National Report – Austria

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1. Sources of the exchange of information system and its scope

In the light of the current international developments, the cooperation between countries regarding the exchange of information ("EOI") for tax purposes is becoming more and more important. Austria has an extensive network of EOI agreements covering 92 jurisdictions¹ (87 double tax treaties ("DTT")² containing (amended) EOI provisions as well as 5 tax information exchange agreements³ ("TIEA"))⁴. Almost all Austrian DTTs contain EOI clauses that provide for an “extensive” exchange of information as stated in Article 26 of the OECD Model Tax Convention.⁵ As Austria’s current DTT policy follows a global transparency concept, it primarily seeks to implement “extensive” EOI clauses.⁶ However, some of the DTT still contain a “small” information clause⁷ not being in line with the current standard for transparency and exchange of information for tax purposes. “Small” information clauses were primarily agreed upon with contracting states with respect to which Austria had concerns that these states were not able to provide for a minimum standard of confidentiality. Especially in the field of business, professional and bank seccreries it could be observed that mainly developed countries were following a restrictive EOI approach in order to protect different national interests.⁸

Due to political and constitutional reasons towards the Austrian domestic bank seccrecy⁹ Austria was unable to implement the OECD standard on transparency and exchange of information as introduced by the OECD MTC of 2005. Therefore, Austria made a reservation to the implementation of the revised version of Article 26 para 5 OECD MTC. The revised version of Article 26 para 5 OECD MTC stipulates that the requested contracting state must not refuse to provide information just because it is held by a “bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.” However, against the background of recent international developments and efforts undertaken by the Global Forum on Transparency and Exchange of Information for Tax Purposes as well as the political pressure of the G20 and the EU, Austria withdraw its reservation on Article 26 OECD-MTC together with Switzerland, Belgium and

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¹ DTTs with Lybia and Syria are signed but not yet in force.
² 84 of the DTTs are in force.
⁴ This report also deals with the tax treaty with Liechtenstein entering into force on January 1, 2014. Until now there has not been any EOI between Austria and Liechtenstein as the DTT in force does not provide for an exchange of information clause.
⁵ Jirousek, Exchange of Information and Cross-Border Cooperation between Tax Authorities, SWI 2013, 467.
⁶ Based on an extensive information clause, the competent authorities of the contracting states do not only exchange the information necessary to implement the relevant convention, but also information necessary for the implementation of domestic law provisions.
⁷ If this clause has been agreed upon, the competent authorities may only exchange the information which is necessary for the implementation of the convention itself.
⁹ Sec 38 Banking Act.
Luxembourg on March 13, 2009. From now on, Austria committed itself to the international standards for transparency and exchange of information for tax purposes and started to adapt its EOI provisions.\textsuperscript{10} Since March 13, 2009 Austria signed or revised 37 DTTs or TIEAs entitling now for EOI in accordance with the current OECD standard as stipulated by Article 26 OECD MTC.\textsuperscript{11}

In addition, Austria has taken further steps to improve administrative assistance on a multilateral level. On 29 May 2013 Austria signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and thereby declared its commitment to increased co-operation among tax authorities and its willingness to combat tax avoidance and tax evasion on an international level. However, the Convention has not been ratified yet.\textsuperscript{12} The scope of the Convention is broad. It covers a wide range of taxes and also provides for other forms of assistance such as: spontaneous exchanges of information, simultaneous examinations, performance of tax examinations abroad, service of documents, assistance in recovery of tax claims and measures of conservancy and automatic exchange of information. The Convention further provides for measures to protect the confidentiality of the information exchanged.

