I am pleased to present the 14th annual issue of Private Foundations: A World Review! As always, my sincere thanks go to Toby Graham, David Russell, Anita Gaspar, Steve Meiklejohn, Fergus Nimmo, and Laura Jose for their support throughout the production process, as well as to the 26 authors of the 2018 issue who have all submitted excellent articles on a variety of interesting topics. Unfortunately I cannot mention them all. The choice among those I mention in my annual editor’s choice collection is always very difficult and that is why I have decided on a strict topic-based approach and leave it up to you to pick your favourites.

Within the 2018 issue, I first of all would like to draw your attention to our encompassing coverage of the new foundation jurisdictions: The introductory article by Paolo Panico in the General Section familiarizes us with what has been going on on the foundation front over the past year. The Jurisdiction-Specific Section contains articles that deal with the most recently enacted foundation laws, starting with Filippo Noseda on the Abu Dhabi foundation that came into effect on 17 August 2017. In addition, Tony Pursall gives us an update on the now enacted Cayman Islands Foundation Company, Stijn Janssen and Martijn van Steensel introduce us to the Dubai foundation that was enacted on 21 March 2018 and Todd D Mayo on the New Hampshire foundation, the first private foundation within the USA, in existence as of 1 October 2017. These landmark developments are rounded off with updates by Liza Harridy on the Barbados foundation, Adrian Pilcher on how the Gibraltar foundation paves its way in the initial coin offerings and blockchain spaces, and Mark Lea on the Samoan foundation. Cryptocurrencies and their challenges are also touched upon in various other articles.

Apart from the coverage of the new foundation laws, the Issue in both sections also features an in-depth analysis of various questions linked to international private foundations: Dr Rupert Graf Strachwitz takes us on a sophisticated journey well back into the history and philosophy of charitable foundations. David Russell, AM QC, examines the implications of the Common Reporting Standard (CRS) and Anti-Money Laundering Legislation for trusts and foundations and for John Brassey it is ‘Requirement to Correct’ in 2018 as HMRC have put a deadline on when and how they will change the landscape with

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regards to offshore assets and historic compliance issues. Furthermore Katrin Sepp, Urmas Kaarlep, and Turgay Kuleli\textsuperscript{13} try to unblock the bottlenecks of the Estonian wealth-management scene for private foundations by offering suggestions for the amendment of the Estonian Foundations Act to the Estonian legislator. Katerína Ronovská and Vlastimil Pihera\textsuperscript{14} focus on the unbearable lightness of forced heirship in the Czech Republic and Ákos Menyhei\textsuperscript{15} enlightens us what happens if one puts the English type trust concept into a civil law jurisdiction like Hungary.

I am also particularly proud of this year’s charitable focus,\textsuperscript{16} which reminds us that private foundations do play a significant role in the charitable sector, in particular in changing times like ours. I do hope that this focus will continue also in the issues to come.

I myself have also not been idle during the past year as far as new developments are concerned. And there have been many, having to do in particular with the Organisation of Economic Co-Operation and Development (OECD) and the European Union (EU). Transparency remains an issue, a fact that is strongly reflected by David Russell’s,\textsuperscript{17} John Brassey’s\textsuperscript{18} Dimitar Hristov’s and Anna Zeitlinger’s\textsuperscript{19} as well as Michael Petritz’s and Cordula Horkel-Wytrzens\textsuperscript{20} articles. And as you will see, transparency is about to be enhanced and increased in a tight pattern.

In my 2015 Editorial ‘A World of Glass: Transparent, but also Fragile: Trustwise’,\textsuperscript{21} I discussed the dangers to the privacy of individuals by registering, storing, and making available all kinds of information to an unknown public. In 2016 I extended this question by asking ‘(Where) Have You Already Been Registered?’\textsuperscript{22} In 2017 I reflected on ‘En route to Nineteen Eighty-Four? Are the Tunes of Orwell’s Nineteen Eighty-Four echoed in Twenty-Seventeen?’\textsuperscript{23} In 2018 I want to open the issue by providing you with an update on the OECD and EU transparency regimes under the title Tidal Waves.

