

Banking secrecy – made of glass for tax reasons?

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Introduction

Over the decades Austria has remained faithful to its banking secrecy by being a late adopter, if at all, of international standards for exchanging information regarding bank accounts. While Austrian law already provided for a piercing of banking secrecy in judicial criminal proceedings and proceedings before tax prosecution authorities, other attempts to reduce banking secrecy (also with respect to anti-money laundering measures) remained largely unsuccessful. However, the recent amendments to the legal framework have put an end to this and led to a material softening of banking secrecy in Austria.

As part of the 2015/2016 tax reform, the legislature enacted a set of new laws and regulations, commonly known as the 'banking legislative package'. One aspect is the transformation of EU Directive 2014/107/EC(1) into Austrian law. In addition to the measures required to implement the directive, the legislature also introduced new laws carefully tailored to remove legal obstacles based on banking secrecy that prevented – or at least impeded – tax collection.

The main parts of the banking legislative package are set out below.

Banking legislative package

Act on Common Reporting Standards

Under the terms of the directive, Austria was not known as an "early adopter".(2) However, by implementing the Act on Common Reporting Standards,(3) Austria voluntarily agreed to apply the new account due diligence obligations to all accounts opened as of October 1 2016. Further, Austria undertook to start exchanging information with respect to these accounts by the beginning of 2017 (ie, together with all other EU member states (rather than making use of the exception provided for in the directive)). In addition, the act allows a voluntary application of a stricter approach – that is, Austrian credit institutions (within the meaning of the act) may apply standards for higher and lower value accounts.

Pursuant to the act, Austrian credit institutions and insurers must provide account information in an electronic format to the Ministry of Finance regarding customers (natural persons or legal entities) that are not resident in Austria. The Ministry of Finance then forwards this information to the relevant foreign tax authorities.

As a side note, Austria and Liechtenstein will handle the reporting obligation among themselves quite differently. Austrian residents who hold bank accounts with credit institutions in Liechtenstein are not affected by the Act on Common Reporting Standards if their capital incomes are yielded from asset structures (eg, private foundations, establishments and trusts), and the credit institute in Liechtenstein will arrange for proper taxation in accordance with bilateral treaties. In a nutshell, the credit institute carries out the taxation and pays the amounts through tax authorities in Liechtenstein to the Austrian tax authorities.

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Apart from the abovementioned implementation of reporting standards, the legislation introduced as part of the banking legislative package provides Austrian authorities, including tax authorities, with extensive new rights and powers materially undermining banking secrecy.

Statute on Account Register and Inspection of Accounts

One of the core aspect of the new law is the setup of an account register covering any and all accounts and deposits established with Austrian credit institutions (as defined in the Statute on Account Register and Inspection of Accounts,⁽⁴⁾ (see below) in connection with:

- certain (licensed) banking businesses (ie, the deposit business (Section 1(1)(1) of the Banking Act));
- the existing account business (Section 1(1)(2) of the Banking Act);
- the building savings and loan business (Section 1(1)(12) of the Banking Act); and
- the deposit business (Section 1(1)(5) of the Banking Act).

In addition to details of the relevant account, the account register holds data identifying the holder of such account, irrespective whether the holder is a natural person, legal entity, located in Austria or located abroad.

The federal minister of finance is responsible for the establishment and maintenance of the account register. Austrian credit institutions and Austrian branch offices of EU Capital Requirements Regulation credit institutions and financial institutions (together 'financial institutions') must continuously report and update the account register in an electronic format with information on their accounts.

In other words, Austrian financial institutions that previously valued banking secrecy as one of their premier services must now provide detailed information on their clients, including so-called 'sector-specific personal identifiers'⁽⁵⁾ or – if no such identifier is available – personal details such as a client's first name, surname, date of birth, address and country of residence. In addition, the following information must be provided:

- the account or depot number;
- the opening and closing date of the account; and
- a description of the financial institution.

If third parties (eg, authorised representatives, trustees or beneficial owners) are vested with rights in these accounts, financial institutions must also notify this fact.

The reporting obligation started with retroactive effect from March 1 2015. If a financial institution fails to comply with its duties, the law provides for significant fines.

This collection of sensitive information in a centralised register regarding accounts held with Austrian financial institutions is one aspect of the Statute on Account Register and Inspection of Accounts. The other even more intriguing aspect is how easily the information in the register will be accessible to Austrian authorities.

Account register query and account inspection

Previously, queries by Austrian (finance) criminal courts regarding bank accounts held by suspects were cumbersome. In order to ascertain whether an individual held an account (respectively a (securities) deposit) with a financial institution, an official query had to be directed to the Associations of Austrian Banks. This query was then forwarded to the almost 800 financial institutions in Austria, thereby disclosing the fact that a discovery procedure for bank accounts was being performed regarding a specific account holder.⁽⁶⁾

With effect from October 5 2016, Austrian authorities (ie, public prosecutors, criminal courts, tax authorities, financial penalty authorities and the Federal Fiscal Court) can directly obtain information from the account register. The statute provides for two different alternatives to obtain information: account register queries and account inspections.

By performing an account register query, the inquiring authority gains access to so-called 'outer

account data' (ie, the account number, name of the account holder, residence of the holder and date of birth) stored in the account register, but no details on the account balance in relation to transactions. In order to safeguard data protection requirements, inquiring institutions are limited to perform searches for specific natural persons and accounts, and every query and transmission of individual-related data from the account register must be recorded in such a way that the inquirer (ie, the person initiating the query) can be identified. The records of the query are to be held for 10 years. Individuals and legal entities subject to taxation who are subjected to an account register query must be informed about the query by way of Finanz Online, the online platform of the Austrian tax authorities.

