Austria's New Approach on Banking Secrecy Law and Tax Treaty Policy

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By Alexander Hofmann, TEP

For a long time, Austria, among Switzerland, Liechtenstein, Luxembourg and Belgium, was known as an investment place offering strong banking secrecy laws which indeed operated as to shield information in the hand of banks from being exchanged with tax authorities. Over the years, the global community felt ever more uneasy with states that favored tax evasion. The article traces the political pressure Austria faced within the OECD and the EU to change its policy. It introduces the new legislation Austria has put into effect in 2009 in order to honor its promise to step up to the OECD standard.

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A. Introduction

For a long time Austria was known as an investment place offering strong banking secrecy laws.\(^1\) The Austrian financial community had justified this by pretending to protect a sloppy understanding of privacy. This legislation allowed tax authorities access to customer data held by a bank only within very limited scenarios, among other things, in case of pending penal proceedings concerning tax evasion.\(^2\) Indeed, it operated as to shield information in the hand of banks from being exchanged with both national and foreign tax authorities for merely administering and enforcing national and international tax law.

Over the years, most nations faced growing budget deficits and a need to raise revenue. The global community felt ever more uneasy with states which for themselves yielded benefits from laws that have been perceived as an opportunity to enhance tax evasion. On several fronts Austria faced political pressure to drop its policy.

B. International initiatives against uncooperative tax havens

1. OECD Standards

With support of the European Union and The Group of 20 states (G20) the OECD made efforts to have their standards implemented in the double taxation treaties (“DTT”).\(^3\) Within the OECD Global Forum on Taxation a model Tax Information and Exchange Agreement (“TIEA-MA”) was released on April 18\(^{th}\), 2002\(^4\) and Article 26 of the Model Convention with respect to Taxes on Income and on Capital (“OECD-MC”) was revised to capsule the best practice standards applied by the majority of the OECD member states in the exchange of information on July 15\(^{th}\), 2005. The new Article 26 Para 1 OECD-

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1 Section 38 Para 1 Banking Law Code (Bankwesengesetz, “BWG”). According to Section 38 Para 5 BWG 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 Section 38 Para 2 (1) BWG. This required (i) corroborated suspicion of an offence of tax laws committed with intent and (ii) the formal opening of proceedings. The Administrative Court (Verwaltungsgerichtshof, “VwGH”) once found that preliminary proceedings of German authorities did not meet the second factor (VwGH 26.07.2006, 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 request.” (OECD [Ed.], Tax Co-operation 2009/Towards a Level Playing Field [2009] 10).

MC restated principles almost well settled at that time whereas competent authorities of the contracting states shall exchange such information as is foreseeable relevant\(^5\) 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. Within this framework contracting states shall be obliged to provide information even if they may not need it for own tax purposes (Article 26 Para 4 OECD-MC); but the exchange should be subject to confidentiality requirements (Article 26 Para 2 OECD-MC) and the specific restrictions set forth in Article Para 3 OECD-MC (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.\(^6\) However, exchange of information on request can be identified as the core procedure to satisfy OECD-MC standards.\(^7\)

On July 15\(^{th}\), 2005, the following new Para 5 had been added to Article 26 OECD-MC:

“\(\text{In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.}\)”

Most OECD states did exchange banking information even before July 15\(^{th}\), 2005. The addition rather intended to deprive jurisdictions like Austria, Belgium, Luxemburg or Switzerland of the argument Article 26 Para 3 OECD-MC could justify their stand.\(^8\) However, for the time being, Austria refused to catch up with this demand and made a reservation.\(^9\) Therefore, it ran the risk to

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\(^5\) This factor should allow an exchange of information as far reaching as possible without turning into a fishing expedition.