**Introduction**

Last year’s editorial dealt with the automatic exchange of information as well as the fourth EU Anti-Money Laundering Directive, in particular the public ownership registers. In the meantime, both the OECD as well as the EU have been working on pieces of legislation that develop and enhance both the CRS as well as the Anti-Money Laundering Directive.

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What has thus happened in the past twelve months?

**OECD: maintaining the integrity of the CRS**

**Update CRS**

The CRS is now in force. The first exchanges already took place in September 2017 between 49

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\begin{itemize}
  \item Russell (n 11).
  \item Brassey (n 12).
  \item J Niegel, ‘(Where) Have You Already Been Registered?’ (2016) 22(6) Trusts & Trustees 585–92.
\end{itemize}
jurisdictions. Another 53 jurisdictions will start to exchange information in September 2018.  

As of 21 December 2017, already over 2600 bilateral exchange relationships were established with respect to 78 jurisdictions that had by then committed to the CRS. In addition to taking over the CRS into domestic law, another key element of its successful implementation is the adherence to an international framework that allows for the actual automatic exchange of information under the CRS:  

In this respect, more than 100 jurisdictions have opted to participate in the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (‘Multilateral Convention’) and in the CRS Multilateral Competent Authority Agreement (MCAA), which is based on Article 6 of the Multilateral Convention. Other states alternatively rely on a bilateral agreement, such as a double tax treaty or a tax information exchange agreement as a basis for the exchange of information. In addition, certain information exchanges will take place on the basis of the relevant EU Directive, agreements between the EU and third countries as well as bilateral agreements, such as the UK-Crown Dependencies and Overseas Territories (CDOT) Agreements.

Facility to disclose CRS avoidance schemes

Already on 5 May 2017 the OECD launched a public disclosure facility for information on schemes designed to circumvent the application of the CRS. Interested parties, ie practitioners, financial advisors, civil society, and anyone with knowledge of schemes purportedly aiming at circumventing the application of the CRS are encouraged to make use of this facility and to report such schemes. The disclosure facility can be accessed via the Automatic Exchange Portal.  

As explained in the OECD Press Release, this facility is part of a wider three step process the OECD has put in place to deal with schemes that aim at avoiding reporting under the CRS. As part of this process, all actual or perceived loopholes that are identified will be systematically analysed to further strengthen the effectiveness of the CRS which in itself already limits opportunities for taxpayers to circumventing the greatest possible extent. The three-step process to deal with CRS avoidance schemes complements the ongoing peer reviews carried out by the Global Forum on Tax Transparency and Exchange of Information for Tax Purposes to ensure the effective implementation of the CRS in all jurisdictions.

Release of a consultation document on the misuse of residence by investment schemes to circumvent the common reporting standard

A second area of concern that the OECD has addressed are the increasing residence by investment (RBI) or citizenship by investment (CBI) programmes, which allow foreign citizens to obtain residence or citizenship in the state offering such programmes by

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31. ibid.
making local investment or by the payment of a flat fee. While the OECD concedes that there are a number of legitimate reasons such as eg greater mobility thanks to visa-free travel, it at the same time highlights a possible misuse of RBI and CBI programmes to circumvent the CRS. As part of its CRS loophole strategy, the OECD has thus released a consultation document on 19 February 2018 that *inter alia* assesses how these schemes may be used to circumvent the CRS as well as identifies those schemes that present a particularly high risk of abuse. Public input was sought until 19 March 2018 to obtain further evidence on the misuse of CBI/RBI schemes and on effective ways for preventing such abuse. Such input will influence the next steps that will be taken.

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**Model mandatory disclosure rules for CRS avoidance arrangements and opaque offshore structures**

Shortly after, on 9 March 2018, the OECD, in response to a request of the G7, then issued new Model Disclosure Rules that require lawyers, accountants, financial advisors, banks, and other service providers to inform tax authorities of any schemes they put in place for their clients to specifically avoid reporting under the CRS or to prevent the identification of the beneficial owners of entities or trusts. The new rules introduce an obligation on a wide range of intermediaries to disclose schemes aimed at avoiding CRS reporting to the tax authorities. The new rules also require the reporting of structures that hide beneficial owners of offshore assets, companies, and trusts.