All DTTs recently signed by Austria contain exchange of information clauses ensuring an exchange of information to the most extensive degree possible in the current legal framework. However, any request for the exchange of information has to fulfill the “foreseeable relevant” requirement, which means that simple “fishing expeditions”\textsuperscript{13} are not permitted. Unfortunately, neither Austrian domestic law nor Austrian case law provide for a definition of the term “fishing expedition” or more closely define the term “foreseeable relevant”. For interpretation issues, treaty protocols may serve as possible reference to interpret this term. These protocols explicitly state specific formal identification requirements that have to be dealt with by the requesting state in order to obtain any information from the requested state. In general, the requested state has to be informed by the requesting state about the “the identity” of the person under examination. Accordingly, if a request for EOI is not accompanied by the relevant information about the identity of the person, the request could be treated as “fishing expedition” and therefore not be answered by the requested state. The criteria for the identification requirement are specified in the Commentary to the OECD MTC. According to the administrative practice of Austria – which is in line with the recommendation provided by the OECD\textsuperscript{14} - the latest version of the Commentary to the OECD MTC should be referred to when applying and interpreting the provisions of existing DTTs. According to the Austrian tax administration this principle applies irrespective of the date when the respective DTT was concluded.

\textsuperscript{10} Either by way of protocols amending existing tax treaties or in the form of new tax treaties; see Jirousek, Branch Report – Austria, in IFA, Cahiers de droit fiscal international Volume 98b - Exchange of information and cross-border cooperation between tax authorities (2013) 111.

\textsuperscript{11} The revised DTTs constitute the substantive basis for Austria’s international commitment to exchange bank information. The domestic legal framework for this commitment is the Administrative Assistance Implementation Act (Federal Law Gazette 2009/102).

\textsuperscript{12} http://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf-

\textsuperscript{13} Speculative requests of information that have no apparent link to a pending investigation, aiming only to receive by chance data as possible evidence.

provided that the wording of the respective DTT is in line with the latest version of the OECD MTC. Thus, it is not necessary that the name or the address of a taxpayer are specified since according to the revised OECD Commentary on Article 26 OECD MTC even “group requests” are allowed. However, Article 26, para 5.1 OECD Commentary states that “in cases in which the requesting State does not provide the name or address (or both) of the taxpayer under examination or investigation, the requesting State must include other information sufficient to identify the taxpayer”.

Any DTTs revised after Austria’s commitment to the international standards for transparency and exchange of information are now fully in line with Article 26 OECD MTC. None of the protocols of the revised DTT state an obligation to specify the name and the address of the taxpayer. Consequently, the instrument of “group requests” may in any case be applied to all contracting states having concluded revised DTTs with Austria. Whether the instrument of “group requests” can also be applied in the case of unrevised treaties is still open. Unfortunately, there is no administrative practice in this respect so far.

The wording of 10 treaties is more restrictive than the OECD standard as it requires the requesting state to provide the “name and address” of the persons under investigation. Due to these identification requirements, the “Peer Review Report Phase 2 of the Global Forum on Transparency and exchange of information for tax purposes” EOI considered these treaties to be inconsistent with the new OECD standard as drafted in Article 5 OECD TIEA-Model and its commentary.

Some of the Austrian DTTs (Algeria, France, Canada, Mexico, Norway, Switzerland, Turkey and the USA) include clauses for assistance in the collection of taxes. However, none of them is in line with the wording of Article 27 OECD MTC. Only the revised treaty with Liechtenstein reflects the latest standard of an OECD conform assistance in collection clause.

In addition, Austria is willing to sign TIEAs with countries that do not provide for a similar tax system. Since Austria’s commitment to the OECD standard, 5 TIEAs closely following the OECD standard and allowing for exchange of bank information were signed with the following countries: Andorra, Gibraltar, Jersey, Monaco and St. Vincent & the Grenadines.

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15 This opinion has been criticized in the Austrian literature: Lang, Haben die Änderungen der OECD-Kommentare für die Auslegung älterer DBA Bedeutung? SWI 1995, 412; Lang, Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen, IWB 2011, 281.


17 Austria has not yet amended its domestic law as regards group requests. Therefore, it is not clear whether based on the actual wording of the domestic law “group requests” are permitted.

18 Belgium; Bosnia and Herzegovina; Bulgaria; Luxembourg; Mexico; Qatar; Serbia; South Africa; Tajikistan. Same is true for Singapore.