\(^9\) 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.“ (OECD [Ed.], Model Tax Convention on Income and on Capital/Condensed Version [2008] Commentary on Article 26 Ref 23). Belgium, Luxemburg and Switzerland made the same reservation.
be put on a black list of jurisdictions which according to the OECD Progress Report have not committed to the internationally agreed tax report.\textsuperscript{10}

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 have undertaken to abide by these demands ("Peer Review Group").\textsuperscript{11}

2. EU Policy

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

a) EU Savings Directive

The ultimate aim of the Council Directive 2003/48/EC ("EU Savings Directive")\textsuperscript{12} is to enable savings income in the form of interest payments made in one member state to beneficial owners who are individuals resident in another member state to be made subject to effective taxation in accordance with the laws of the latter member state (Recital Para 8 EU Savings Directive). 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 established and the competent authority of this member state to communicate this information automatically to the member state where the beneficial owner who received the payments resides (Chapter II EU Savings Directive). In defending their specific banking secrecy laws, Austria, Belgium and Luxembourg could manage to bargain for the levy of a withholding tax with the revenues to be shared with the other member state to save them from the automatic exchange of information procedure under Chapter II during a transitional period (Chapter III EU Savings Directive).\textsuperscript{13} In anticipating the non EU members

\textsuperscript{10} See Lafite/Vondrak/Gruber, Quo vadis Bankgeheimnis?, ecolex 2009, 573.
\textsuperscript{13} 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 (Article 11 Para 1 EU Savings Directive). 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 (Article 12 Para 1 and 2 EU Savings Directive). 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 Article 2 Para 1 EU Savings Directive. Structuring the account as a portfolio yielding dividends and capital gains will not generate reportable interest
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 (Article 17 Para 2 [ii] EU Savings Directive). After corresponding agreements had been entered into between these countries and the EU, the regulation came into effect as of July 1st, 2005. By its terms, the Chapter III exception granted to Austria, Belgium and Luxemburg was designed to be applied during a transitional period only which shall end not earlier than the later of the following conditions is met: (i) Switzerland, Liechtenstein, San Marino, Monaco and Andorra having stepped up to the minimum OECD standard (exchange information on request) by means of agreements with the EU and (ii) the USA having committed themselves to the same principle with respect to interest payments within the scope of the directive agreement according to an unanimous judgment of the EU Council (Article 10 Para 2 EU Savings Directive). Belgium accepted the rules of automatic communication as of 2010, but for Austria and Luxemburg 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 for to defer the fulfillment of Article 10 Para 2 EU Savings Directive. Austria argued that it were prepared to 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, in consistence with Article 26 Para 5 OECD-MC, the call for transparency be extended to the disclosure of beneficial ownership and beneficiaries of corporations, trusts and similar entities in general. In an effort to remove loopholes and inequities, the EU Commission submitted a proposal to have the EU Savings Directive revised. 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. So far, no compromise was 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 2014 at the latest.

Payments under Article 6 Para 1 EU Savings Directive (Barry, Swiss banks’ deal - or no deal, STEP Journal January 2011, 58, 59). Payments made by an Austrian private foundation (Privatstiftung) do not constitute payments from a paying agent within the scope of Article 4 EU Savings Directive (Lafite/Vondrak/Gruber, Spiel mir das Lied vom Tod, Bankgeheimnis!, ecolex 2010, 84).

16 Lafite/Vondrak/Gruber, Spiel mir das Lied vom Tod, Bankgeheimnis!, ecolex 2010, 84.
17 See footnote 13.
b) EU Assistance for the Recovery of Tax Claims Directive

Dating back to February 2\textsuperscript{nd}, 2009, the EU Commission proposed to replace the Council Directive 1976/308/EEC of March 15\textsuperscript{th}, 1976.\textsuperscript{21} This lead to the Council Directive 2010/24/EU of March 16\textsuperscript{th}, 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").\textsuperscript{22} In widening the scope of application, the new directive incorporates the Article 26 OECD-MC standard. Each member state shall provide information foreseeably relevant to the applicant authority in the recovery of tax claims (Article 5 Para 1 EU Assistance for the Recovery of Tax Claims Directive); such obligation being subject to specific exceptions similar to those capped by Article 26 Para 3 OECD-MC (lack of reciprocity, protection of business secrets or violation of public policy - Article 5 Para 2 EU Assistance for the Recovery of Tax Claims Directive). Article 5 Para 3 EU Assistance for the Recovery of Tax Claims Directive restates the OECD-MC guideline in that the exceptions of Para 2 shall in no case be construed as permitting a requested authority to reject a request for information but for it is held by a bank.

