



FRESHFIELDS BRUCKHAUS DERINGER

Family-owned businesses

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Family-owned businesses and other owner-managed enterprises have always represented an important economic factor in central Europe. Numerous enterprises generating a major part of the relevant gross domestic product must be regarded as family-owned businesses. The close relationship between the partners/shareholders and their business, as well as short decision-making processes, guarantee flexibility and adaptability. However, these advantages entail certain risks. Due to their special structure, family-owned businesses face special challenges that must be prepared for by careful planning and preventive organisation.

Family-owned businesses appear in all legal forms: they range from limited partnerships, with a family member as the personally liable shareholder, to listed, albeit still family-controlled, joint-stock corporations or Societates Europaeae. The legal form is frequently a result of the business's history, but may just as often be a consequence of the relevant specific corporate culture, tax considerations and the specific market requirements.

Traditionally, the clientele of our firm includes a large number of family-owned businesses. Many of our partners have acquired long-term experience in advising family-owned businesses and their owners – in Austria, Germany and in other European states.

In the 'family-owned business' sector group the lawyers of Freshfields Bruckhaus Deringer analyse market developments, corporate governance considerations, financing requirements by banks and other developments and exchange respective experiences in order to be able to deal with the specific problems faced by family-owned businesses in even more detail. Our clients benefit directly from the resulting interdisciplinary and transnational exchange of experience.





Key aspects of our consultancy services

In providing our consultancy services, we place special emphasis on subjects such as entrepreneurial structure, including its effects on publicity and co-determination, succession and tax planning, and corporate finance. Since family-owned businesses, in their relevant spheres of influence, participate actively in the market for entrepreneurial transactions, we use our experience in structuring and carrying out national and transnational mergers and acquisitions (M&A) transactions to support and assist them in this area as well.

In dealing with all these subjects, the range of our consultancy services always includes – if and insofar as required by the subject in question – the services of our firm’s specialists on tax, real estate, competition and antitrust, public, dispute settlement and labour law, etc.

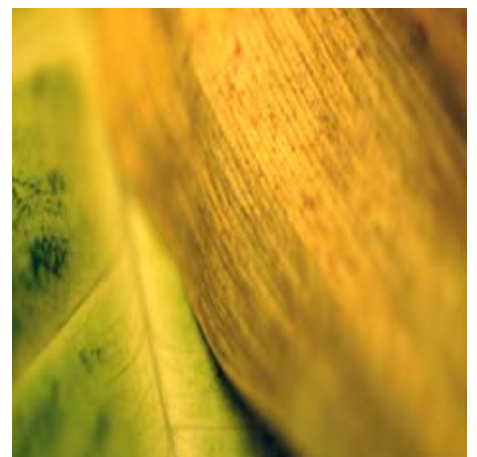
To the extent that family offices are established in the course of asset allocation, we are able to offer advice on their design, the integration of family members, compliance with the applicable provisions of the law of succession and of family law and the setting-up of specific investment and asset protection structures.

Personal support, right from the start

In advising family-owned businesses and their owners, a personal relationship of mutual trust with the consultant is of paramount importance at many points. What our clients look for is a consultant with both professional and life experience who approaches all problems from an entrepreneurial point of view, is familiar with the structures and decision-making processes in a family-owned business and bases his/her advice on this knowledge. In our firm, we meet these requirements. A partner who is assigned a client will always take care of this client personally and will deal with all problems on which this client may request his/her advice. Depending on the actual problems presented, other partners and/or employees will be included in the relevant project or in the ongoing consultancy services, subject to the client's approval. Our aim is to provide highly qualified, practical and success-oriented consultancy services that will add value to the client's enterprise.

International competence

Nowadays, family-owned businesses are increasingly active internationally. As an international law firm, we are in a position to combine our experience in advising family-owned businesses with our international network and knowhow. This enables us to go beyond providing 'classic' advisory services to family-owned businesses and to offer services like succession planning 'across the borders', no matter whether this is required because of different nationalities/domiciles of the owners or their heirs, or as a result of international asset diversification. Moreover, we also offer consultancy services in connection with transnational corporate acquisitions, mergers, co-operations and reorganisations.





