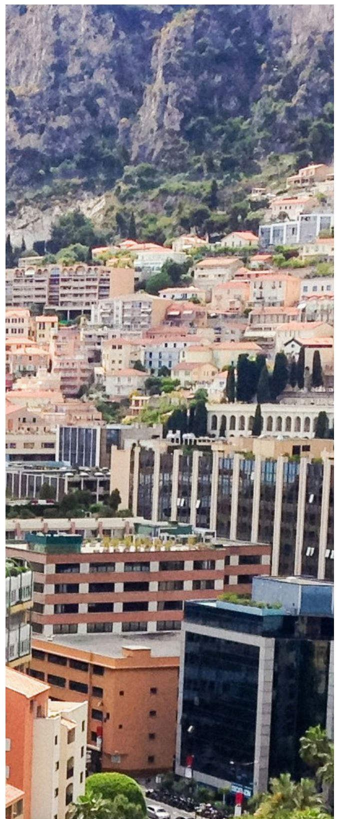
In view of the above, we believe that this could be a relevant benefit for companies to monitor closely.

Comparative Table

The main differences between the New ICE regime enshrined in the State Budget Law for 2024, the previous ICE regime (State Budget Law for 2023) and the Conventional Remuneration of Share Capital Regime (RCCS) can be seen in the table below:

CRITERIA	NEW ICE SCHEME LOE 2024	PREVIOUS ICE LOE 2023 REGIME	RCCS
REFERENCE PERIOD	From 01-01-2024	Between 01-01-2023 and 31-12-2023	Between 2017 and 31-12-2022
REDUCTION RATE	variable rate, indexed to the average 12-month Euribor rate, plus a spread of 1.5p.p. (2p.p. if SME or *Small Mid Cap*) + increases of 50%, 30% and 20% in 2024, 2025 and 2026	4.5% (0.5 p.p. increase possible)	7%
LIMIT ON DEDUCTION	€ 4.000.000	€ 2.000.000	€ 2.000.000
EXERCISES FOR USING THE BENEFIT	7 exercises	10 exercises	6 exercises
ELIGIBLE CAPITAL INCREASES	Contributions made in cash during the tax benefit period, through loans granted by the taxpayer or entities with which they are in a special relationship, are now excluded.	Greater scope of application compared to the RCCS	Smaller scope of application

A CHALLENGE: DECONSTRUCT TO STRUCTURE



By **Martin Litwak**
Founder / CEO
Untitled Strategic Legal Consulting

Prejudices. Wealth planning is rife with prejudices.

They say it is used for money laundering, when it is proven that the channels for laundering are usually far removed from the tools and countries or channels used for proper structuring. They say it is used by the rich to avoid paying taxes, when it is clear that the rich pay more taxes than anyone else, even using the tools available to structure their wealth. They also say it is a moral issue: how can you change your tax residence or structure your assets to reduce the tax burden if those taxes are supposed to go to those who have less, the false theory of wealth redistribution. They say it is used to hide or to disappear, as if insecurity were not commonplace in most countries in the region, as if maintaining some privacy were not a right that all people have.

They say many things about estate planning, about offshore jurisdictions, about trusts, about changing tax residency, about protecting what you have, about taking care of yourself, about protecting what we have for the benefit of our loved ones.

They say many things, and many of those things we believe. They believe them. They make us see wealth planning as something foreign, distant, dangerous. And it is then that I ask myself many questions.

Do we want to preserve our assets over time? Do we want to enjoy our wealth without fear of it being stolen, confiscated, or reduced? Do we want to see the product of our labor help us through retirement? Do we want to leave as much as possible to our children? Do we want to live without fear? Do we want to sleep peacefully?

I do. I imagine you do too.

Deconstructing is the first step towards wealth planning. Getting rid of prejudices, evading those myths fundamentally built by countries or groups of countries that seek to raise taxes, to fund state coffers more and more obscenely, and also by a sector of progressivism that appeals to the moral issue: if you have a lot, you must share it or you are a bad person.

Don't all taxpayers do this?