The current Austrian bilateral EOI network is supplying two different kinds of EOI procedures: the exchange upon request and the exchange on spontaneous basis. So far, Austria does not provide for an automatic exchange of information based on DTTs or TIEAs. However, within the EU an automatic exchange of information system will be applied with the beginning of 2015.\(^\text{20}\)

With respect to Germany, the Treaty on Legal Protection and Legal Assistance Concerning Taxes\(^\text{21}\) signed on October 4, 1954, still applies. This treaty, however, is not in line with the OECD standard stipulated in the OECD MTC.

Austria is going to implement FATCA\(^\text{22}\) provisions, which will provide a legal framework for direct cooperation between Austrian banks and the IRS.\(^\text{22}\) However, by the FATCA agreement has not been concluded (however negotiated) and the contracting parties agreed on confidentiality. Accordingly, there is no detailed information available regarding the Austrian FATCA agreement.

2. Administrative cooperation in tax matters under EU Law and its implementation in Austria

2.1. Mutual assistance

Under the scope of the new EU Directive 2011/16/EU of February 15, 2011 on administrative cooperation in the field of taxation (repealing Directive 77/79/EEC) which was implemented in Austria by the EU Administrative Cooperation Act\(^\text{24}\), Austria can exchange information with other EU-Member states. In addition to the traditional forms of exchange of information (i.e. exchange upon request and spontaneous exchange of information), the Directive also provides for an automatic exchange of information between the competent authorities of the Member states. The automatic exchange of information will be applied as of January 1, 2015.\(^\text{25}\)

The EU Directive 2011/16/EU has to be regarded as the minimum standard of administrative cooperation. Bilateral or multilateral agreements on administrative assistance going beyond the scope of the EU Directive shall remain unaffected. The competent authority is free to choose between the exchange of information mechanisms provided by bilateral treaties or the EU Directive. Regarding the assistance in the collection of taxes (Article 27 OECD MTC), Austria is obliged to assist all EU Member states on the basis of the EU Directive 2010/24/EU (implemented in Austria by the EU Act on Assistance in Recovery).\(^\text{26}\)

\(^{20}\) Based on paragraph 7 and 22 of the new EU Administrative Cooperation Act implementing the new EU Directive 2011/16/EU.


\(^{22}\) Foreign Accounts Tax Compliance Act.

\(^{23}\) Due to the strong domestic bank secrecy the implementation of the “Model 2” approach is expected.

\(^{24}\) Federal Law Gazette I 112/2012.

\(^{25}\) Paragraph 7 EU Administrative Cooperation Act.

2.2. Asset Recovery Office

The EU Council Decision 2007/845/JHA obliges Member states to set up or designate national Asset Recovery Offices ("AROs") as national central contact points facilitating the cooperation between Member states on the tracing of assets derived from crime.27 The Council Decision 2007/845/JHA authorizes the AROs to exchange information and best practices, both upon request and spontaneously. Austria designated the Federal Criminal Police Office (Bundeskriminalamt – Referat "Vermögensabspörhung") as national ARO, which is active since January 1, 2008. The national ARO is also responsible to keep statistics regarding asset recovery by the criminal investigation police in Austria and thus entitled to take appropriate coordination measures. Currently, the following projects of the European Commission regarding the record, storage and transfer of personal data are being processed by the national ARO: European Commission Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of financial system for the purpose of money laundering and terrorist financing28; European Commission Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds29; and the European Commission Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union30.

3. The collection and exchange of information under the anti-money laundering law

The EU Directive on the prevention of the use of financial system for the purpose of money laundering and terrorist financing was implemented in Austria by several Acts (e. g. Banking Act, Lawyers Act, Stock Exchange Act, Law on Gaming, Insurance Supervision Act). According to Article 21 of the EU Directive 2005/60/EC, Austria – in order to combat money laundering and terrorist financing – is obliged to establish or designate a Financial Intelligence Unit. In Austria, the Financial Intelligence Unit was installed at the Federal Bureau of Investigation.31

The obligation for financial institutions to provide information not only on their own initiative (in cases in which reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted) but also upon request by the Financial Intelligence Unit exists since 1994.32 The function of the Financial Intelligence Unit is to assemble, analyze and investigate relevant information which might be an indication of money laundering. In case of evidence, the Financial Intelligence Unit has to inform other departments of the Federal Bureau of Investigation as well as other authorities such as e. g. Federal Agency for State Protection and Counter Terrorism, Financial Market Authority or Ministry of Finance.33 The information received by the national authority is also exchanged with foreign Financial Intelligence Units to combat organized crime more