Pascal Saint-Amans, Director of the OECD Centre for Tax Policy and Administration introduced the new rules with the following words:

> Time is up for tax evaders and their advisors that still want to game the rules and continue to hide assets offshore. With the automatic exchange of CRS information becoming a global reality this year, it is the right moment to get hold of those taxpayers and advisors that attempt to undermine the reporting on offshore assets and that try to play the new global tax transparency framework. The mandatory disclosure rules will be a powerful tool to detect taxpayers that continue to refuse to be compliant with their obligations to declare their assets and income to their tax authorities. They will also have a deterrent effect against the design, marketing and use of schemes to avoid CRS reporting or hide beneficial owners behind opaque offshore structures. This is key both for the integrity of the CRS and for making sure that taxpayers that can afford to pay

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33. ibid.
advisors and to put in place complex offshore structures do not get a free ride.\textsuperscript{37}

The purpose of the new rules is to provide tax administrations with information on arrangements that purport to circumvent the Common Reporting Standard (‘CRS Avoidance Arrangements’) and on structures that disguise the beneficial owners of assets held offshore (‘Opaque Offshore Structures’).

CRS Avoidance Arrangements are understood as arrangements that are designed to circumvent, are marketed as, or have the effect of, circumventing the CRS, as translated in the relevant domestic laws. An arrangement generally circumvents the Common Reporting Standard when it avoids the reporting of CRS information to all jurisdictions of tax residence of the taxpayers in a way that undermines the policy intent of the CRS.

In contrast, Opaque Offshore Structures are structures that involve the use of a passive entity in a jurisdiction other than the jurisdiction of tax residence of one or more of the beneficial owners and are designed to, marketed as or have the effect of disguising the identity of the beneficial owner(s). Among others, this may include the use of nominee shareholders, the exercise of indirect control over entities or the use of jurisdictions with weak rules for the identification of beneficial owners.\textsuperscript{38}

To minimize reporting in low-risk situations, there is an exception from the definition of Offshore Structure for Institutional Investors.

The information required to be disclosed includes the taxpayers using such structures or arrangements and those who are involved with their design and set-up: an Intermediary is required to file a disclosure when the arrangement or structure is first made available for implementation, or whenever the Intermediary provides services in respect of the arrangement or structure. The design details as well as the users and any other Intermediaries involved in the supply of that arrangement or structure need to be provided.\textsuperscript{39}

Intermediaries include both Promoters as well as Service Providers. They are defined, not by reference to the role or occupation of the person, but by the role they play in the design, marketing, implementation or organization of the arrangement or structure.

Promoters are persons who are responsible for the design or marketing of the scheme or arrangement. In contrast, Service Providers are persons who provide assistance or advice with respect to the design, marketing, implementation or organization of the scheme or arrangement.

The Model Mandatory Disclosure Rules generally only impose disclosure obligations on Intermediaries that have a sufficient nexus with the reporting jurisdiction. They apply to Intermediaries operating through a branch located in that jurisdiction as well as those who are resident in, managed or controlled, incorporated or established under the laws of that jurisdiction.

The Model Rules however do not require attorneys, solicitors, or other legal representatives to disclose any information that is protected by legal professional privilege or other professional secrecy obligations. They are only obliged to the extent that an information request for the same information could be denied under Article 26 of the OECD Model Tax Convention and Article 21 of the Multilateral Convention.

In cases where the Intermediary is not required to comply with equivalent disclosure obligations due to the fact that the Intermediary is outside the scope of the Rules or bound by the requirements of professional secrecy, the Model Rules however impose a direct disclosure obligation on Reportable Taxpayers. In these cases, the Reportable Taxpayer has to provide all relevant information on the arrangement or structure that is within its knowledge, possession, or control.

The jurisdiction where the Intermediary makes the disclosure and the jurisdiction where the taxpayer is resident will need to have a reliable exchange of information relationship in place to ensure that the

\textsuperscript{37} ibid.


