

AUSTRIA'S NEW APPROACH ON BANKING SECURITY LAW AND TAX TREATY POLICY

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For many years Austria, Switzerland, Liechtenstein, Luxembourg, and Belgium were known as investment havens offering strong banking secrecy laws, operating in order to shield banking information from tax authorities. Over the years, the global community grew more uneasy with states that favored tax evasion. This article traces the political pressure Austria faced within the OECD and the EU to change its policy. It introduces the new legislation Austria put into effect in 2009 in order to honor its promise to step up to the OECD standard. Finally, it analyzes the underlying policy and its consequences for Austria.

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I. INTRODUCTION

Historically, Austria was known as an investment destination offering strong banking secrecy laws.¹ The Austrian financial community justified their system by pretending to uphold strong privacy rights. At the time, legislation allowed tax authorities access to customer data held by banks only within very limited scenarios, such as in cases of pending penal proceedings concerning tax evasion.² Indeed, it operated as a shield for banks, allowing them to withhold information from both national and foreign tax authorities merely attempting to administer and enforce national and international tax law.

Over the years, most nations faced growing budget deficits and a need to raise revenue. This need increased the global community's unease with states that enjoyed personal benefits from laws perceived to enhance tax evasion. Austria faced political pressure to drop its policy on several fronts.

II. INTERNATIONAL INITIATIVES AGAINST UNCOOPERATIVE TAX HAVENS

A. OECD Standards

With support of the European Union (EU) and The Group of 20 states (G20), the OECD tried to have their own standards implemented in the double taxation treaties (“DTT”).³ Within the OECD Global Forum on

¹ Bankwesengesetz [BWG] [Austrian Banking Law Code] Bundesgesetzblatt [BGBl] No. 108/2007, § 38 para. 1 (Austria). According to BWG § 3 para. 5, which forms part of the constitutional law, a change of said law requires a qualified quorum of delegates present and voting for it in the Austrian Parliament.

² *Id.* para. 2.1. This required (i) corroborated suspicion of an offence of tax laws committed with intent and (ii) the formal opening of proceedings. The Administrative Court once found that preliminary proceedings of German authorities did not meet the second factor. *See* Verwaltungsgerichtshof [VwGH] [Administrative Court] Jul 26, 2006, No. 2004/14/0022.

³ “Availability of reliable information (in particular bank, ownership, identity and accounting information) and powers to obtain and provide such information in response to a specific

Taxation, a model Tax Information and Exchange Agreement (“TIEA-MA”) was released on April 18th, 2002⁴ and Article 26 of the Model Convention with respect to Taxes on Income and on Capital (“OECD-MC”) was revised. These revisions encapsulated the best practice standards applied by the majority of the OECD member states in the exchange of information on July 15th, 2005.⁵ The new OECD-MC Article 26(1) restated principles almost well settled at that time, stating competent authorities of the contracting states shall exchange such information that is *foreseeably relevant* not only for carrying out the provisions of the convention but also to the administration or enforcement of the domestic laws concerning *taxes of every kind*. The restriction that information must be foreseeably relevant should allow access to a broad range of required information but will also avoid mere fishing expeditions. Within this framework, contracting states shall be obliged to provide information even if they may not need it for their own tax purposes.⁶ The exchange, however, should be subject to confidentiality requirements⁷ and the specific restrictions set forth in OECD-MC Article 26(3) (no obligation to take measures at variance with, or to supply information not obtainable under, the laws or practice of the requesting or the requested state; no disclosure of confidential business information). Modes of providing information within the OECD rule setting are either exchange on request, spontaneous exchange, or automatic (routine) exchange.⁸ Of these three, the exchange of information on request is the core procedure to satisfy OECD-MC standards.⁹

On July 15th, 2005, Paragraph 5 was added to Article 26 OECD-MC:

In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency

request.” Organisation for Economic Co-operation and Development [OECD], Global Forum on Transparency and Exchange of Information, *Tax Co-operation 2009: Towards a Level Playing Field* 10 (2009).

⁴ See OECD, *Agreement on Exchange of Information on Tax Matters* (2002) [hereinafter TIEA-MA].

⁵ OECD, *Model Tax Convention on Income and Capital*, art. 26 (July 17, 2008) [hereinafter OECD-MC].

⁶ *Id.*, art. 26, § 4.

⁷ *Id.* § 2.

⁸ ALEXANDER PUTZER, *DAS NEUE BANKGEHEIMNIS* 14 (2010).