Corporate law

Key questions

The basic questions of corporate law are of particular importance when providing consultancy services to family-owned businesses. The choice of a form of business organisation is an essential factor affecting the future of the family-owned company. The corporate or partnership constitution will affect the interactions of management and owners, generation succession, the financing of the enterprise and the integration of non-family managing directors and the family owners of the businesses. Special attention is paid to pooling agreements and to advisory board constitutions in which the participation rights of the owners who are family members are determined, often for very long periods. Advisory boards can be set up in such a way as to permit the advising and, if necessary, the choice and supervision of members of the management by third-party experts. In setting up rules for the utilisation of profits and for withdrawals, it is of primary importance to balance cash needs of the business and the family members and to include tax law consequences.

Our services include, without limitation:

- choice of legal form and alteration of legal form;
- drawing up of contracts (pooling agreements, company/partnership agreements and constitution of the business);
- 'corporate governance' of the family-owned business;
- succession planning and transition to the next generation (including wills, contracts of inheritance and marriage contracts, execution of wills);
- securing of corporate assets against third-party claims (marriage contracts, waivers of the compulsory portion, foundations, trusts);
- employment contracts with members of the management board and managing directors, including, but not limited to, managing owners (advance profit payments, cash incentives, pensions);
- participation in the establishment of suitable management and organisational structures; 'family-office';
- foundations; and
- election of other advisers and asset managers.

M&A

In addition to providing consultancy services in connection with basic questions, we also support and assist family-owned businesses in carrying out corporate acquisitions, setting up co-operations and implementing reorganisation measures, including, but not limited to, mergers of family-owned businesses with other enterprises. Particularly in mergers, there is an inseparable connection between the M&A advisers and the owners, because mergers always affect the legal position of the owners and the owners are increasingly involved in the financing of the takeover. In the case of family-owned businesses that are, or wish to be, listed on the stock exchange, specific questions concerning company law and stock exchange rules will have to be answered as well.

The most important fields of consultancy are:

- corporate acquisitions, establishment of joint undertakings or a participation of third parties (private equity or strategic investors) in the family-owned businesses itself;
- reorganisations;
- advice on questions of company law, initial public offering, shareholders' meetings;
- participation in the safeguarding of shareholders' rights; and
- obligations of information and other duties under the Securities Trading Act and the Securities Acquisition and Takeover Code.





Taxes

Tax law is of considerable importance in advising family-owned businesses. Because of the fact that frequently most of the family assets are tied up in the enterprise, the company/partnership agreement must provide withdrawal rights to cover taxes on income. This results in the owners' tax burden becoming a burden on the company's liquid funds. Proper tax planning contributes to the prevention of capital outflows and helps to maintain the business' ability to finance itself.

The choice of the right legal form, succession plan and design from the point of view of inheritance and family law requires careful consideration of the basic questions of tax law, which are often of primary importance to the parties involved. In view of the erratic development of tax law, all decisions taken must regularly be examined from the point of view of their fiscal expediency. In doing so, tax considerations should never be taken as absolute, but should always be seen in conjunction with entrepreneurial requirements and with the situation of the family. This requires a holistic approach.

The most important fields of consultancy are:

- choice of legal form and/or company split-up models as a basis for taxation of earnings and inheritance;
- domicile of businesses and their owners;
- structuring of international participations;
- documentation of transfer prices between group companies;
- ensuring adequate remuneration in order to avoid hidden profit distribution;
- use of foundations to preserve the ownership structure (*Unternehmensträgerschaft*) and the optimisation of the tax burden on succession;
- optimisation of balance sheet policies from the fiscal point of view; and
- optimal structuring of invested funds from a fiscal point of view.

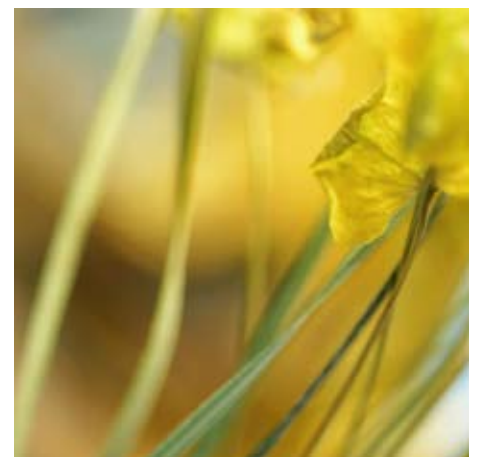
Financing

Family-owned businesses are increasingly faced with the question of their future financing. In view of the fact that banks are placing restrictions on the granting of loans and of the present situation on the financial markets, the structuring of an enterprise is becoming more and more important. Beside classical and new forms of debt financing, equity suppliers also play an important part.