At some point, this will change, I know it. **The culture of "pay more and more" has to shift towards a tax system that is friendly to the taxpayer**, where one feels that what they pay is useful, is used for logical reasons and does not go down the drain of state waste, corruption, endless spending, and party coffers. We need to see that the tax effort is in line with our possibilities. We need to see that taxes go down and life remains the same or better; not that taxes go up and life gets worse.

This will change. But first, we have to change ourselves.

It is not wrong to structure your wealth. Not only is it not wrong: it is right. It is advisable for anyone who has something to protect, just as we protect other aspects of our lives. Just as we take care of our health and do not wait to become seriously ill to join a medical service (whether public, mixed, or private). Just as we plan our family vacations and do not just arrive at any place, any day, to see where we will sleep with our children. Just as we plan their education and do not send them to the first school we see in the neighborhood, nor to the first university that comes to mind. All that planning is good. It is logical. It is correct. It appeals to common sense.

Why doesn't our common sense accept that we need to plan our estate?

Deconstruct to structure. Deconstruct. Structure.

By **Kyra Motley**
Partner
Boodle Hatfield

THE ART OF PLANNING IN AFRICAN FAMILY BUSINESS EMPIRES

In Africa, family-owned businesses form the backbone of many economies. These enterprises are crucial for growth, employment, and wealth creation across the continent.

The rise of family businesses in Africa has been accompanied by a significant increase in market potential, positioning them as vital players in the region's economic landscape. Aligned with a fast-growing ultra-high net-worth population - a trend that is set to continue on an upward trajectory according to recent data from the Knight Frank Wealth Report – the burgeoning success brings unique challenges, particularly concerning succession planning and governance.

Why is effective succession so important?

Succession planning is a critical yet often overlooked aspect of managing family-owned businesses. Many African family enterprises are led by aging CEOs who have built their companies from the ground up. These founders are typically deeply involved in the day-to-day operations, making it challenging to envision the business without their leadership. The absence of a clear succession plan can lead to uncertainty and conflict among family members, potentially jeopardising the future of the business.

Without a succession plan, businesses face the risk of leadership vacuum upon the retirement or death of the founder. This vacuum can lead to power struggles, operational disruptions, and even the collapse of the business. A well-structured succession plan ensures continuity, preserves family harmony, and maintains the confidence of employees, customers, and investors.

Will imperfect governance jeopardise success?

Governance in family-owned businesses often lacks the formal structures seen in public companies. This can lead to issues such as nepotism, lack of accountability, and ineffective decision-making processes. Governance challenges are particularly pronounced in businesses where family interests are deeply intertwined with business operations.

Effective governance involves establishing clear policies and procedures, creating a professional board of directors, and ensuring transparency and accountability in business operations. It also requires balancing the interests of family members with the needs of the business. This balance is essential for long-term sustainability and growth.

The value of wealth planning

Wealth planning is a strategic approach to managing and preserving wealth across generations. For family-owned businesses, this involves not only financial planning but also addressing the complex dynamics of family relationships and business operations. Wealth planning becomes increasingly important as the founders age and the next generation prepares to take over.

As leaders grow older, the need for a transition plan becomes urgent. This plan should include identifying and preparing potential successors, whether they are family members or external candidates. It is crucial to start this process early to ensure that successors are well-prepared to take on leadership roles. This preparation includes providing them with the necessary education, training, and exposure to different aspects of the business.

Family dynamics can significantly impact the success of succession planning and governance. As families grow and change, so do their expectations and involvement in the business. Wealth planning must address these dynamics by fostering open communication, managing conflicts, and aligning the interests of different family members.

One effective approach is to establish a family council, which serves as a platform for discussing family-related issues, making collective decisions, and maintaining family unity. A family constitution, outlining the values, vision, and policies for family involvement in the business, can also be a valuable tool in managing family dynamics.

Strategies for effective planning

- **Early planning and involvement:** One of the most effective strategies for ensuring a smooth succession and governance is to start planning early. Involving the next generation in the business from a young age helps them understand the business's values, culture, and operations. This early involvement also allows potential successors to gain the necessary skills and experience.

- **A clear blueprint:** Ensuring a clear organisational structure, establishing formal policies and procedures, and appointing qualified professionals to key positions helps to separate the family interests from business operations, ensuring that decisions are made in the best interest of the business.