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28 COM(2013) 45/3
29 COM(2013) 44/2
efficiently. In accordance with the Council Decision of October 17, 2000\textsuperscript{34}, Financial Intelligence Units shall exchange spontaneously or upon request any available information that might be relevant for the processing or analysis of information or for an investigation regarding financial transactions related to money laundering and the (legal) persons involved. When a request is made, the requested Financial Intelligence Unit shall provide all relevant information, including available financial information and requested law enforcement data. The transmitting Financial Intelligence Unit may impose restrictions and conditions regarding the use of the provided information for other purposes than combating of money laundering. The receiving Financial Intelligence Unit shall comply with any such restrictions and conditions. The Financial Intelligence Unit is obliged to ensure that information submitted is not accessible to any other authority.

Since the anti-money laundering provisions provide for comprehensive access to tax sensitive data a discussion started as to what extent the collected data may be used in tax proceedings. In Austria there are several provisions dealing with the inadmissibility of evidence gained from such data.\textsuperscript{35} According to these laws, data collected by the Financial Intelligence Unit must not be used to the disadvantage of the accused or suspected defendant or any third party involved in criminal tax law proceedings carried out exclusively on grounds of fiscal offences. However, this principle does not apply with respect to severe fiscal offences like smuggling or evasion of import or export duties which are subject to the competence of the courts as well as financial offences pursuant to § 38a (evasion of tax) and § 39 (taxation fraud) Criminal Tax Law Act. As regards administrative tax proceedings, any information relevant for such proceedings is generally not subject to exchange of information between the Financial Intelligence Units. Therefore, the requesting Financial Intelligence Unit is not allowed to disclose such information to the tax authorities. If the competent authority nevertheless gains knowledge of such information, it may – in accordance with a decision of the Austrian Supreme Administrative Court\textsuperscript{36} – use the information only if the transmitting State did not impose restrictions and conditions on the further use of the information transmitted.

The current legal provisions towards the admission of information in criminal tax law proceedings were critizised in Austrian literature as being more or less ineffective, since according to a decision of the Austrian Supreme Administrative Court “subsequent evidence” (i.e. evidence collected on the basis of information derived from inadmissible evidence) is admissible.\textsuperscript{37}

Considering the question whether the exchange of tax-relevant information would have a negative impact on the individual’s right to privacy (Article 8 of the European Convention of Human Rights (“ECHR”)), it needs to be stressed that Article 8 para 2 ECHR stipulates important restrictions. An infringement by a public authority is only authorized “\textit{in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of

\textsuperscript{34} Council Decision of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information, 2000/642/JHA.


\textsuperscript{36} Supreme Administrative Court 22. 1. 1992, 90/13/0237.

\textsuperscript{37} Lafite/Varro/Vondrak, Unvereinbarkeit der Geldwäscherei-Meldepflichten mit dem Bankgeheimnis, ecol ex 2011, 1043 (1046); for more details see also chapter 7.1.1.2.
the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” The exchange of tax-relevant information between Financial Intelligence Units can be considered as a necessary intervention of a public authority in the interests of the economic well-being of the country or for the prevention of disorder or crime. According to Austrian academic literature, exchange of information for tax purposes does not infringe upon Article 8 ECHR.

The exchange of information implemented by Financial Intelligence Units may also have a negative impact on the free movement of capital, since burdensome notification requirements mainly arise in cross-border cases. However, as EU secondary law cannot infringe upon EU primary law (Article 63 TFEU) and taking into account the exceptions regarding the free movement of capital as stipulated in Article 65 (1) (b) TFEU and Article 75 TFEU, the information exchange implemented by the Financial Intelligence Units should not infringe upon Article 63 TFEU.