For debt suppliers, the influence exercised on the enterprise by families, the dependence on the asset owner (*Vermögensträger*) as manager, the taxability of withdrawals and the quality of controlling are important subjects. Due to the increased attention expected to be paid to these aspects in the future assessment of loan default risks, enterprises are now facing additional requirements in the areas of planning and covenants. Freshfields Bruckhaus Deringer offers advice on the choice of suitable banks and private investors as well as on the structuring of the contractual relationships with them.

For equity suppliers, the classic problem is disinvestment if there are no plans to have the company listed on the stock exchange. In addition to this classic form of venture capital, we have developed a number of off-balance-sheet financing structures – also including external equity capital for the purpose of exploiting the opportunities offered by tax law.

Our consultancy services also cover the reconciliation of entrepreneurial decisions and their presentation with the lists of requirements submitted by the debt suppliers, and suggestions for necessary alterations before the conclusion of the relevant transaction.





Dispute settlement

Disputes between the owners of family-owned businesses occur with a certain frequency. They may be caused not only by differing opinions concerning the right business policy, but also by divergent personal interests (which may be triggered by the relevant individual family, financial or fiscal situation). This is particularly true in the case of businesses whose owners are divided into various branches of the original family, each consisting of a great number of members. Typically, conflicts of interests appear at the time of, or after, the transition from the 'founder generation' to the successor generation. Disputes between owners are not only disruptive and draining on a personal level, but may also have a detrimental effect on the enterprise. For this reason, it is very important to set up suitable mechanisms for settling disputes among the owners that guarantee quick and confidential solutions to all such problems. We advise family-owned businesses in their choice of suitable mechanisms of dispute settlement and represent businesses and their family member owners in disputes before arbitral tribunals and courts of law and in mediation proceedings.

Labour law

Comprehensive legal/economic consultancy services provided to family-owned businesses must also include specialist advice on questions of labour law.

The typical conflicts between executives of businesses and their owners are usually even more acerbic in the case of family-owned businesses. The choice of the most suitable corporate constitution and of the succession planning structures should always be accompanied by an optimisation of the group structures with regard to the representation of employees in the company's control bodies and to the workers' participation in the enterprise's management. Finally, extraordinary entrepreneurial commitment and dedication, particularly on the part of managing partners or shareholders, should be reflected in their remuneration.

The most important fields of consultancy are:

- optimisation of corporate organisation from the points of view of co-determination, collective bargaining and the works constitution, also to prepare for the transition to the succeeding generation;
- development and design of performance-oriented systems of remuneration (share option plans/bonus plans/cash-incentive schemes), taking into account the related questions of corporate governance;
- questions regarding the employee pension plan; and
- support, from a labour-law point of view, of national and international transactions and reorganisations.

In a family-owned business, it is considered desirable to have one competent contact person for all questions of labour law. We meet this requirement by providing comprehensive consultancy services in all areas of individual and collective labour law, including, without limitation, questions of termination of employment, of social security and of the outsourcing of pension obligations.





Real estate transactions law

In the last few years, the real estate assets owned by businesses have increasingly become the focus of attention and are now a decisive factor in relation to the question of improvements to the rate of return and the balance sheet profits. While in former times, it was accepted as desirable that a large percentage of a company's assets should be represented by real property, it is becoming increasingly clear nowadays that, in the final resort, investments in 'stones and earth' tie up capital that might be much more profitable if invested in producing goods. Moreover, as a result of the changes in production processes, a historically grown real property portfolio is frequently no longer required for the maintenance of business operations. Rather, it is a valuable part of hidden reserves that can be used to either improve the business's equity position, also in view of the claims now raised by credit institutions, or be isolated from the business risks and be transferred into the family members personal property.

Therefore, by way of sale-and-leaseback transactions that may, for instance, be on- or off-balance sheet according to national or international accounting standards, of exploiting development possibilities on parts of the real property that are no longer in use or of an active real property management, reserves can be used as capital, as, for instance, within the scope of corporate financing transactions.

The range of our consultancy services includes all questions in connection with 'real property as an economic asset', the most important being:

- advice on structuring complex real estate transactions, with special emphasis on the opportunities available under tax law;
- comprehensive assistance with regard to all questions of the development of real estate, including, without limitation, the choice of suitable corporate structures, participation models and joint venture agreements, clarification and securing of building rights and realisation of building projects, also taking into account the aspects of distribution and marketing; and
- advice on the outsourcing and management of real property portfolios, eg by way of sale-and-leaseback transactions, drawing up of tax-optimised reorganisation and sales concepts and on professional asset and facility management.