- **Regular reviews and updates:** Changing family dynamics requires that Wills, trust structures, and powers of attorney are regularly reviewed to ensure they remain relevant and effective. Planning should not be seen as a one off event.

The rise of family-owned businesses in Africa represents a significant opportunity for economic growth and wealth creation. However, this success comes with the responsibility of ensuring smooth leadership transitions and effective governance. By focusing on succession planning, addressing family dynamics, and professionalising business operations, African family enterprises can secure their legacy and continue to thrive for generations to come. The art of planning in African family business empires is not just about preserving wealth but also about building a sustainable future that honours the founder's vision while adapting to changing times.

TRUSTS AND SINGLE FAMILY OFFICES IN SINGAPORE, DO YOU NEED THEM BOTH?

By **Suzanne Johnston,** *Partner*; **Yi Lee,** *Managing Associate*; **Chenge Liu,** *Paralegal* from Stephenson Harwood (Singapore) Alliance

The wealth management world is ever-changing, and nowhere is this more evident than in the dynamic realm of single family offices ("**SFOs**") in Singapore. With more high-net-worth individuals ("**HNWIs**") harnessing SFOs for their succession, immigration and tax planning needs, Singapore is emerging as a prime destination for these activities.

Trusts, with their unparalleled flexibility and effectiveness, are also a viable option for succession and tax planning and can be immensely beneficial in combination with, or independent from, SFOs. In fact, a well-tailored trust may achieve a family's succession and tax planning needs, negating the need for SFOs.

The Boom of Single Family Offices in Singapore

Singapore has witnessed an unprecedented surge in the establishment of SFOs due to its strategic location, robust financial infrastructure, and friendly regulatory environment. Recent estimates put the total number of SFOs in Singapore at a staggering 1,400 by the end of 2023, with 300 springing up just last year alone.

When we ask potential clients for their motivation in establishing a family office, the answers are as diverse as they are intriguing. Succession planning, tax efficiency and immigration to Singapore are often key. For some, Singapore is perceived as the perfect base for their family with good schools and a safe and harmonious society. Having a SFO also has immigration perks, it allows clients a right of abode in Singapore which can eventually lead to permanent residency and citizenship (a Singapore passport tops the list for visa free travel around the globe), while others find SFOs beneficial for the family's centralised wealth management. Amongst a gamut of reasons, the generous tax incentives and simple tax regime in Singapore remain core motivators.

Singapore's Tax Regime: A Magnet for Wealth

Singapore's tax regime attracts investors and HNWIs with an irresistible blend of benefits. The absence of capital gains and inheritance tax, along with a relatively low-income tax rate, makes Singapore a haven for wealth preservation and growth. Personal income tax rates are progressive, ranging from 0% to 24% for residents, ensuring that wealth is not eroded by excessive taxation. Corporate tax stands at a flat 17%, with various exemptions and incentives available for trusts, funds, startups and specific industries, further enhancing the appeal.

So how generous are the tax exemptions for SFOs and trusts?

Trusts vs SFOs: Tax Exemptions in A Nutshell

Both trusts and SFOs can avail themselves to numerous tax exemptions under section 13 of the ITA. For trusts, there are foreign trust exemptions (section 13F), locally administered trust exemptions (section 13N), and foreign philanthropic trust exemptions (section 13L). For SFOs, the most commonly utilised exemptions are the resident fund tax incentive (section 13O), enhanced-tier fund tax incentive (section 13U) and the offshore fund tax incentive (section 13D).

The scope of exemption under these incentives relates to income gains from investments. The crème da la crème being enjoyed by foreign trusts and SFOs where “specified income arising from designated investments”, which is the broadest of the tax exemptions, and exempts "trading income" eg income derived from the carrying on of a trade, business or profession from Singapore is granted.

Locally administered trusts face slightly more restrictive conditions - trading income is excluded from exemptions but other income such as interest derived from deposits or debt securities, distribution made from a real estate investment trusts, and structured products offered by a financial institution, still benefit from tax exemption and if fact, there is a possibility of a legislative change that clarifies the position of dividend income in a locally administered trust.