⁹ OECD, Ctr for Tax Policy, *Promoting Transparency and Exchange of Information for Tax Purposes* 4 (Jan. 19, 2010).

or a fiduciary capacity or because it relates to ownership interests in a person.¹⁰

Most OECD states did exchange banking information even before July 15th, 2005. The addition was intended to deprive jurisdictions like Austria, Belgium, Luxembourg or Switzerland of the argument that OECD-MC Article 26(3) would justify their stand on banking secrecy.¹¹ However, for the time being, Austria refused to catch up with this demand.¹² Therefore, it ran the risk of being put on a black list of jurisdictions which according to the OECD Progress Report had not committed to the internationally agreed tax report.¹³

In 2009, a peer review process was established by the Global Forum on Transparency and Exchange of Information at the OECD. A group of 30 nations was entrusted to monitor the implementation of OECD standards by OECD member and non-member states which had agreed to abide by these demands (“Peer Review Group”).¹⁴

B. EU Policy

Within the European Union several actions were taken to step up the exchange of information, mutual assistance for the recovery of claims, and administrative cooperation in the field of taxation.

1. EU Savings Directive

The ultimate aim of the Council Directive 2003/48/EC (“EU Savings Directive”) is to enable savings income in the form of interest payments made in one member state to beneficial owners who are residents in another member state to be made subject to effective taxation in accordance with the laws of the latter member state.¹⁵ To achieve this, the directive requires the agent paying out interest to report the minimum amount of tax relevant information to the member state where he is

¹⁰ OECD-MC, *supra* note 5, art. 26, § 4.

¹¹ OECD-MC, *supra* note 5, at 359 (commentary on art. 26).

¹² *Id.* at 361. It is important to note, Belgium, Luxembourg and Switzerland made the same reservation. (This read as follows: “Austria reserves the right not to include paragraph 5 in its conventions. However, Austria is authorized to exchange information held by a bank or other financial institution when such information is requested within the framework of a criminal investigation which is carried on in the requesting State concerning the commitment of tax fraud.”)

¹³ See Wolfgang Lafite et al., *Quo vadis Bankgeheimnis?*, 2009 ECOLLEX 573 (2009).

¹⁴ See *Promoting Transparency and Exchange of Information for Tax Purposes*, *supra* note 9, at 3.

¹⁵ Council Directive 2003/48 2003 O.J. (L 157) 38 (EC) [hereinafter EU Savings Directive].

established. The competent authority of this member state must then communicate this information automatically to the member state where the beneficial owner who received the payments resides.¹⁶ In defending their specific banking secrecy laws, Austria, Belgium and Luxembourg could bargain for the levy of a withholding tax with the revenues being shared with the other member state to save them from the automatic exchange of information procedure under Chapter II during a transitional period.¹⁷ In anticipating the non EU members Switzerland, Liechtenstein, San Marino, Monaco and Andorra to apply the same principles (at least to levy a withholding tax instead of an automatic exchange of information) this expectation was drafted to form a condition precedent for the Directive to become effective.¹⁸ After corresponding agreements had been arranged between these countries and the EU, the regulation came into effect on July 1st, 2005.¹⁹

By its terms, the Chapter III exception granted to Austria, Belgium and Luxembourg was designed to be applied during a transitional period only, which would not end until the following conditions were met: (i) Switzerland, Liechtenstein, San Marino, Monaco and Andorra agree to the minimum OECD standard (exchange information on request) through agreements with the EU and (ii) the USA commit themselves to the same principle with respect to interest payments within the scope of the directive agreement according to a unanimous judgment of the EU Council.²⁰ Belgium accepted the rules of automatic communication as of 2010²¹, but for Austria and Luxembourg the EU Savings Directive has remained a source of rancor. In order to keep running the transitional period, Austria vetoed an EU agreement with Liechtenstein to defer the fulfillment of EU Savings Directive Article 10(2). Austria argued that it was prepared to

¹⁶ *See id.*, art. 8, at 42.

¹⁷ *See id.*, art. 11, at 43. The applicable withholding tax rate is 15 % during the first three years of the transitional period, 20 % for the subsequent three years and 35 % thereafter. *Id.*, art 11, § 1 at 43. Member states levying the withholding tax shall retain 25 % of the revenue and transfer 75 % of it to the state of residence of the recipient. *Id.*, art. 12 § 1, 2 at 44. However, the EU Savings Directive could easily be bypassed. Setting up the account in the name of a corporation while allowing the beneficial (as opposed to the legal) owner access to bank facilities sidesteps the definition of beneficial owner in the EU Savings Directive art. 2 § 1. Moreover, structuring the account as a portfolio yielding dividends and capital gains will not generate reportable interest payments under art. 6, § 1. Aileen Barry, *Swiss banks' deal - or no deal?*, 19 STEP JOURNAL 58, 59 (Jan. 2011). Payments made by an Austrian private foundation (Privatstiftung) do not constitute payments from a paying agent within the scope of EU Savings Directive Article 4, either. Wolfgang Lafite, Philip Vondrak & Philip Gruber, *Spiel mir das Lied vom Tod, Bankgeheimnis!*, 2010 ECOLX 82, 84 (2010).

¹⁸ EU Savings Directive, *supra* note 15, art. 17, § 2 at 45.

¹⁹ PUTZER, *supra* note 8 at 87.

²⁰ EU Savings Directive, *supra* note 15, art. 10, § 2 at 43.