c) EU Administrative Cooperation Directive

An end for Austria’s banking secrecy was also looming from efforts to improve throughout the EU administrative cooperation in tax matters. On February 2\textsuperscript{nd}, 2009, the Commission of the EU presented a proposal to change Council Directive 77/799/EEC of December 19\textsuperscript{th}, 1977 concerning mutual assistance by the competent member states in the field of direct taxation and taxation of insurance premiums ("EU Administrative Cooperation Directive").\textsuperscript{23} This proposal was based on the finding that the old directive was an inappropriate tool to enhance fair competition and smooth functioning of the internal market and to combat tax fraud adequately. On December 7\textsuperscript{th}, 2010, the EU finance ministers reached a political agreement on the EU Administrative Cooperation Directive. 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’s and Luxembourg’s opposing any further weakening of their banking secrecy, the directive sets out a step-by-step approach for the procedure of automatic exchange of information. From 2015, member states will communicate information automatically for a maximum of only five categories of income.

\textsuperscript{21} COM (2009) 28 final.
\textsuperscript{22} OJ L 84/1, 31.3.2010, 1.
(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. The extension to the income categories dividends, capital gains and royalties as well as the removal of the condition of availability was spared subject to further reports and proposals of the Commission to be provided by July 1\textsuperscript{st}, 2017.\textsuperscript{24}

3. Unilateral measures against tax havens

Finally, Austria faced headwind from national lawmakers discriminating taxpayers who invest money in jurisdictions that fail to step up to the information exchange standard of the OECD. In 2009, Germany, for instance, passed the Combating Tax Evasion Act from July 29\textsuperscript{th}, 2009 (\textit{Steuerhinterziehungsbekämpfungsgesetz}, “StHBekG”).\textsuperscript{25} Under this law, German citizens and enterprises doing business in uncooperative tax havens are deprived of tax benefits in terms of expenses and expenditures as well as of the privileged taxation of dividends, and made subject to enhanced reporting obligations or levied with a duty to enable extended access to bank information.\textsuperscript{26}

4. End of the Game

On March 13\textsuperscript{th}, 2009, Austria bowed to the pressure of the global community. Together with Belgium and Luxembourg it withdrew its reservation to Article 26 Para 5 OECD-MC. This milestone freed the path to overhaul national legislation for to pierce the banking secrecy.

C. The reform: The implementation of the Administrative Cooperation Act

1. Conceptual outlay of the new law

It took heated debates and shady deals in the parliament in order to depart from the old law with the required qualified quorum of delegates.\textsuperscript{27} Eventually, the Austrian parliament passed the Implementation of Administrative Cooperation Act (\textit{Amtshilfe-Durchführungsgesetz}, “ADG”) which took effect on

\textsuperscript{24} Press release of the Council of the EU from February 15\textsuperscript{th}, 2011, 6554/11; Ecofin Council - Tax information exchange: Member states step up cooperation, EUROPOLITICS/Economic & monetary affairs December 7\textsuperscript{th}, 2010.

\textsuperscript{25} German Federal Law Gazette (\textit{deutsches Bundesgesetzblatt}) I 48/2009 from July 31st, 2009.

\textsuperscript{26} Putzer, Das neue Bankgeheimnis (2010) 63 through 67.

