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# Austria Moves Forward on Information Exchange

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HIGHLIGHTS

# Austria Moves Forward on Information Exchange

*by Stefan Frank and Christian Wimpissinger*

The first and the second chambers of the Austrian parliament (the National Council and Federal Council) on September 1 and 3 (respectively) adopted the Act on the Execution of Administrative Assistance (Amtshilfe-Durchführungsgesetz, or ADG), implementing the OECD principles on the bilateral exchange of information.

Together with amending its existing tax treaties to provide for the exchange of information as set forth in article 26 of the OECD model tax treaty and entering into new tax treaties, this is a major step in Austria's initiative to be removed from the OECD gray list of jurisdictions that do not meet tax-related reporting standards. (For the gray list, see *Doc 2009-7580* or *2009 WTD 62-22*.)

## The New Act

The ADG has three pillars: a declaration of its purpose, a quasi-preamble; a description of how administrative assistance is achieved and to what extent; and the way in which the new act will loosen Austrian bank secrecy.

Section 1 of the ADG states its purpose as ''the implementation of the OECD-principles regarding the bilateral exchange of information.'' The essence of those principles appears to be the minimum requirement that any information, including bank account details, that is ''foreseeably relevant'' for purposes of the administration and enforcement of tax laws has to be exchanged. This interpretation was confirmed by the National Council Finance Committee, which pointed out that ''fishing expeditions'' allowing random scanning of information are not within the scope of the information exchange requirement.

The threshold for the exchange of information relating to bank accounts was much higher before. Criminal fiscal proceedings relating to intentional tax evasion had to be initiated before bank information was released. The initiation of those proceedings was not accepted in the case of Germany, however, because there is no appeal in that country against the initiation of criminal fiscal proceedings, as is required under Austrian law.

The second pillar of the ADG establishes the manner and extent of the information exchange. The extent to which information must be exchanged depends on the respective tax treaty, EU legislation, or an international agreement such as a tax information exchange agreement and is subject to substantial changes and differences depending on the bilateral relationships, so that determination is not specified by the ADG itself.

In view of the reference to international agreements for purposes of determining the extent of information to be exchanged, reciprocity, professional privileges, and public policy must be taken into account (see, for example, article 26 of the OECD model tax treaty).

The ADG also provides that any administrative acts undertaken in the context of the new law must be executed in the same manner as if a domestic procedure were executed. The applicability of rules on the exchange of information is determined by the competent authority, which is generally the Federal Finance Ministry, and not a court. According to the ADG, the Finance Ministry may, however, delegate the administrative assistance proceedings to other authorities, a power that appears arbitrary.

The third pillar of the new ADG is the regime establishing how the exchange of information is implemented regarding bank details. Those details, which are generally protected by Austrian bank secrecy, may be obtained only if EU law, an applicable tax treaty, or another international agreement includes a provision that does not allow for the rejection of the provision of information for the sole reason that the information is protected by bank secrecy rules.

Whether information that is protected by Austrian bank secrecy rules must be provided to foreign authorities is therefore no longer a question of Austrian law, but depends on the relevant international law.

Credit institutions have to provide all information asked for by the Austrian authorities to fulfill their information exchange obligation to foreign authorities. The person whose banking details are obtained must be informed immediately after the Austrian authorities have determined that, generally, an information exchange procedure is legitimate. If the affected person has good reason, he may, within two weeks, ask the authorities to issue a ruling stating the reasons why the bank details might be shared. Such a ruling can subsequently be appealed at the Supreme Administrative Court or the Constitutional Court. Until the respective court arrives at a decision, the information exchange procedure is halted. If the decision is in favor of the affected bank customer, the bank records may not be passed on to the foreign authorities.

Because obtaining information despite Austria's bank secrecy is possible only in the international context, the National Council Finance Committee holds that bank secrecy is affected only for persons that are not subject to tax in Austria.

## Political Support and Outlook

The Austrian government tried to push the ADG through parliament in July but failed because of a rule that requires a two-thirds majority to pass a law that affects bank secrecy. The government was unable to comply with that rule because it effectively required the support of at least two of the three opposition parties.

This was ultimately accomplished by concluding a deal with the Green Party and the Alliance for the Future of Austria: In exchange for their votes, the coalition government agreed to increase the competence of the National Audit Office. (For prior coverage, see *Tax Notes Int'l*, Aug. 3, 2009, p. 344, *Doc 2009-16647*, or *2009 WTD 141-8*.)

As mentioned above, the ADG is only one step Austria had to take to be removed from the OECD gray list, the other steps being the revision of existing tax treaties and the signing of new tax treaties.

Finance Minister Josef Pröll on September 8 said that ''today three double tax treaties in line with the OECD-standards were signed with Great Britain, Denmark and Norway.'' Pröll said 12 additional tax treaties have been initialed recently, and that it is the government's goal to be off the gray list before the G-20 meeting September 24-25.

Instead of adopting the ADG, Austria could have chosen to amend each tax treaty individually to provide for an adequate exchange of information, especially regarding bank accounts. Adopting an act that states that goal explicitly and providing the decisive procedural tools apparently were important steps to send a clear message to the international community that Austria is on its way to complying with the OECD standards. ◆

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