²¹ PUTZER, *supra* note 8 at 87.

accept a full implementation of the automatic exchange of information process under Chapter II of the EU Savings Directive but only on the condition that, consistent with OECD-MC Article 26(5), the call for transparency be extended to the disclosure of beneficial ownership and beneficiaries of corporations, trusts and similar entities in general.²² In an effort to remove loopholes and inequities²³, the EU Commission submitted a proposal to have the EU Savings Directive revised.²⁴ A report of the Committee on Economic and Monetary Affairs of the European Parliament on said proposal suggested, among other amendments, that the transition period keeping Luxembourg and Austria still outside the rule of automatic exchange shall unconditionally end no later than July 1st, 2014.²⁵ So far, no compromise has been reached to reconcile this dispute within the EU. However, it is widely expected that the transitional period and Austria's exceptional status under the EU Savings Directive will end in 2014 at the latest.²⁶

2. EU Assistance for the Recovery of Tax Claims Directive

Dating back to February 2nd, 2009, the EU Commission proposed to replace the Council Directive 1976/308/EEC of March 15th, 1976.²⁷ This led to the Council Directive 2010/24/EU of March 16th, 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures ("EU Assistance for the Recovery of Tax Claims Directive").²⁸ In widening the scope of application, the new directive incorporates the OECD-MC Article 26 standard. Each member state shall provide information foreseeably relevant to the applicant authority in the recovery of tax claims²⁹; such obligation is subject to specific exceptions similar to those encapsulated by OECD-MC Article 26(3) (lack of reciprocity, protection of business secrets or violation of public policy).³⁰ EU Assistance for the Recovery of Tax Claims Directive Article 5(3) restates the OECD-MC guideline by stating that said exceptions shall in no

²² Lafite et al., *supra* note 17 at 84.

²³ EU Savings Directive, *supra* note 15, art. 17, § 2 at 45.

²⁴ *Proposal for a Council Directive amending Directive 2003/48/EC on taxation of savings income in the form of interest payments*, COM (2008) 727 final (Nov. 13, 2008).

²⁵ Report on the proposal for a Council directive amending Directive 2003/48/EC, EUR. PARL. DOC. A6-0244/2009 (2009).

²⁶ PUTZER, *supra* note 8 at 91.

²⁷ *Proposal for a Council Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures*, COM (2009) 28 final (Feb. 2, 2009).

²⁸ Council Directive 2010/24/EU, 2010 O.J. (L 84) 1 (EU).

²⁹ *Id.*, art. 5, § 1 at 5.

³⁰ *Id.*, art. 5, § 2 at 5.

case be construed as permitting a requested authority to reject a request for information even if it is held by a bank.

3. EU Administrative Cooperation Directive

The impending end for Austria's banking secrecy was also brought about by efforts to improve administrative cooperation in tax matters throughout the EU. On February 2nd, 2009, the Commission of the EU presented a proposal to change Council Directive 77/799/EEC of December 19th, 1977 concerning mutual assistance by the competent member states in the field of direct taxation and taxation of insurance premiums ("EU Administrative Cooperation Directive").³¹ This proposal was based on the finding that the old directive was an inappropriate tool to enhance fair competition and efficiency in the internal market and to adequately combat tax fraud. On February 15th, 2011 the Council of the European Union adopted the EU Administrative Cooperation Directive.³² The new directive will ensure that the OECD minimum standard for the exchange of information on request between tax administrations is implemented in the EU. Thus it will prevent a member state from refusing to supply information concerning a taxpayer of another member state on the sole grounds that the information is held by a bank. However, due to Austria and Luxembourg's opposition to any further weakening of their banking secrecy, the directive sets out a step-by-step approach for the procedure of automatic exchange of information. Beginning in 2015, member states will communicate information automatically for a maximum of only five categories of income (income from employment, director's fees, certain life insurance products, pensions as well as ownership of and income from immovable property) provided that the information is available. An extension to other income categories (dividends, capital gains and royalties) as well as the removal of the condition of availability was under consideration but was eventually excluded until additional reports and proposals are submitted by the Commission on or before July 1st, 2017.³³

³¹ *Proposal for a Council Directive on administrative cooperation in the field of taxation*, COM (2009) 29 final (Feb. 2, 2009).

³² Press Release, Council of the European Union, Combating tax fraud: Adoption of directive on strengthened mutual assistance and the exchange of information, Council Doc. 6554/11 (Feb. 15, 2011).

³³ *Id.*; see also Tanguy Verhoosel, *Tax information exchange: Member states step up cooperation*, EUROPOLITICS, Dec. 7, 2010, <http://www.europolitics.info/tax-information-exchange-member-states-step-up-cooperation-artr289380-30.html> (last visited Jan. 18, 2011).