The beauty of trust tax exemptions lies in their automatic application and simplicity in requirements. In contrast to the tax exemptions applicable to SFOs, there are no additional requirements imposed for a trust to benefit from the trust tax exemptions eg minimum assets under management criteria, staffing quotas and local spending thresholds. Trust tax exemptions do not require formal approval by the Monetary Authority of Singapore ("**MAS**"), as compared to SFO tax incentives.

With this flexibility, however, comes a degree of uncertainty. This is because without MAS approval, the trust tax exemptions are not guaranteed for the life of the trust and are subject to legislative change.

In comparison, two of the most popular SFO tax exemptions require MAS approval and, therefore, offer long-term tax certainty because they are granted for the life of the fund and insulate the tax treatment of the fund from legislative changes. This is a key advantage for strategic wealth planning. However, due to enhanced measures and stringent requirements in recent years for SFOs, there is a trend towards the section 13D tax incentive for SFOs. The section 13D tax incentive offers a streamlined process, which does not need MAS approval. Despite the absence of long-term tax certainty, we are seeing an increasing number of clients sacrifice tax certainty in favour of utilising section 13D which, if succession planning is your core priority, begs the question, why not simply create a trust and utilise the trust tax exemptions?

Trusts for Succession Planning: How They Work

Besides tax planning, when it comes to securing a family's future, trusts stand out as a powerful tool for succession planning. Unlike SFOs, which focus primarily on wealth management and investment, trusts are specifically designed to protect assets, provide high levels of confidentiality, and ensure smooth succession across generations. Trusts allow flexible planning, permitting specific parameters for the use of assets, and provide asset protection in adverse circumstances. Trusts can also be used for dynastic family planning (very popular in Asia), and coupled with proper family governance, can ensure a family's wealth is preserved, grows sustainably and align family values through generations.

Trusts remain a favoured tool for these purposes, offering robust asset protection, confidentiality, and streamlined succession mechanisms.

Immigration and Residency Benefits

That said, establishing an SFO in Singapore can provide significant immigration benefits which may not be achieved through a trust. Family members can apply for Employment Passes (EPs) or Permanent Residency under the Global Investment Plan (GIP), facilitating their ability to live and work in Singapore. In the longer term, both of these immigration routes can lead to Singapore citizenship. We are seeing a surge in clients looking to convert their permanent residency into Singapore citizenship in view of world economic and political events.

So, trust, family office, or both?

Unsurprisingly, the answer depends on the unique needs and objectives of each family.

Trusts are ideal for families primarily focused on succession planning and asset protection. They offer simplicity, confidentiality, and automatic tax exemptions without the need for meeting stringent financial thresholds. Trusts are effective for ensuring a smooth transition of wealth across generations while maintaining a high level of control and privacy.

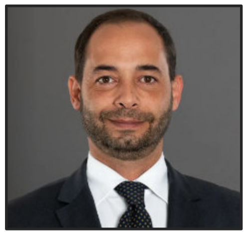
Family Offices, particularly licensed ones, are suitable for families with more complex needs, including active wealth management and investment in diverse assets. They provide a structured and professional approach to managing substantial wealth, with the ability to attract external funds and comply with rigorous regulatory standards. Family offices are perfect for families looking to enhance their investment capabilities and manage their wealth on a larger scale.

Combining Both can offer the best of both worlds. A trust, with its investment power reserved to designated persons, can own an SFO and fund entity, providing robust asset protection and succession planning while leveraging the investment expertise and professional management of a family office. This integrated approach ensures comprehensive wealth management, balancing the need for security with the ambition for growth.

Ultimately, the choice depends on the family's goals, whether it's preserving wealth, growing it, or both. There is no silver bullet when it comes to succession and tax planning but, in our view, the SFO should not be seen, or promoted as, a golden tool. If you strategically combine SFOs and trusts, you can leverage the strengths of both to enhance asset protection, streamline management, and ensure seamless succession. But you may not need both to achieve the family's ambitions.