\textsuperscript{27} See footnote 1.
September 9th, 2009.28 It is based on the idea to leave the banking secrecy unchanged as far as Austrian domestic cases are concerned but to step up the regulation to the OECD guidelines (exchange of information on request) when a cross border setting is affected in that a foreign authority asks Austria to provide tax relevant information. Having dressed the legislation this way, it saved the politicians from being blamed for having betrayed a policy they have had defended vigorously for so long.

The scope of the ADG extends to the implementation of the OECD standards in the bilateral exchange of tax relevant information (Section 1 ADG). In order to seize secret banking information in course of an administrative cooperation procedure following a request by a foreign state a two tier process must be undergone: First, EU law, a DTT or another bilateral treaty (e.g. a TIEA) or laws of other kind applicable between Austria and the requesting state must command such request be answered and explicitly rule out the possibility to decline to supply such information solely because it is held by a bank. If this is the case, in a second step, the ADG forms the basis to proceed with the answer allowing the employment of the same administrative measures as if a domestic tax claim were at issue (Section 2 Para 1 and 3 ADG). Hence, the ADG does not form an independent framework to grab on bank information. If EU- or bilateral regulations are missing, it lacks a scope of application. Moreover, it is necessary for Austria to revise or enter into new DTTs or bilateral agreements for to take comfort from the ADG mechanics.29 EU law commanding to obtain and reveal banking information (see section B.2. above) has the same effect and will be enforced by means of the ADG.

2. Procedural requirements for a request

The competent authority to handle a request for information under the ADG is the Federal Minister of Finance (“FMF”). Once it has received a request


29 Nolz/Jirousek, Das neue Amtshilfe-Durchführungsgesetz – Neuerungen beim Bankgeheimnis, ÖStZ 2009, 430. At the time this article was submitted, Austria has had entered into (i) DTTs incorporating the Art 26 Para 5 OECD-MC standard with: Bahrain, Belgium, Denmark, Germany, Great Britain, Ireland, Luxembourg, Mexico, Netherlands, Norway, San Marino, Sweden, Switzerland and Singapore; (ii) TIEAs reflecting the same standard with Andorra, Gibraltar, Monaco and St. Vincent & The Grenadines (see [https://www.bmf.gv.at/Steuern/Fachinformation/InternationalesSteu_6523/Diesterreichisch enD_6527/start.htm](https://www.bmf.gv.at/Steuern/Fachinformation/InternationalesSteu_6523/Diesterreichisch enD_6527/start.htm) (updated February 2nd, 2011). The negotiations on a revised DTT between Austria and Liechtenstein are still ongoing and be expected to come to an end 2011. After such agreement will have come into force, Austria will be forced to drop some tax regulations having 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.
and before it can proceed with, the authority must examine if the specific prerequisites provided for in the regulations applicable as to the requesting state (e.g. EU law, DTT, other bilateral treaty or rules of law governing the bilateral relation) are met (Section 2 Para 3 ADG). Thus, the admissibility of a request and the extent to which it has to be served must be looked up in the underlying bilateral regulation from case to case.

Most of the agreements or technical notes attached thereto Austria had entered into require to contain the statements as enumerated in the following to support a request. Essentially, these requirements are taken from Art 5 Para 5 TIEA-MA and center on the general demand to demonstrate the *foreseeable relevance* of the information to the request (Art 5 Para 5 TIEA-MA; Art 26 Para 1 OECD-MC). These prerequisites shall ensure that bilateral assistance in the administration of tax laws must not open up the gate for a fishing expedition. Nevertheless, the various procedural requirements need to be interpreted liberally in order not to frustrate effective exchange of information. The commentaries provided by the OECD to the TIEA-MA and the OECD-MC are helpful means of construction to evaluate a request and to decide whether or not it can be processed. However, due consideration must be given also to any deviation of the underlying regulation from the model language of the TIEA-MA or the OECD-MC.