C. *Unilateral Measures against Tax Havens*

Finally, Austria faced pressure from national lawmakers and discriminating taxpayers who invest money in jurisdictions that failed to step up to the information exchange standard of the OECD. In 2009, Germany, for instance, passed the Steuerhinterziehungsbekämpfungsgesetz (Combating Tax Evasion Act) from July 29th, 2009.³⁴ Under this law, German citizens and enterprises doing business in uncooperative tax havens are deprived of tax benefits as well as the privileged taxation of dividends. They are also made subject to enhanced reporting obligations or levied with a duty to enable extended access to bank information.³⁵

D. *End of the Game*

On March 13th, 2009, Austria bowed to the pressure of the global community. Together with Belgium and Luxembourg it withdrew its reservation to OECD-MC Article 26 Paragraph 5. This milestone freed the path to overhaul national banking secrecy policies.³⁶

III. THE REFORM: THE IMPLEMENTATION OF THE ADMINISTRATIVE COOPERATION ACT

A. *Conceptual Outlay of the New Law*

It took heated debates and shady deals in the parliament to reach a quorum and depart from the old law.³⁷ Eventually, the Austrian parliament passed the Amtshilfe-Durchführungsgesetz (“ADG”) (Implementation of Administrative Cooperation Act) which took effect on September 9th, 2009.³⁸ It is based on the idea that it would be ideal to leave banking secrecy policies unchanged as far as Austrian domestic cases are concerned but aims to increase regulation of international cases to the OECD guidelines (exchange of information on request).

The scope of the ADG extends to the implementation of the OECD standards in the bilateral exchange of tax relevant information³⁹. In the case

³⁴ Steuerhinterziehungsbekämpfungsgesetz [Combating Tax Evasion Act], Jul. 31, 2009, BGBl. I at 2302 (F.R.G.).

³⁵ PUTZER, *supra* note 8 at 63-67.

³⁶ Wolfgang Nolz & Heina Jirousek, *Das neue Amtshilfe-Durchführungsgesetz – Neuerungen beim Bankgeheimnis*, 2009 ÖSTERREICHISCHE STEUERZEITUNG [ÖSTZ] 430 (2009).

³⁷ *See generally supra* note 1.

³⁸ Amtshilfe-Durchführungsgesetz [ADG] [Implementation of Administrative Cooperation Act] Bundesgesetzblatt Teil I [BGBl I] No. 102/2009 (Austria).

³⁹ *Id.* § 1.

of an administrative cooperation procedure following a request by a foreign state, the seizure of secret banking information requires a two-tier process.

First, any laws applicable between Austria and the requesting state, most obviously EU law, a DTT, or another bilateral treaty (e.g. a TIEA), must explicitly command an answer and rule out the option of declining to supply such information on the sole grounds that it is held by a bank. In a second step, the ADG proceeds with the answer, following the same administrative measures as if a domestic tax claim were at issue.⁴⁰

It is clear then that the ADG is not an independent framework by which to seize bank information. If EU or bilateral regulations are missing, it lacks any scope of application. Moreover, it is necessary for Austria to revise or enter into new DTTs or bilateral agreements to benefit from the ADG mechanics.⁴¹ EU law commanding the obtainment and revelation of banking information (see section II.B. above) has the same effect and will be enforced by means of the ADG.

B. Procedural Requirements for a Request

The Federal Minister of Finance (“FMF”) is the authority who handles a request for information under the ADG. Once a request has been received, the FMF must determine if the applicable regulations for the requesting state (e.g. EU law, DTT, other bilateral treaty or rules of law governing the bilateral relation), have been met.⁴² Because of this, the admissibility of a request for information, as well as the extent to which the Austrian government must comply with this request, is determined by previous bilateral regulations or EU law.

⁴⁰ *Id.* § 2 paras. 1,3.

⁴¹ See Nolz & Jirousek, *supra* note 36. At the time this article was submitted, Austria had entered into (i) DTTs incorporating the OECD-MC Art. 26, § 5 standard with: Bahrain, Belgium, Bulgaria, Denmark, Finland, Germany, Great Britain and Northern Ireland, Hong Kong, Ireland, Luxembourg, Mexico, Netherlands, Norway, San Marino, Serbia, Sweden, Switzerland and Singapore; (ii) TIEAs reflecting the same standard with Andorra, Gibraltar, Monaco and St. Vincent & The Grenadines. See Bundesministerium Für Finanzen [Ministry of Finance], Die österreichischen Doppelbesteuerungsabkommen [Austrian Double Taxation Agreement], http://www.bmf.gv.at/Steuern/Fachinformation/InternationalesSteu_6523/DiesterreichischenD_6527/_start.htm (last visited Mar. 14, 2011). The negotiations on a revised DTT between Austria and Liechtenstein are still ongoing and are expected to come to an end in 2011. After the agreement comes into force, Austria will be forced to drop some tax regulations that have a discriminatory effect against Liechtenstein (e.g., a higher tax of 25% on endowments to Liechtenstein foundations opposed to 2.5% levied on the funding of an Austrian private foundation). This might be a cause for why the negotiations with Liechtenstein drag on.