At the risk of sounding like a broken record, families should invest in proper legal advice to craft a tailored strategy that aligns with their long-term vision and ensures their legacy endures for generations to come. They should exercise caution and not get swept up in the rhetoric around SFOs, take a step back (breathe), and ask themselves, is this right for our family?

By **Rogério Fernandes Ferreira**, *Founder & managing partner,* **Duarte Ornelas Monteiro**, *Managing senior lawyer,* **João Aguiar Câmara,** *Lawyer* from RFF Lawyers



TRANSITIONING TAX INCENTIVES:

PORTUGAL'S NHR REGIME TO THE NEW TAX INCENTIVE ON SCIENTIFIC RESEARCH AND INNOVATION

Abstract

The Portuguese State Budget Law for 2024 marked a significant shift in the country's tax policy by terminating the Non-Habitual Resident (NHR) regime and introducing a new tax incentive scheme aimed at promoting scientific research and innovation. This article examines the details of this transition, the mitigation rules for existing and prospective NHRs, and the potential advantages and challenges of the new regime. It provides a comprehensive analysis of the tax benefits under both regimes and discusses the anticipated practical difficulties in implementing the new incentive scheme.

Introduction

The Non-Habitual Resident (NHR) regime, established by Decree-Law no. 249/2009 and Decree no. 12/2010, was designed to attract high net worth individuals, highly qualified professionals, and foreign pensioners to Portugal. By offering significant tax benefits, it aimed to enhance Portugal's tax competitiveness and attract foreign investment. However, the State Budget Law for 2024 has officially terminated the NHR regime as of 1st January 2024 and introduced a new tax incentive regime for scientific research and innovation. This article explores the details of this transition, its implications for taxpayers, and the potential impact on Portugal's attractiveness to foreign talent and investment.

Termination of the NHR Regime

The NHR regime was highly successful in attracting skilled professionals and investors to Portugal. However, the former Portuguese Government, associating the regime with the housing crisis in Portugal, announced its termination in October 2023. The State Budget Law for 2024 confirmed this decision, with the NHR regime officially ending on 1st January 2024.

Mitigation Rules for Existing and Prospective NHRs

Despite the termination of the NHR regime, the State Budget Law for 2024 includes mitigation rules to safeguard the legitimate expectations of taxpayers who had already taken material steps to change their tax residency to Portugal. These mitigation rules are designed to provide a transitional period for those who were in the process of relocating to Portugal under the NHR regime.

The key provisions include:

- Individuals already registered as NHRs as of the law's effective date.
- Individuals who meet the conditions to qualify as tax residents in Portugal by 31st December 2023.
- Individuals who become tax residents by 31st December 2024, provided they have one of the following:
    - Promise or work contract, promise or agreement of secondment concluded until 31st December 2023, the performance of whose duties is to take place in national territory
    - Lease agreement or other agreement granting the use or possession of real estate in Portuguese territory signed until 10th October 2023
    - Reservation contract or promissory contract for the acquisition of a right in rem over real estate in Portuguese territory signed until 10th October 2023
    - Enrolment or registration for dependents in an educational establishment in Portuguese territory, completed by 10th October 2023
    - Residence visa or residence permit valid until 31st December 2023
    - Procedure, initiated until 31st December 2023, for granting a residence visa or residence permit, before the competent authorities, in accordance with the legislation in force applicable to immigration,

namely through the request for an appointment or actual appointment for submission of the application for a residence visa or residence permit, or by submitting the application for the granting of residence visa or residence permit

- Family members of the applicants in any of the situations mentioned above.

These individuals can benefit from the NHR regime for a period of 10 consecutive years under the terms previously in force, maintaining the advantages associated with the regime. Specifically, they must:

- Request NHR registration by 31st March of the year following the year they establish tax residency (2025).
- If NHR registration is delayed, special taxation under the transitional regime takes effect from the year of registration for the remaining period within the 10 years.

Introduction of the New Scientific Research and Innovation Regime

The new regime aims to attract highly skilled professionals in specific fields, replacing the broader NHR regime with a more targeted approach. The new regime is officially termed the Scientific Research and Innovation Regime and includes significant differences in scope and benefits compared to the NHR regime.