\textsuperscript{39} ibid.
relevant information reaches the jurisdiction of tax residence of the relevant taxpayer in a timely and structured manner.\textsuperscript{40}

The model disclosure rules will now be submitted to the G7 presidency while the OECD is currently working on an exchange of information framework for the new Rules, to be developed under the Multilateral Convention on Mutual Administrative Assistance.\textsuperscript{41}

**European Union**

**Corporate tax avoidance: agreement reached to tackle aggressive cross-border tax planning**

On 13 March 2018, the Council reached agreement on a proposal by the Commission based on Action 12 of the OECD’s 2013 Action Plan to prevent tax base erosion and profit shifting and aimed at enhancing transparency to tackle aggressive cross-border tax planning. On 21 June 2017, the Commission had published a corresponding Draft Directive entitled ‘Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements’, which would amend the Directive on Administrative Cooperation in the field of taxation. Materially, the Commission is aiming at preventing corporate tax avoidance as well as at avoiding divergence across EU Member States in relation to cross-border tax planning arrangements. The effectiveness of the CRS shall be enhanced by laying down the requirement for mandatory automatic exchange of information in tax matters.\textsuperscript{42}

\textit{On 13 March 2018, the Council reached agreement on a proposal by the Commission based on Action 12 of the OECD’s 2013 Action Plan to prevent tax base erosion and profit shifting and aimed at enhancing transparency to tackle aggressive cross-border tax planning.}

The Member States will have until 31 December 2019 to transpose the Directive into their national laws. The new reporting requirements will apply from 1 July 2020 and Member States will be obliged to exchange information every three months, within one month from the end of the quarter in which the information was filed. The first automatic exchange of information will thus be completed by 31 October 2020.\textsuperscript{43}

The similarities between these mandatory EU rules on the reporting of cross-border tax planning arrangements and the OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures are evident.

Once effective, the Draft Directive will require intermediaries such as tax advisors, accountants, and lawyers who design and/or promote tax planning schemes to report schemes that are considered potentially aggressive. The definition of said schemes is on purpose wide-ranging and aimed at avoiding any loopholes or omissions that could potentially be exploited by aggressive tax planners. Some EU Member States, like for example the UK, Ireland, and Portugal have already enacted mandatory national reporting
requirements for aggressive tax planning schemes. Consequently, the EU initiative is not entirely new, there are already some precedents in EU Member States.

According to the Press Release dated 13 March 2018, the Draft Directive establishes ‘hallmarks’ to identify the types of schemes that must be reported to the tax authorities. The requirement to report a scheme does not imply that it is harmful, only that it may be of interest to tax authorities for further investigation. While it is conceded that many schemes have entirely legitimate purposes, the declared aim is to identify those that do not. The Draft Directive thus covers all intermediaries and all types of direct taxes (income, corporate, capital gains, inheritance, etc.). In short, any company or professional, including lawyers, accountants, tax and financial advisors, banks and consultants, who designs or promotes a tax planning arrangement, which generally speaking contains a cross-border element, will be covered.

As the proposed new Directive is EU legislation, intermediaries outside the EU are not bound. However, if the intermediary is not located in the EU or is otherwise bound by professional privilege or secrecy rules, the obligation to report the tax arrangement passes to the taxpayer. The Member States will be required to automatically exchange the information they receive through a centralized database as well as to impose in their national law effective, proportionate and dissuasive penalties on intermediaries who do not comply with the reporting requirements.

En route to the fifth EU Anti-Money Laundering Directive

As you will remember from last year’s editorial, the EU has joined forces with the Financial Action Task Force (FATF) in the elaboration of the FATF standards and has taken them over into the European law by four successive Anti-Money-Laundering Directives to prevent the abuse of the financial system for money laundering or terrorist financing.

The addressees of the Directives are credit and financial institutions whom the Directives according to the Action Plan of the European Commission for strengthening the fight against terrorist financing of February 2016 seek to afford protection.

The fourth Anti-Money Laundering Directive, also known as Directive 2015/849/EU, which incorporates the FATF Recommendations of 2012 has been in force since May 2015. The Directive particularly applies to all financial institutions and institutes a customer due diligence system whereby said financial institutions are required to establish the identity of their customers, ongoing monitoring, beneficial ownership, and politically exposed person (PEP) identification as well as third-party equivalence.