4. The exchange of information system in practice
An effective exchange of information system requires that the requested information is provided on short notice. According to the information of the Austrian Ministry of Finance, in 2011 Austria received 385 incoming requests for information from EU countries and 25 incoming requests from countries outside the EU. In the same year Austria sent 868 requests for information to EU countries and 6 requests to countries outside the EU. With respect to the automatic exchange of information the following number of files was reported: outbound: none, inbound from EU jurisdictions: 15 files; inbound from non-EU jurisdictions: 10 files.

According to the Peer Review Report Phase 2, Austria has answered in less than 90 days more than 71% of all requests received in the three year review period (2009-2011). 33 of the total amount of 829 requests could not be answered, as 10 requests regarded banking information and 23 requests were subject to limitations contained in the applicable DTT. Unfortunately, based on the information received by the Ministry of Finance, more detailed evaluations are not available.

5. Joint audits and multinational audits
As the world’s economy is heading towards globalization, information gathering issues are becoming more and more important for national tax administrations. Following international efforts towards implementation of more efficient mutual assistance instruments between jurisdictions on bilateral and multilateral basis, “joint audits” as a new form of coordinated action between tax administrations constitute an important instrument to achieve better international cooperation and collaboration of tax administrations. “Joint audits” allow two or more countries to form a single

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38 Article 8 para 2 ECHR.
40 Jirousek, Branch Report – Austria, in IFA, Cahiers de droit fiscal international Volume 98b - Exchange of information and cross-border cooperation between tax authorities (2013) 111.
42 As identified in the 2010 OECD Joint Audit Report.
audit team in order to conduct a taxpayer examination. Austria is aware of the importance of this instrument and therefore is willing to allow representatives of foreign tax authorities to be present in Austria during tax examinations. However, Austria has no practical experience with “joint audits” so far.\(^{43}\)

A presence of foreign tax representatives at interviews or examinations (e.g. books and records of a person) within the territory of the requested State is only possible if there is corresponding bilateral or multilateral legal basis. EOI clauses as stated in DTT could serve as a possible legal basis. Moreover, the EU Council Directive 2011/16/EU\(^{44}\) (implemented in Austria by the EU Administrative Cooperation Act\(^{45}\)) provides for mutual assistance to EU Member States, allowing tax examinations conducted by foreign tax representatives in Austria and vice versa. Also the recently signed Convention on Mutual Administration Assistance in Tax Matters may serve as legal basis for joint audits in the near future.\(^{46}\)

6. **Tax solutions of equivalent effect - alternative to exchange of information and its legitimacy**

6.1. **Alternative techniques to obtain information**

6.1.1. Acquisitions of stolen bank data

Austria has not been involved in the active acquisition of “stolen” bank data. Relevant information derived from “illegally” obtained sources (e.g. LGT bank case) acquired by other states (for instance, Germany) was forwarded to the Austrian finance authorities on the basis of an international exchange of information. However – to our best knowledge – the information received was not utilized in the course of an administrative tax or criminal tax procedure, because all tax payers involved filed a self declaration.

6.1.1.1. Sensitive data and banking secrecy

Austria’s domestic law contains a bank secrecy (§ 38 Banking Act). It commits not only credit institutions (as defined by § 1 Banking Act), but also their shareholders, employees or any other person acting on behalf of the credit institution as well as officials of governmental authorities to maintain confidentiality of knowledge acquired in the course of performing their duties. Based on the wording of § 38 Banking Act, competent governmental authorities in both criminal as well as administrative tax proceedings are bound by the bank secrecy. Sensitive bank data obtained (also by infringing § 38 Banking Act) by a public authority in the course of performing its duty in a strictly national case can basically only be used as evidence within the scope of § 38 para 2 Banking Act, stipulating under which circumstances the obligation to maintain the banking secrecy does not apply.\(^ {47}\) For example, there is no obligation to keep to the banking secrecy vis-à-vis criminal courts and the public prosecutor in the case of instituted criminal court proceedings if a judicial approval is at hand, or vis-à-vis the governmental criminal tax authorities in the case of already initiated criminal

\(^{43}\) Jirousek, Branch Report – Austria, in IFA, Cahiers de droit fiscal international Volume 98b - Exchange of information and cross-border cooperation between tax authorities (2013) 111.