Key features of this new regime include:

- A flat tax rate of 20% on net income from employment and self-employment in designated scientific and innovation activities.
- Eligibility for individuals not considered tax residents in Portugal during the last five years.
- A 10-year benefit period, contingent on maintaining tax residency and earning income in the specified activities each year.
- Exemption from Portuguese tax for several categories of foreign-sourced income without needing to rely on Double Taxation Treaties.

Scope and Activities Covered by the New Regime

The new regime's scope is directed at individuals engaged in specific scientific and innovation activities. The activities covered under this regime include:

- Teaching in higher education and scientific research, including employment in entities dedicated to knowledge production, dissemination, and transmission within the national science and technology system.
- Qualified jobs related to contractual benefits for productive investment under the Investment Tax Code.
- Job positions or other activities carried out by tax residents in the Autonomous Regions of Madeira and Azores, as defined by Regional Legislative Decree.
- Research and development position whose costs are eligible under the tax incentive system for business development.
- Positions in certified startup companies under the Startup and Scaleup Law.

- Qualified positions in entities recognized by the Agency for Investment and Foreign Trade of Portugal or by IAPMEI - Agency for Competitiveness and Innovation, which are deemed relevant to the national economy and regional development.

Comparative Analysis of the NHR and New Regimes

The NHR regime offered broad tax benefits, including exemptions for various types of foreign-sourced income and a flat tax rate for high-value-added activities. Under the NHR regime:

- Foreign-source income such as dividends, interest, rental income, and capital gains were exempt from Personal Income Tax, provided they were taxable in the source state or under the OECD Model Convention.
- Pensions from foreign sources were taxed at a flat rate of 10%.
- Income from high-value-added activities was taxed at a special rate of 20%.

In contrast, the new regime provides:

- A 20% flat tax rate on net income from employment and self-employment in specified activities.
- Exemption from Portuguese tax for several categories of foreign-sourced income, simplifying the tax benefits without requiring interpretation of international treaties.
- Pension income subject to progressive tax rates up to 53%, unlike the NHR's flat rate.

The new regime's advantages include broader exemptions for foreign-sourced income and simplified tax benefits for eligible professionals, for instance, capital gains derived on securities are a paradigm example of a foreign stream of income which was usually liable to Portuguese tax under the NHR regime and that can, in principle, be tax exempt under this new regime. However, the new regime is more restrictive in scope, limiting eligibility to those engaged in specific scientific and innovation activities.

Practical Challenges and Implementation Issues

Implementing the new regime presents

several practical challenges, particularly regarding the registration procedure. The absence of a finalized Ministerial Order and the need for updates to the Tax Authorities' systems may complicate the initial application process. Despite this, the Portuguese Government has recently announced a series of measures targeted to boost the economy that include the regulation of this regime, so we can expect these difficulties to be overcame soon. Additionally, the regime does not apply to individuals who have previously benefited from the NHR or Return Program regimes and can only be used once per taxpayer.

Conclusion

The termination of the NHR regime and the introduction of the new scientific research and innovation tax incentive regime reflect a significant policy shift in Portugal's approach to attracting foreign talent and investment. While the new regime offers targeted benefits for highly skilled professionals in specific fields, its implementation will require careful attention to practical challenges and procedural details. The comparative analysis suggests that, for certain categories of income, the new regime may offer superior benefits, enhancing Portugal's attractiveness as a destination for highly skilled professionals in designated sectors. The success of the new regime will depend on its effective implementation and the clarity of the registration process, ensuring that Portugal remains competitive in attracting global talent and investment.

MEET THE TEAM.

RHIANNON WINTER VAN ROSS

VP, Corporate Legal, Private Client & Global Memberships, ALM

rvanross@alm.com

KHRIS FENTON

Vice President, Corporate & Mid-Market Sales, ALM

kfenton@alm.com

FRANCESCA FFISKE

Global Director, Private Client

fffiske@alm.com

ELLIE MAY DONOHOE

Head of Private Client Partnerships

edonohoe@alm.com

RACHAEL MOWLE

Memberships Director

rmowle@alm.com

RACHAEL TOOVEY

Global Director, Membership Operations

rtoovey@alm.com