44. ibid n 43.
46. ‘Enhancing transparency is key to our strategy to combat tax avoidance and tax evasion. If the authorities receive information about aggressive tax planning schemes before they are implemented, they will be able to close down the loopholes before revenue is lost.’ (Vladislav Goranov, minister for finance of Bulgaria which currently holds the Council presidency, statement available at <http://www.consilium.europa.eu/en/press/press-releases/2018/03/13/corporate-tax-avoidance-agreement-reached-on-tax-intermediaries/> accessed 19 March 2018).
47. Examples of the hallmarks that could potentially enable tax avoidance or abuse include arrangements which: involve cross-border payments to a recipient resident in a no-tax or almost no-tax country; involve a jurisdiction with inadequate or weakly enforced Anti-Money Laundering Legislation; are set up to avoid national law effective, proportionate and dissuasive penalties on intermediaries who do not comply with the reporting requirements.
Despite the fact that the fourth EU Anti-Money Laundering Directive, which was adopted by the European Parliament on 20 May 2015, carried an implementation deadline by the EU Member States on 26 June 2017, the legislative train has already departed towards the fifth EU Anti-Money Laundering Directive.  

The fifth revision of the current directive was proposed on 5 July 2016 as part of the Commission’s Action Plan against terrorist financing and also as a response to the revelations in the Panama Papers of April 2016. On 20 December 2017, the EU ambassadors confirmed the political agreement reached between the presidency and the European Parliament on strengthened rules to prevent money laundering and terrorist finance. In particular the Fifth Directive, which is still in its draft stage, addresses two main objectives—preventing the use of the financial system for the funding of criminal activities and strengthening transparency rules to prevent the large-scale concealment of funds and as such addresses the following five tasks: to ensure a high level of safeguards for financial flows from high-risk third countries, to enhance the powers of the EU Financial Intelligence Units and to facilitate their cooperation, to ensure centralized national bank and payment account registers or central data retrieval systems in all Member States, to tackle terrorist risks linked to virtual currencies and to tackle risks linked to anonymous prepaid instruments, eg prepaid cards. On 13 December 2017, a provisional agreement was reached which resulted in a final compromise of which the following two points shall be mentioned in more detail:

**Beneficial ownership registers**

- The access to the beneficial ownership registers of companies and trusts (Articles 30 and 31) has been enhanced and the registers will be interconnected to facilitate cooperation between the Member States.
- The information on the beneficial ownership information of companies will be public.
- The information on the beneficial ownership information on trusts and similar legal arrangements, like private foundations, will be accessible on the basis of a legitimate interest.
- In addition, public access upon written request to beneficial ownership information on trusts that own a company that is not incorporated in the EU will be granted.
- Member States have the right to grant an even broader access to the registers on the basis of their national law.

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56. The Commission has established and regularly updates a harmonized list of non-EU countries that show deficiencies in their anti-money laundering prevention schemes. Additional due diligence measures will be required for financial flows from these countries.

57. This measure is in particular linked to lowering the threshold for identifying the holders of such cards to EUR 150.00 while at the same time increasing know-your client requirements. At the same time, virtual currency exchange platforms and custodian wallet providers will be obliged to apply customer due diligence controls, ending the anonymity associated with such exchanges.


Improved cooperation between the Member States’ financial intelligence units

The cooperation between the financial intelligence units of the Member States is to be increased and they will have access to information in centralized bank and payment account registers that enables them to identify the account holders.

The amended Directive is expected to enter into force by the end of 2019, ie 18 months after its publication, which will be around mid-2018. In respect of the specific provisions of the Directive, it is foreseen that national registers of beneficial owners of companies will be made public by the end of 2019, while national beneficial ownership registers of trusts will be accessible to persons with a legitimate interest in early 2020. In addition, the implementation of national bank account registers is expected as from 2020, whereas the interconnection of all national registers will proceed from 2021. 60

Outlook

Although the regulations discussed above, namely the OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, the EU’s Draft Directive on Reportable Cross-Border Arrangements, and the Fifth Anti-Money Laundering Directive are still in their draft stages, their strategic focus is clear.