\(^{44}\) Article 11 of the EU Council Directive 2011/16/EU. In the past also foreseen by the Council Directive 77/799/EEC.

\(^{45}\) § 10 and 11 of the EU Administrative Cooperation Act.

\(^{46}\) Article 9 of the Convention.

\(^{47}\) Fischerlehner, Beweisverwertungsverbote im Abgabenverfahren, taxlex 2008, 161.
proceedings due to willful fiscal offences (excepting financial misdemeanors).\textsuperscript{48} The disclosure of information without infringing the banking secrecy is also possible if information needs to be provided under § 41 Banking Act\textsuperscript{49} or under the Securities Supervision Act and the Stock Exchange Act to the Financial Market Authority (FMA). Information received on this basis can generally also be used in administrative tax procedures.\textsuperscript{50}

6.1.1.2. \hspace{0.5em} (General) admissibility of illegally obtained evidence in criminal or administrative tax proceedings

The Austrian Criminal Tax Law Act stipulates several restrictions with respect to the utilization of evidences obtained in an unlawful way in the course of criminal tax proceedings.\textsuperscript{51} Further restrictions on the admissibility of evidence in criminal tax proceedings may also arise from other laws.\textsuperscript{52} However, the existing restrictive rules with respect to the utilization of evidences may only prohibit that such evidence is taken into account with respect to the decision. According to the opinion of the Supreme Administrative Court\textsuperscript{53}, the use of inadmissible evidence for obtaining further evidence is not covered by the restrictive rules mentioned and shall therefore be allowed.\textsuperscript{54, 55}

As regards the admissibility of illegally obtained data in administrative tax proceedings, the Austrian Supreme Administrative Court ruled that – in general – all evidence is admissible as long as it is suitable for determining the relevant facts or circumstances.\textsuperscript{56} Therefore, such evidences may be used even if the authorities derived it by e.g. infringing the banking secrecy.\textsuperscript{57} The decision is based on the Austrian Federal Fiscal Code which – in contrast to the Criminal Tax Law Act – does not contain restrictions with respect to the admissibility of evidence. This, however, does not mean that all kind of illegally obtained evidence is admissible in administrative tax proceedings. Following the opinion of Stoll\textsuperscript{58}, an absolute restriction on the admissibility of evidence exists (even) in administrative tax proceedings, if the illegally obtained evidence infringes a constitutional right or contradicts the aim or purpose of the law that was infringed in the course of obtaining the respective evidence.\textsuperscript{59}

\textsuperscript{48} § 38 para 2 nr 1 Banking Act as amended by Federal Law Gazette I 2007/108.
\textsuperscript{49} Cases in which suspects or reasonable grounds to suspect crimes with respect to money laundering or terrorism financing are at hand – for details see above chapter 3.
\textsuperscript{50} Leitner/ToFjl/Brandl, Österreichisches Finanzstrafrecht\textsuperscript{3} Rz 1839.
\textsuperscript{51} See § 98 Criminal Tax Law Act; E.g. evidence obtained by way of unlawful seizure.
\textsuperscript{52} E.g. Section 38 and 41 Banking Act; Section 25 Stock Exchange Act, but also fundamental principles of the constitution. See also Leitner/ToFjl/Brandl, Österreichisches Finanzstrafrecht\textsuperscript{3} Rz 1975 ff.
\textsuperscript{53} Supreme Administrative Court 5.3.1991, 90/14/0238.
\textsuperscript{54} Stoll, BAO 1769.
\textsuperscript{55} See Leitner, Österreichisches Finanzstrafrecht, 3. Auflage, Rz 1974 and Tanzer, Der Grundsatz der freien Beweiswürdigung im Abgabenverfahren, in Holoubek/Lang Allgemeine Grundsätze des Verwaltungs- und Abgabenverfahren 403 ff criticizing the court decision.
\textsuperscript{56} See Stoll, BAO-Kommentar Bd 2, 1768; Kotschnigg/Pohnert in Kotschnigg, Beweisrecht BAO § 166 Tz 37.
\textsuperscript{57} Supreme Administrative Court 6.6.1990, 89/13/0262; Supreme Administrative Court 22.1.1992, 90/13/0237.
\textsuperscript{58} Stoll, BAO-Kommentar Bd 2, 1768 ff.
\textsuperscript{59} For further details please see Kotschnigg/Pohnert in Kotschnigg, Beweisrecht BAO § 166 Tz 56 ff.
6.1.2. Whistleblower reward
Since the activation of the "whistleblower website" on March 20, 2013, anyone can actively participate in the fight against corruption. The whistle-blower system is designed to ensure a secured communication platform between informants and the public prosecution office. It provides both the confidentiality of the reports provided as well as the anonymity of the informants. Incoming reports are handled the same way as complaints. Rewards for providing information do not exist.