⁴² ADG, *supra* note 38 § 2 ¶ 3.

Many of the bilateral regulations determining the admissibility of a request contain statements such as the following.⁴³ Essentially, the requirements determining if the information requested must be given are taken from TIEA-MA Article 5(5) and center around the general demand to demonstrate the *foreseeable relevance* of the information.⁴⁴ These prerequisites shall ensure that bilateral assistance in the administration of tax laws must not open up the gate for a fishing expedition.⁴⁵ Nevertheless, the various procedural requirements need to be interpreted liberally in order to not frustrate effective exchange of information.⁴⁶ The commentaries provided by the OECD to the TIEA-MA and the OECD-MC are helpful in evaluating a request and deciding whether or not it can be processed. However, due consideration must also be given to any deviation of the underlying regulation from the model language of the TIEA-MA or the OECD-MC.⁴⁷

1. Identity of the Person under Examination or Investigation

A request for information submitted by a state to Austria must reveal the identity of the person who is the target of the procedure.⁴⁸ Usually, a request will specify the name and the address of this person. In situations where the requesting state is unable to deliver these data, the identification requirement may be satisfied also by supplying other identifying information (e.g. a current or historical account number, tax number, social security number, ID number or even biometrical data).⁴⁹ One author argued that the name and address cannot be substituted by other information allowing the identification of the person. He substantiates his argument using evidence from the technical notes and DTTs Austria has entered, in which the term “*identity*” is translated to “*Bezeichnung*.” This term, however, is ambiguous as it can also be translated to mean “*description*.”⁵⁰ In my opinion, an overly narrow interpretation of the language in these treaties inhibits an effective exchange of information, and therefore the OECD commentary must prevail when a treaty’s language

⁴³ Heinz Jirousek, *Die Umsetzung des OECD-Standards der Amtshilfe in Österreich – das neue Amtshilfe-Durchführungsgesetz* [Implementation of the OECD Standard on Transparency and Exchange of Information], 2009 STEUER UND WIRTSCHAFT INTERNATIONALE [SWI] 494.

⁴⁴ TIEA-MA, *supra* note 4, art. 5 § 5; OECD-MC, *supra* note 5, art. 26, § 1.

⁴⁵ OECD-MC, *supra* note 5 at 359 (commentary on art. 26, § 5).

⁴⁶ TIEA-MA, *supra* note 4, Commentary on art. 5, § 57.

⁴⁷ PUTZER, *supra* note 8 at 31.

⁴⁸ TIEA-MA, *supra* note 4, art. 5, para. 5a.

⁴⁹ *Id.*, Commentary on art. 5, para. 5a; *see also* Claus Staringer & Oliver-Christoph Günther, *Bankgeheimnis und internationale Amtshilfe*, in INTERNATIONALE AMTSHILFE IN STEUERSACHEN 218 (Michael Lang et al eds., 2011).

⁵⁰ PUTZER, *supra* note 8 at 34.

appears ambiguous. Otherwise the requirement would not only work against fishing expedition hazards but would serve as a hurdle to attain evidence identified with reasonable certainty.

The DTT between Austria and Switzerland, revised on September 3rd, 2009, expressly said name and address must be stated for identification purposes in the inquiry.⁵¹ It should be noted that the Bundesrat (federal government) of Switzerland, a member of the steering group in the peer review process (see section II.A. above), decided on February 13th, 2011 to propose a set of new construction rules. Under the proposal, any form of identifying information presented would be acceptable on a request for information under existing DTTs (including said agreement with Austria) so that a taxpayer's identity can also be determined by means other than name and address.⁵²

2. Statement of the Information Sought

The requesting state must at least roughly outline the nature of the information it desires and indicate in which form it wishes to receive the information from Austria.⁵³

3. Tax Purpose

The request must be proven necessary for a specific tax purpose.⁵⁴ This reflects the core agreement that the information must be “*foreseeably relevant*” to the administration and enforcement of the requesting state's tax law.⁵⁵ However, the Austrian government cannot verify the necessity of the information for itself and must take the requesting state at its word.⁵⁶

4. Reference to Austria

The request must indicate reasonable evidence that the information requested is held in Austria or is in the possession or control of a person within the jurisdiction of Austria.⁵⁷ Business or credit cards, cell phone

⁵¹ Protokoll BGBl III No. 27/2011, art. 3 (Austria).

⁵² Der Bundesrat, *Amtshilfe in Steuersachen: Der Bundesrat legt Anpassungen dem Parlament vor. Die Bundesbehörden der Schweizerischen Eidgenossenschaft*, available at <http://www.admin.ch/aktuell/00089/index.html?lang=de&msg-id=38487> (last accessed October 23, 2011).

⁵³ TIEA-MA, *supra* note 4, at Art. 5(5)(b).

⁵⁴ *Id.* at Art. 5(5)(c).