a) Identity of the person under examination or investigation

The request of a state must reveal the identity of the person who is concerned by the procedure (Article 5 Para 5 [5][a] TIEA-MA). Usually, a request will specify the name and the address of this person. However, Ref 58 in the commentary on Article 5 Para 5 [5] TIEA-MA says that the identification requirement may be satisfied also by supplying an account number or similar identifying information (e.g. tax number, social security number, ID number and the like).

b) Statement of the information sought

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31 OECD Commentary on Article 26 OECD-MC Ref 5.
32 OECD Commentary on Article 5 TIEA-MA Ref 57.
34 In the technical notes and DTTs Austria entered into, the term “identity” is translated with “Bezeichnung” which stays also for “description”. Making reference to that, Putzer (Das neue Bankgeheimnis [2010] 34) argues that the name and address cannot be substituted by other information allowing the identification of the person. In my opinion, the OECD commentary must prevail when construing the TIEA-MA language.
The requesting state must at least roughly outline the nature of the information it is longing for and indicate in which form it wishes to receive the information from Austria (Article 5 Para 5 [5][b] TIEA-MA).

c) Tax purpose

The request must demonstrate a need to know the information sought for in light of a specific tax purpose it should serve (Article 5 Para 5 [5][c] TIEA-MA). This considers the core understanding that the information must be “foreseeably relevant” for the administration and enforcement of the requesting state’s tax law (Article 26 Para 1 OECD-MC). However, the Austrian government is not conferred upon with a responsibility to verify this prerequisite by taking a look on the foreign jurisdiction.35

d) Reference to Austria

Without establishing contacts to Austria, a request cannot be answered. Therefore, the request must indicate grounds for believing that the information requested is held in Austria or is in the possession or control of a person within the jurisdiction of Austria (Article 5 Para 5 [5][d] TIEA-MA). Business or credit cards, cell phone numbers of a bank employee, account statements or other correspondence with an Austrian bank would definitely constitute a sufficient pointing at Austria. Even competent proof of a transfer of cash from the requesting state to Austria or another state would sufficiently refer to Austria and trigger an obligation to render assistance under the ADG. Austria may not argue that it were equally likely that the information is in the other country. The same would apply if an account may or may not have been closed in Austria (e.g. in a situation where the account holder has left Austria).36

e) Name and address of the bank

To the extent known, the bank believed to be probably in possession of the requested information must be identified by name and address. If these particulars are not known, they may be skipped. However, this is not valid for DTTs or agreements in which a knowledge-qualification for the respective procedural requirement is missing.37

36 OECD Commentary on Article 5 TIEA-MA Ref 59 and 60; Fraberger/Petritz/Eberl (Bankgeheimnis neu – ungeklärte Fragen Teil 2, 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.
37 E.g. the DTT Austria – Switzerland (Gröhs/Günther, Internationale Amtshilfe und Bankgeheimnis – aktuelle Fragen und Entwicklungen, Handout for 5th Viennese Deloitte Conference on White Collar and Tax Crime Law from September 22nd, 2010, p. 11).
f) Pursuance of all proportionate means available to obtain the information

A request for information will in most instances place an extra burden on the administrative machinery of the requested state. It can be justified only if it is easier for the requested state to obtain the information sought after than for the applicant state. Therefore, a requested state should be relieved from the obligation to contemplate a request if the applicant avails of convenient or proportionate means to obtain the information within its own jurisdiction. Hence, a request must state and establish that the applicant state has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties (Article 5 Para 5 [g] TIEA-MA).38

g) Additional requirements and information

Article 26 Para 3 (a) OECD-MC bars the carrying out of administrative measures that are not in conformity with the law and administrative practices of the applicant state; and Article 26 Para 3 (b) OECD-MC 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. The requesting state must not make use of the assistance in order to circumvent hurdles set up by its own jurisdiction against obtaining or exploiting information. In course of the procedure, Austria has to verify that such negative factors do not exist (Section 2 Para 3 ADG). However, the CTTs and TIEAs Austria is a party to do not put an obligation on the other contracting party to make specific representations in that respect.39