6.2. Alternative bilateral and/or multilateral initiatives, alternatives in order to collect revenue

6.2.1. EU Savings Directive and its announced reform
The Directive 2003/48/EC of June 3, 2003 on taxation of savings income seeks to ensure that individuals resident in an EU Member State who receive interest income from another Member State are taxed in the Member State in which they are resident for tax purposes. The EU Savings Directive either provides for an (automatic) exchange of information system on the respective interest payments or – in case of Austria and Luxemburg – for a withholding tax system. In Austria the Directive was implemented by the EU Withholding Tax Act ("EU-QuStG") entering into force as of 1.7.2005. Under the EU-QuStG a (special) withholding tax is collected in Austria, if (Austrian) paying agent pays interest income to a beneficial owner of the respective interest income who is resident in another Member State. The withholding tax rate amounted to 15% during the first three years of the transitional period and 20% during the subsequent three years. Since 1.7.2011 Austria levies a withholding tax at a rate of 35%.

Under the Austrian EU withholding tax regime a taxpayer may opt for an exemption that requires a certificate issued by the competent tax authority of the taxpayer’s state of residency. The respective document has to include details of the Austrian interest paying agent as well as the Austrian bank account or the interest bearing securities. The certificate should make sure that the competent tax authority is aware of Austrian interest income to be taxed in the other Member state. The certificate leads to a withholding tax exemption for a period of three years.

On 13.11.2008, the European Commission proposed an amendment to the Savings Directive in order to close existing loopholes and to prevent tax evasion in a more effective way. The main amendments intend to ensure taxation of interest payments channeled through intermediate tax-exempted structures and to extend the scope of the Directive; according the proposed amendment income derived from investments in innovative financial products as well as in certain life insurance products should also be covered by the Directive.

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60 See: https://www.bkms-system.net/bkwebanon/report/clientInfo?cin=1at21&language=ger
62 Due to agreements with non-EU Member States, also Switzerland, Andorra, Liechtenstein, Monaco and San Marino are also subject to the taxation of savings income regime.
64 Between 1.7.2008 and 1.7.2011.
6.2.2. The „Rubik standard agreements“

By looking for an alternative to the automatic exchange of information programs, nevertheless enabling Austria to combat tax avoidance and tax evasion on an international level and to maintain its banking secrecy, Austria recently signed two bilateral treaties with Switzerland\(^{66}\) and Liechtenstein\(^{67}\) ("rubik agreements"). These rubik agreements provide for both the regularization of the past as well as an appropriate future (automatic) taxation of capital “situated” in Switzerland and Liechtenstein in accordance with Austrian tax law.

The scope of the “rubik” agreement with Switzerland is limited to Austrian taxpayers who were beneficial owners of the “bankable assets” deposited with Swiss banks including Swiss bank accounts. The scope of the “rubik” agreement with Liechtenstein also includes (bankable) assets managed by Liechtenstein trustees or fiduciaries through domestic (Liechtenstein) or non Liechtenstein (legal) vehicles; consequently, Liechtenstein foundations or even Panama foundations are covered as long as they are managed by at least one Liechtenstein trustee. Both agreements do not cover assets held or deposited with Austrian banks.

As regards the regularization of the past cover the Swiss rubik agreement refers to the (relevant) assets held with Swiss banks at December 31, 2010 or at December 31, 2012, the Liechtenstein rubik agreement refers to December 31, 2011 and December 31, 2013. The higher value of the assets at the dates mentioned is defined as “relevant capital”.