⁵⁵ OECD-MC, *supra* note 4, at Art. 26(1).

⁵⁶ PUZTER, *supra* note 4, at 37.

⁵⁷ TIEA-MA, *supra* note 4, at Art. 5(5)(d).

numbers of a bank employee, account statements or other correspondence with an Austrian bank would constitute a sufficient connection to Austria. Even competent proof of a transfer of cash from the requesting state to Austria would sufficiently implicate Austria and trigger an obligation to render assistance under the ADG. Austria may not argue that it is equally likely that the information is in another country. The same stipulation would apply if the account in question were closed in Austria (e.g. in a situation where the account holder has left the country).⁵⁸

5. Name and Address of the Bank

The bank believed to be in possession of the requested information must be identified by name and address in the request. If these particulars are not known, they may be skipped. This is not valid for DTTs or agreements in which a knowledge-qualification for the respective procedural requirement is missing.⁵⁹ But DTTs that necessitate the name and address of the bank independent of knowledge are too specific and miss the OECD demands. In the revised DTT between Austria and Switzerland such knowledge qualification was missing.⁶⁰ However, in the proposal mentioned above (see section III.B.1.) the Swiss government has also suggested to design the existing DTTs in line with said knowledge qualification.

6. Pursuance of All Proportionate Means Available to Obtain the Information

A request for information is an extra burden on the administration of the state answering the request. It can be justified only if it is easier for the requested state to obtain the sought information than it would be for the applicant state. Therefore, a requested state should be relieved from the obligation of contemplating a request if the applicant country finds a convenient or proportionate means to obtain the information within its own jurisdiction. A request must therefore establish that the applicant state has pursued all means available in its own territory to obtain the information,

⁵⁸ TIEA-MA, *SUPRA* note 4, AT ART. 5 REF 59 AND 60; FRIEDRICH FRABERGER, MICHAEL PETRITZ, AND CHRISTIAN EBERL (in *Bankgeheimnis neu – ungeklärte Fragen Teil 2*, RECHT DER WIRTSCHAFT [RDW] 2010, 61) take the position that the relationship to (i) a bank, (ii) an account number and (iii) the account holder or another set of facts establishing a comparable concrete reference must be specified which in my opinion is a view too strict.

⁵⁹ Staringer et. al, *supra* note 49, at 222.

⁶⁰ Protokoll BGBl III, Art. III (2011).

except those measures that would give rise to disproportionate difficulties.⁶¹

7. Additional Requirements and Information

Any information requested must be obtained by means that conform with both the laws of the applicant state and the requesting state. The OECD-MC bars the carrying out of administrative measures that are not in conformity with the law and administrative practices of the applicant state; it clarifies that no information must be supplied which the requesting state would not be able to obtain under its own laws or in the normal course of its own administrative practice.⁶² The requesting state must not use a request for information as a means to circumvent laws set up by its own jurisdiction against obtaining or exploiting that information.⁶³ But as Austria is evaluating the request, it is relieved from a responsibility to determine whether obtaining the information will violate either of the countries' information laws. The DTTs and TIEAs to which Austria is a party assume that a request is not made in an attempt to breach the requesting state's law and relieve the requesting party from making specific representations in that respect.⁶⁴

C. Information of the Persons of Concern in a Request to Disclose Banking Information

Once the FMF has cleared a request (subject to ADG Section 2[3]) with regard to the disclosure of banking information, it must immediately notify (i) the persons concerned and authorized to dispose of the account as well as (ii) the bank.⁶⁵ This shall ensure due process.

While notifying the person of concern may seem very straightforward, sometimes this is not the case. In most instances the beneficial owner and the holder of the account will be the same. But the wording of the law is unclear on what the required procedure is if the person concerned (identified in the request) is in fact a beneficial owner of the assets and different from the person who has the power to dispose of the funds vis-à-vis the bank (e.g. a trustee) or vice versa.

⁶¹ TIEA-MA, *supra* note 4, at Art. 5(5)(g); TIEA-MA, *supra* note 4, at Commentary on Art. 5 Ref 63.

⁶² OECD-MC, *supra* note 5, at Article 26(3)(a)(b).

⁶³ TIEA-MA, *supra* note 4, at Art. 5(5)(f).

⁶⁴ PUTZER, *supra* note 8, at 40.

⁶⁵ ADG, *supra* note 38, at § 4(1).

A strict understanding of the statute would not allow the FMF to redirect the notice to the beneficial owner or the account holder if they are not the person of concern in the request. Scholars who take that position argue that principles to attribute beneficial ownership may differ from state to state. It would be asking too much from the FMF to find the beneficial owner or account holder if their name is not on the request form. These scholars must admit, however, that if the FMF is not allowed to do its own fact finding and redirect the notice, ADG-assistance would fail; at least in the case where the account holder is not on the form.⁶⁶

In my opinion this viewpoint is too narrow. The beneficial owner and his link to the legal account owner must be a part of the information released to the person of concern on the request.⁶⁷ In order to make the ADG work in accordance with OECD principles both the person who can dispose of the account as well as the beneficial owners must be deemed “persons concerned” and put on notice even if not mentioned in the request.⁶⁸ Austria’s banks are required to investigate all of the ownership information, including beneficial ownership, of their customers⁶⁹ and so the information required to make the proper notifications (to trace the beneficial owner behind an account holder under investigation and vice versa) must be deemed at hand in the normal course.