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 but a request for additional information should not delay a response to a request that complies with the aforesaid rules.40

3. Information of persons whose interests are concerned by a request to disclose banking information

Once the FMF has cleared a request (subject to Section 2 Para 3 ADG) with regard to the disclosure of banking information, it must immediately notify the person(s) concerned as well as the bank (Section 4 Para 1 ADG). This shall ensure due process. Notwithstanding the narrow wording of the statute, not only those who can dispose of an account but also beneficial owners must be deemed

38 OECD Commentary on Article 5 TIEA-MA Ref 63.
39 See Article 5 Para 5 Subpara f TIEA-MA.
40 OECD Commentary on Article 5 TIEA-MA Ref 64.
“persons concerned” and put on notice. It should be noted, that chapter B.2.1. of the Terms of Reference developed by the Peer Review Group suggests that informing the concerned person might inhibit the purpose of the procedure.

4. 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 Section 2 Para 3 ADG. Such application must be filed within two weeks upon the notification and state the reasons for why the decision to supply information may be wrong. Open issues raised in course of the procedure are to be resolved by mutual agreement with the requesting state (Section 4 Para 2 ADG).

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 expressly applied for and granted by either court. If the petitioner has applied for a stay, he or she must provide the FMF with a copy of the application to halt the procedure accordingly (Section 4 Para 3 ADG).

The FMF may go ahead with the release of the information requested subject to the following conditions:

(i) if no ruling is asked for: not until the two week term for the request of a ruling has run;

(ii) if a ruling is asked for and no complaint to the courts combined with a motion to stay is filed: not until the six week term for the complaint to the courts has run;

(iii) if a complaint to the courts is filed combined with a motion to stay which is declined eventually: not until the motion to stay is declined;

42 OECD (Ed.), Launch of a Peer Review Process/Terms of Reference (2010); see footnote 11.
43 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 (Section 85 Para 2 Constitutional Court Act [Verfassungsgerichtshofgesetz]; Section 30 Para 2 Section Administrative Court Act [Verwaltungsgerichtshofgesetz]).
(iv) if a complaint to the courts is filed together with a motion to stay which is granted eventually: not until the complaint is dismissed (Section 4 Para 3 ADG).

Chapter C.5 of the Terms of Reference 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, this nurtures misgivings that in situations where contest litigation takes more than 90 days the OECD-standard is missed.

5. Disclosure of confidential banking information

If the information sought is subject to secrecy law, it must be claimed from the bank by the FMF giving adequate notice. In the demand the FMF must certify that the prerequisites for the disclosure under Section 4 Para 3 ADG have been met. Then, the bank is obliged to supply the information as well as documents and data or to allow their inspection (Section 3 Para 1 ADG). 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 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 (Section 3 Para 2 ADG).

6. Date of application of the ADG

The ADG came into effect on September 9th, 2009. Requests for information which Austria receives after that date will be processed under the new law. A request can be answered only to the extent the underlying DTT or TIEA applies or has taken effect. With regard to most of the treaties and agreements Austria has entered into so far, this is January 1st, 2011. But the DTT with 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 grab on information relating even to earlier periods on the separate basis of judicial assistant agreements to which the ADG does not apply (Section 5 ADG).\(^{45}\)

D. Conclusion

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\(^{44}\) See footnote 42.

\(^{45}\) Lafitte/Vondrak/Gruber, Spiel mir das Lied vom Tod, Bankgeheimnis!, ecolox 2010, 82 and 83.
By means of the ADG Austria has implemented the least standard required by OECD recommendations regarding the disclosure of banking information in course of bilateral administrative assistance (exchange on request). Administrative practice and judicial case law dealing with the ADG will proof whether or not Austria could catch up to the enhanced standard. Anticipated developments within the EU, a revision of the EU Savings Directive respectively, will most likely force Austria to make further concessions and finally to accept an automatic exchange of banking information around 2014.