Other than an account register query, account inspections provide access to inner account data (ie, information on the account balance and account transactions). Tax authorities may, subject to certain prerequisites⁽⁷⁾ request access by arguing that there are reasonable doubts about the accuracy of the tax declaration. Such requests must be approved by the Federal Fiscal Court based on the tax authority's file, including a reasoned statement by the tax authority and minutes of a (mandatory) hearing of the taxable person. The Federal Fiscal Court renders decisions on the information provided by the tax authority in writing and, if feasible,⁽⁸⁾ within three days.

If a taxpayer is not the holder of the bank account but is, for example, an authorised representative, the trustor or the beneficial owner of a bank account held by a third party, the tax authority may still require an account inspection, subject to previously hearing the account holder. The tax authority's appraisal of the account holder's statement must be provided to the Federal Fiscal Court together with the request for granting the account inspection.

Capital Outflow Reporting Act

The Capital Outflow Reporting Act⁽⁹⁾ is aimed at preventing unpleasant knock-on effects caused by the introduction of the banking package. In order to prevent the outflow of capital from Austria, the legislature passed this act imposing the obligation to report capital outflows that occur after March 1 2015 (ie, with retroactive effect). In addition, the act provides for reporting obligations regarding capital inflows from Switzerland and Liechtenstein.

In relation to capital outflow, every transfer that exceeds the €50,000 threshold and originates from an account or deposit held by a natural person must be reported to a credit institution (as defined in the Statute on Account Register and Inspection of Accounts), a payment institution or the Federal Financing Agency. The act exempts only business-related accounts held by entrepreneurs, escrow accounts of lawyers, notaries and business trustees.⁽¹⁰⁾

The act provides for an extensive definition of 'capital outflows' that includes:

- pay-outs and transfers of deposits repayable on demand, fixed-term deposits and savings deposits;
- pay-outs and transfers within the scope of payment services or in connection with the sale of Austrian treasury bills;
- the transfer of ownership of securities as a gift in Austria; and
- the transfer of securities to a foreign securities account.

In addition to this extensive definition of the term 'capital outflow', the act prevents circumventing the reporting obligation by splitting capital outflows in multiple transactions below the €50,000 threshold. In a nutshell, the reporting obligation applies as soon as there is an obvious connection between multiple transfers.

In relation to capital inflow, the act attempted to trap tax evaders (ie, those Austrians that transferred funds to Switzerland or Liechtenstein before entry into force of the relevant tax agreements with Austria). Again, credit institutions, payment institutions and the Federal Financing Agency must report capital inflows exceeding €50,000 that occurred between July 1 2011 and December 31 2012 (originating from Switzerland) and January 1 2012 and December 31 2013 (originating from Liechtenstein). Reports must be made by December 31 2016, at the latest.

Comment

By enacting the banking legislative package, tax transparency became a reality in Austria and Austria's previously well-protected banking secrecy was materially loosened to combat tax fraud and tax evasion. The legislation affects banks (by imposing material reporting and due diligence obligations) and holders of Austrian accounts, regardless of the country of residence.

Considering that before the introduction of the account register and account inspections only (finance) criminal courts could inspect bank accounts – and taking into account that the new provisions also gave the tax authorities the right to inspect bank accounts without any allegation of a crime of the bank or depot account holder, but rather on doubts regarding the tax declaration – the new statute severely reduces the right to banking secrecy.

It remains to be seen whether the simplicity of the account inspection procedure will lead to a misuse of the statute – for example, for fishing expeditions. Practice will show whether the Austrian tax authorities will be able to deal adequately with the privacy needs of individuals and the public's interest in transparency for tax reasons.

Based on the recently amended bilateral agreements, asset structures in Liechtenstein continue to ensure – if set up properly – the anonymity of Austrian residents who keep bank accounts or deposits with credit institutes in Liechtenstein. Obviously fiscal interests outweigh the interest in identifying some bank account or deposit holders in Liechtenstein.

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Endnotes

(1) EU Directive 2014/107/EC of December 9 2014, amending EU Directive 2011/16/EC as regards mandatory automatic exchange of information in the field of taxation.

(2) See Article X of the directive (implementation dates as regards reporting financial institutions located in Austria); this exception postpones all due dates for effective implementation of the exchanges of information by one year.

(3) *Bundesgesetz zur Umsetzung des gemeinsamen Meldestandards für den automatischen Austausch von Informationen über Finanzkonten, Gemeinsamer Meldestandard-Gesetz – GMSG*, BGBl I 116/2015 idF BGBl I 77/2016.

(4) *Bundesgesetz über die Einrichtung eines Kontoregisters und die Konteneinschau, abgekürzt Kontoregister- und Konteneinschaugesetz – KontRegG*, BGBl I 116/2015 idF BGBl I 77/2016.

(5) *Bereichsspezifisches Personenkennzeichen für Steuern und Abgaben* (ie, a personal identifier serving as a method to identify natural persons with respect to taxes).

(6) Knowledge about the query could lead to unpleasant results for the account holder. Hence, the legislature tried to justify the account register by arguing that this would be a more moderate measure to protect the interests of a natural person and legal entities in terms of data protection.

(7) Section 8, *KontRegG*.

(8) Section 9(3), last sentence, *KontRegG*.

(9) *Bundesgesetz über die Meldepflicht von Kapitalabflüssen und von Kapitalzuflüssen, abgekürzt Kapitalabfluss-Meldegesetz*, BGBl I 116/2015 idF BgBl I 77/2016.

(10) Reclassification of a private account into a business account as well as a transfer from a private account to a business account qualify as capital outflow (Section 3(1), last sentence, *Kapitalabfluss-Meldegesetz*).

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