Due to our longstanding experience on all questions regarding real property, we do not limit ourselves to offering professional legal advice, but also provide comprehensive suggestions and advice on the choice of actual suitable partners for the realisation of the concepts developed.

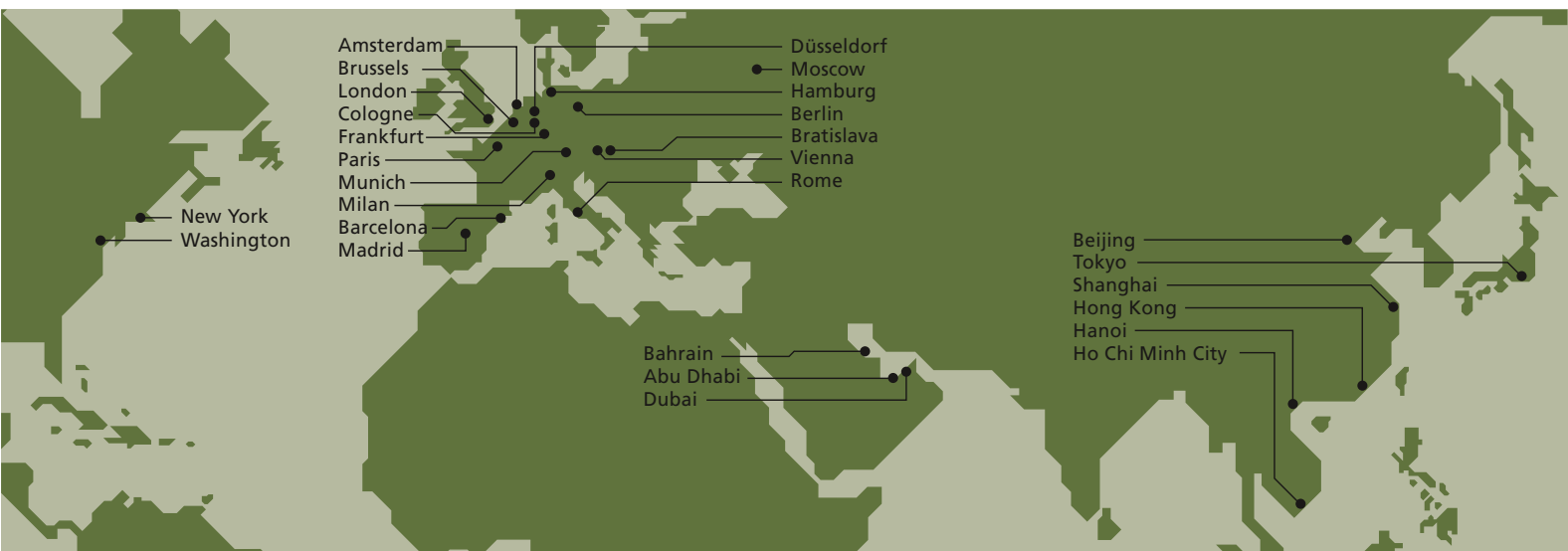
Freshfields Bruckhaus Deringer

Freshfields Bruckhaus Deringer is a firm of integrated partners. Our decision to avoid a hierarchical organisation is based on our belief in and reliance on the individual initiative of each partner. Whenever necessary, our remuneration system permits the involvement of other offices and practice groups, thus contributing to an optimal service to our clients, both from the professional and from the personal point of view. For us, personal integrity, experience regarding economic questions, concentration on the client's economic needs and absolute loyalty are basic concepts.

Our partners in the German-speaking world, who work in our offices in Berlin, Cologne, Düsseldorf, Frankfurt am Main, Hamburg, Munich and Vienna, as well as those in our offices in Amsterdam, Brussels, London, Madrid, Milan and Moscow, offer long-term experience in advising the family-owned businesses domiciled in the relevant economic areas. Our competence in our relevant home markets is supplemented by the international network of our firm. We offer our experience in the most important economic areas worldwide from our 28 offices in 16 countries.

Our claims are based on local knowhow, international experience and a structure ensuring interdisciplinary and transnational consultancy services.

Beyond the classic organisation of practice groups, we have also established sector groups for family-owned business and for important branches of industry, in which we pool our knowhow regarding individual branches. Our continued observation and assessment of these markets guarantees our clients an important competitive advantage, because the results are constantly reflected in our advice.



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