Austrian taxpayers falling under the rubik agreements (ie having banking relationships with Swiss or Liechtenstein banks or Liechtenstein trustees irrespective whether the tax payers actually evaded taxes or not) can choose between a lump sum payment (between 15 % and 38 % of the “relevant capital”) to be withheld by the Swiss or Liechtenstein paying agent (bank or trustee) or disclosing the relevant information to the Austrian tax authorities for the purpose of a (potential) retrospective tax assessment (unless the income has already been declared in a correct way).\(^{68}\) The exact amount of the “lump sum tax payment” was/is calculated on the basis of a formula explained in an Annex to the agreements. If an Austrian tax payer chooses the first option, the lump sum (tax) payment constitutes a tax amnesty for income taxes, inheritance taxes, value added taxes and gift taxes with respect to the relevant capital.\(^{69}\)

The first mentioned option leads to a lump sum (tax) payment withheld by Swiss or Liechtenstein banks or trustees and does not lead to an information flow to the Austrian tax authorities. In case of later investigations (based on others source of information) the amnesty relating to the relevant capital and documented by way of a certificate issued by the paying agent is of relevance. “Tax honest” Austrians (having banking relationships with Swiss banks who declared the income in a correct way) usually go for the second alternative that should not lead to an additional (already) paid tax burden.

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\(^{66}\) Signed on April 13, 2012 and in force since 1 January 2013.

\(^{67}\) Signed on January 24, 2013 and in force since 1 January 2014.

\(^{68}\) The second option is considered as voluntary self-disclosure within the meaning of section 29 Criminal Tax Law Act, granting – if filed correctly - immunity from criminal prosecutions. The second option applies by default if no choice was made.

\(^{69}\) In connection with the Agreement with Liechtenstein foundation entrance taxes are also covered.
As regards the taxation of capital investment income derived from Swiss or Liechtenstein sources in the future the Swiss or Liechtenstein banks or trustees are going to levy a withholding tax. Similar to the Austrian “final” taxation system for capital investment income the withholding tax on the Swiss or Liechtenstein capital investment income is regarded as final; ie, there is no obligation to disclose the respective income vis a vis the Austrian tax authorities. The tax rate is the same as the Austrian withholding tax rate and amounts to 25 %. The withholding tax collected in Switzerland and Liechtenstein is to be transferred to the Austrian fiscal bodies.

Furthermore, the rubik agreement with Liechtenstein also includes detailed rules for the taxation of Liechtenstein foundations (established by Austrians or donating to Austrian beneficiaries).

Finally, it should be noted that the “rubik” agreement with Switzerland fulfilled the expectations of the Austrian Ministry of Finance with regard to the fiscal result of the regularization of the past. In July 2013, the Swiss authorities transferred EUR 416.7 million as the first tranche payment to Austria. In September 2013 the second tranche transmitted amounted to EUR 254.7 million.

7. Conclusions

Austria has a strict domestic banking secrecy legislation as a fundamental principle of constitutional law. Based on international developments and international political pressure, the maintenance of the banking secrecy is becoming more and more difficult. In order to maintain its banking secrecy, Austria also applies alternative instruments, such as rubik agreements. However, this does not mean that Austria is not willing to participate in combatting international tax fraud and tax evasion. On the contrary, Austria is constantly implementing the international standards regarding mutual assistance in tax matters. As of 2009, Austria is fully committed to the international standards of the exchange of information as stipulated in the OECD MTC. In this respect, Austria withdrew its reservation regarding the exchange of bank data and started to amend its DTT network to implement the current standard. Moreover, Austria concluded since 2009 five TIEAS which are fully consistent with the OECD standard. Regarding EU Member states, Austria has already implemented the EU Council Directive 2011/16/EU which also contains a mandatory automatic information exchange (starting as of 2015). On May 23, 2013 Austria also signed the Multilateral Convention on Mutual Assistance in Tax Matters providing for the same standard of mutual assistance as the OECD MTC.