It should be noted that the Terms of Reference developed by the Peer Review Group⁷⁰ suggest that informing the concerned person might inhibit the purpose of the procedure. This draws the attention to an additional weakness of the ADG. Of course, no person should be deprived of its judicial guarantees without cause. But if Austria takes OECD principles at their word, it has to accept that under these principles taxpayer’s rights are not applicable should they unduly prevent or delay effective exchange of information.⁷¹ Unfortunately, the ADG does not outline the protocol for situations in which a person’s right to enjoy due process of law may possibly undermine the chance of an investigation’s success.⁷² When, for instance, the information request is of a very urgent nature or if the notification could jeopardize safeguarding of evidence, it is

⁶⁶ Staringer et. al, *supra* note 49, at 228.

⁶⁷ See footnote 3; and OECD, *supra*, at Reference 5.

⁶⁸ PUTZER, *supra* note 5, at 29; MICHAEL PETRITZ, *Die Auswirkungen des „Endes des Bankgeheimnisses“ auf Stiftungen und Trusts*, ZEITSCHRIFT FÜR STIFTUNGSRECHT [ZFS], 179, 180 (2009).

⁶⁹ BWG, *supra* note 1, at §§ 2(75), 40(1); see OECD (Ed.), Launch of a Peer Review Process/Terms of Reference 4.

⁷⁰ OECD (Ed.), *supra* note 5, at Launch of a Peer Review Process/Terms of Reference 6; see footnote 13.

⁷¹ TIEA-MA, *supra* note 4, at Art. 1.

⁷² OECD TIEA-MA Commentary on Art. 1 Ref 6.

legitimate to place the investigation before due process considerations. The ADG is not sensitive to scenarios of this kind and under no circumstances does it allow a deviation from the notification procedure.

D. Possibility to Contest the Disclosure

The person concerned (account holder and/or beneficiary owner) can ask the Austrian authority (FMF) to issue a ruling (Bescheid) that the disclosure of the banking information abides by ADG Section 2(3). Such application must be filed within two weeks upon the notification and state the reasons why the decision to supply information may be wrong. Issues raised in course of the procedure to obtain information are to be resolved by mutual agreement with the requesting state.⁷³ Since it is in the applicant state's own interest to provide as much information as possible in order to facilitate the prompt response by Austria, incomplete information requests should be rare. Austria may ask for additional information and should resolve open questions with the requesting state as quickly as possible. But this should not delay a response to a request that complies with the aforesaid rules.⁷⁴

Within six weeks the ruling can be challenged by means of a complaint filed with the Constitutional Court (Verfassungsgerichtshof) and/or the Administrative Court. A complaint does not automatically bring about a stay of the assistance procedure unless an application is expressly admitted and granted by either court.⁷⁵ If the petitioner has applied for a stay, he or she must provide the FMF with a copy of the application and also ask for the stay before the FMF in order to halt the assistance procedure accordingly.⁷⁶

The FMF may go ahead with the release of the information requested if (i) the two week term for the request of a ruling has passed, (ii) the six week term for the complaint to the courts upon service of a requested ruling has passed, (iii) a motion to stay filed with either court was declined eventually or (iv) the court has dismissed a complaint eventually, whatever is later.⁷⁷

⁷³ ADG, *supra* note 38, at § 4(2).

⁷⁴ ADG, *supra* note 38, at § 2(3); TIEA-MA, *supra*, at Commentary on Art. 5 Ref 64.

⁷⁵ The courts may grant a stay of the procedure if the petitioner can demonstrate that (i) he or she faces disproportionate harm and (ii) that public interests do not call for the ruling's immediate enforcement (Constitutional Court Act [Verfassungsgerichtshofgesetz] § 85(2) (2008); Administrative Court Act [Verwaltungsgerichtshofgesetz] § 30(2) [2008]).

⁷⁶ ADG, *supra* note 38, at § 4(3).

⁷⁷ ADG, *supra* note 38, at § 4(3).

The Terms of Reference⁷⁸ proposes that a request for information should be answered within 90 days. Since procedures before the Constitutional Court or the Administrative Court can take quite a long time, there are misgivings that situations may arise where contest litigation takes more than 90 days and the OECD-standard will be missed.