The similarities between the mandatory EU rules on the reporting of cross-border tax planning arrangements and the non-mandatory OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures are evident.

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Although the OECD Model Rules are not mandatory under the CRS, it seems likely that they will form the basis for many other jurisdictions to implement domestic rules designed to prevent taxpayers avoiding reporting obligations under the CRS. 61

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The strategic focus of both the EU and OECD regulations is understandable as a response to the terrorist attacks and the appearance of the Panama Papers. The regimes are certainly apt to fight illegal conduct and might even prevent future terrorist attacks, as suspicious activity is likely to be detected at an earlier stage.

At the same time, the new regimes also encroach heavily on the legitimate privacy interests of legally compliant citizens, whereby with the new proposals legitimate privacy of citizens will be limited to an even greater extent. Both the EU as well as the OECD are aware of this and thus try to balance the need for increased security with the protection of fundamental rights and economic freedoms. 62 In particular, the agreed text of the Fifth Anti-Money Laundering Directive seeks to balance the need for increased security with the protection of fundamental rights and economic freedoms. 63

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A lot will depend on the implementation of the regimes. This applies not only at the level of the legislators, the OECD and the EU, but also of the Member States as well as of the individual persons and companies that are obliged by the regimes, the so-called obliged persons, to use a term of the EU Anti-Money Laundering Directive.

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With a view to the regimes themselves as well as to the national implementation laws, David Russell, by making a reference to UK law, already now observes certain deficiencies and inconsistencies and concludes that legislation imposing such severe penalties should contain such obvious fundamental uncertainties does not speak well for the technical skill of the originators of the legislation, or of the Parliament whose responsibility it is to ensure that badly written and self-contradictory legislation does not make it to the statute book.

Also Edward Buckland's concern voiced three years ago that already in the implementation of the Financial Action Task Force’s Recommendations, many countries have in fact opted to go further than the Recommendations actually require, is still valid.

We are indeed faced with a tidal wave of regulation that now needs to be implemented in a consistent manner. This task will present a challenge to both the legislating organizations and their Member States, as well as to the obliged persons. What must not be forgotten is, that once the regimes will be fully in force, we shall be confronted with a data volume of unprecedented proportions. But, we will not only need to ask whether the data will finally be collected, exchanged, and assessed consistently. Before we even consider this final stage we need to ask ourselves whether the legislating organizations, the Member States as well as the obliged persons will be able to handle the regulations and the quickly following amendments from a mere standpoint of available workforce and specialist knowledge, prerequisites that go hand in hand to implement the regimes in practice.

64. Russell (n 11).
67. ibid.
organizations, the Member States as well as the obliged persons will be able to handle the regulations and the quickly following amendments from a mere standpoint of available workforce and specialist knowledge, prerequisites that go hand in hand to implement the regimes in practice.

That being said, I hope that you will enjoy Private Foundations 2018.

Dr Johanna Niegel joined Allgemeines Treuunternehmen (ATU) in 1999 after having worked with international law firms in Moscow, New York, Budapest, and Vienna. She has since specialized in the comparative analysis of international private foundations and trusts. Johanna has been editing Trusts & Trustees ‘Private Foundations: A World Review’ starting from its inception in 2004 and is also an editor to the survey book entitled ‘Private Foundations World Survey’, published by Oxford University Press in August 2013. Johanna took a doctorate in law at the University of Vienna Law School, Austria, and graduated with a master’s degree from Columbia University School of Law, New York, having obtained a Fulbright scholarship. She was named a Harlan Fiske Stone Scholar for Superior Academic Achievement and holds the Parker School Recognition of Achievement with Honors in International and Foreign Law. Johanna was awarded the STEP Diploma in International Trust Management in 2005 and among others currently serves as Deputy Chairman of the Verein STEP, a member of the Swiss & Liechtenstein STEP Federation, as well as Chairman of its Vaduz Centre. Johanna was awarded the STEP Founder’s Award in 2017. Apart from German and English, Johanna is fluent in Russian, French, and Italian.