E. Disclosure of Confidential Banking Information

If the information sought is subject to secrecy law, the FMF must give adequate notice to the bank before claiming it. When notifying the bank that they must give up certain information, the FMF must certify that the prerequisites for the disclosure under ADG Section 4(3) have been met. The bank is then obliged to supply the information as well as documents and data.⁷⁹ The identity of the beneficial owner of an account which is held by another person (e.g. a trustee) forms part of the information to be released. If a client's data are electronically processed, the information and data must be disclosed and furnished on a generally used electronic data carrier if so requested.⁸⁰

F. Date of Application of the ADG

The ADG was formed on September 9th, 2009. Requests for information which Austria has received since then have to be processed under the new law. A request can be answered during, and only with regard to information relevant for, the time when the underlying DTT or TIEA applies or has taken effect. Most of the treaties and agreements Austria has entered into so far came into effect January 1st, 2011. However, there are exceptions. The DTT with the Netherlands, for instance, provided for a retroactive application as of January 1st, 2010. However, information provided in line with the ADG could nurture suspicion of tax evasion constituting a criminal offense. If this is the case, the applicant state might be able to seize information relating to earlier periods on the separate basis of judicial assistant agreements to which the ADG does not apply.⁸¹

⁷⁸ OECD (Ed.), *supra* note 5, at Launch of a Peer Review Process/Terms of Reference 9.

⁷⁹ ADG, *supra* note 38, at § 3(1).

⁸⁰ ADG, *supra* note 38, at § 3(2).

⁸¹ ADG, *supra* note 38, at § 5; Wolfgang Lafite, Philip Vondrak, and Philip Gruber, *Spiel mir das Lied vom Tod, Bankgeheimnis!*, ecolex 82 and 83 (2010).

IV. ANALYSIS

There is no doubt that the ADG marks a turning point in Austria's stance on the issue of protecting bank customers' data. Overall, Austria will benefit from this move, if only because it has now avoided being continually snubbed on the international stage. The new set of agreements with other states will give Austria a better position in its fight against tax evasion, as well as improved chances to obtain tax relevant information from foreign states to raise revenue (so called outbound cases).

For the time being, however, the ADG seems to be a half-hearted exercise and supposedly not the final step of lawmakers on that issue. The procedural hurdles built into the ADG to test whether a request for information is foreseeably relevant in terms of the OECD standard are presumably not appropriate and too strict. First, the draftsmen misunderstood that the criterion of foreseeable relevance does not aim to protect taxpayers' rights or to help them avoid divulging the requested information. It instead reflects the need to establish that the requested state's help is necessary rather than an unnecessary burden. Second, it is very unlikely that a request will be answered within due course if a taxpayer takes full advantage of all legal remedies afforded by the ADG. Proceedings before a court can take years which would exceed the time limit for a request contemplated as appropriate by the OECD (90 days). As of now, no cases have gone through the courts. The majority of agreements entered so far will serve as a standard for requests sent from January 1st, 2011 on. It is too early to judge the effects of the legislation, as there have not been any instances yet where it was necessary. If administrative practice and case law prove the above apprehensions correct, Austria will have failed to successfully remedy its banking secrecy laws and will be forced to adjust the legislation.

Because the bank information of Austrian nationals is more difficult to access than the information of foreign customers using the same bank, it is difficult for a reasonable legislature to support these laws. The law only protects the assets of Austrians so vigorously so that politicians will not be accused of betraying one of their core values. The ADG could come into conflict with EU legal principles because it could be argued that by favoring data protection of its own nationals, Austria discriminates against other EU citizens. This could constitute discrimination on grounds of nationality prohibited by the Treaty on the Functioning of the European Union ("TFEU").⁸² It might also undermine the principles of free

⁸² *The Treaty on the Functioning of the European Union, Non-Discrimination and Citizenship of the Union*, art. 18. OJ C 83/47 (March 30th, 2010).

circulation of people and capital within the internal market of the EU.⁸³ This disparity between the rights of Austrian nationals and other citizens of the EU may even aggravate when Austria will be forced to accept the principle of automatic exchange of information under the EU Savings Directive.

All of this boils down to the question of whether Austria should allow tax authorities to access customer's banking data more or less unconditionally. Austria's banking secrecy laws have provided its citizens with a means of tax evasion, and indeed at times almost seemed to favor such evasion. This implicit premium on breaking the law then raises moral questions about the government itself. The banking secrecy only nurtures distrust of the tax authorities against the financial sector. It creates inefficiencies in the work of the public sector and unnecessary costs. Austria should therefore seize the opportunity of global trends and eliminate its traditional approach to banking secrecy.

V. CONCLUSION

By means of the ADG, Austria has implemented the minimum standard required by OECD recommendations regarding the disclosure of banking information in the case of bilateral administrative assistance (exchange on request). Administrative practice and judicial case law dealing with the ADG will prove whether or not Austria can rise to the enhanced standard. Anticipated developments within the EU, specifically a revision of the EU Savings Directive, will most likely force Austria to make further concessions and eventually accept an automatic exchange of banking information around 2014.

⁸³ *Id.* art. 21 (1), 45 (1) and (2), at 46, 49 and 63.