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What does still remain of the "*Bankgeheimnis*" in the Austrian experience? A brief overview on how the new International and European provisions on the exchange of information has transformed the bank secrecy within the Austrian borders

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Luglio 2015

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1. History of the bank secrecy in Austria

Provisions covering the bank secrecy appear to be based prevalently on the trust relationship between the credit institutes and their clients, a sort of relationship that is not only a prerequisite for the businesses that will take place between them but also a sort of relationship which has had, for a long time, the meaning of valuable success for the bank.

Literature usually considers the concept of bank secrecy in two different ways, the first concerns the secrecy obligation while the second one the concrete storage of information inside the credit institute[1].

Among these two definition, the first one is surely the one which has had the most effective impact, since in absence of such an obligation, banks would have to provide all the information kept by them at anytime[2].

At the same time there are also authors which believe that the main goal of the provisions concerning the bank secrecy is to protect the privacy of customers according to Art. 8 ECHR[3].

Historically, the first references to the bank secrecy in the European experience can be dated in 1619, as established by Art.6 of the "Hamburger Bank" Statute and later on, in 1765 in the Prussian Decree on Criminal law, which admitted the protection of the bank secrecy.

In the more recent history, we have traces of the bank secrecy in the Austrian experience more or less between the two World Wars and during the subsequent economic crisis in which the circulation of black money had considerably increased.

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[1] P. JABORNEGG – R. STRASSER - H. FLORETTA, *Das Bankgeheimnis*, Manz, Wien (Mai 1998).

[2] P. JABORNEGG, *Neues zum Bankgeheimnis* (Teil I), wbl 1990, 29 and W. LAFITE – D. VARRO – P. VONDRAK, *Unvereinbarkeit der Geldwäscherei-Meldepflichten mit dem Bankgeheimnis,* "Ecolex" 2011, p. 1043.

[3] M. FLORA, *Das Bankgeheimnis im gerichtlichen Strafverfahren*, Springer, Wien (2007).

This money, in fact, could be kept in banks institutes where there was the “no-divulgation” praxis based on the protection of the costumer who wanted to open an account[4].

However, the first complete regulation of the bank secrecy in Austria is provided by the §23 KWG of 1979, which established that there was a secrecy obligation for the bank institute during the entire relationship with the client and the obligation for the bank to refuse the disclosure of the information.

Differently, later on, with the formal conversion of §23 KWGb (1979) in the § 38 BWG, there was the introduction of cases where the bank secrecy cannot find application and perhaps one of the most peculiar aspect of this disposition is given by the fact that to be able to amend it, a majority of two thirds of the Parliament is necessary, the same majority required for amending or adopting constitutional acts[5].

By analyzing § 38 BWG, we can see that the people in charge of keeping secret the financial relationships between the clients and the credit institutes, are the partners of the institute, the administrators and the employees.

At the same time, when public authorities and the National Bank become aware of information covered by the bank secrecy, this has to be respected as if it was a form of official secrecy.

On the other hand, the second paragraph of this article refers to cases where the bank secrecy provisions cannot be applied.

The first one concerns the hypothesis of a criminal or criminal-administrative procedure for a tax crime, but only if the procedure has already started.

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[4] P. VONDRAK, *Unvereinbarkeit der Geldwäscherei-Meldepflichten mit dem Bankgeheimnis*, “ecolex” 2011, p. 1043.

[5] C. KERRES - F. PROELL, *Aktuelle Entwicklungen zum Bankgeheimnis*, in “ecolex” 2009, p. 623.

In fact, the disclosure of information under bank secrecy cannot work as the *"notitia criminis"*, as an impulse to begin a trial.

According to the first case then, information can be revealed in front of civil or administrative judges and in front of public authorities when there is already the suspect of money-laundering.

Furthermore, the second case refers to the opening of a *"mortis causa"* procedure, while the third one to the case where the client has agreed, in writing, to disclose his information.

In relation to the consequences of breaking the bank secrecy, these are relevant both from a civil and a criminal point of view.

From the civil point of view, the disclosure of the bank secrecy can lead to the request for damages proposed by the client who, on his side, will have to prove that the bank secrecy was violated with negligence or intentional misconduct and that this has caused him/her real damage.

From the criminal point of view, for breaking bank secrecy there can be fines or it can also be punished also with the arrest.

2. The amendments to the BWG (Bankwesengesetz) and the adoption of the ADG (Amtshilfe-Durchführungsgesetz)

The legal situation of Austria concerning the bank secrecy as described, did not seem to be in line with the International standards of transparency related to the exchange of information and this has precluded the chance to adopt the OECD standard as introduced by the OECD Model of 2005.

During the last years, as the States started to concretely commit themselves to the fight against fiscal frauds, there were several developments from OECD and G20 and also the Federal Republic of

Austria, on the 13 of March 2009, openly expressed its willingness to fully adopt the international standard.

The Austrian government decided for an implementation on two different sides.

From one side, the domestic protection of the bank secrecy was not going to be affected by the standard since it is not considered "offending" as long as applied to only national situations.

From the other one, since the International standard provides for an unlimited transparency in order to fulfill the goals of the Exchange of information, the bank secrecy should not be applied only in cases where these goals are relevant.

The implementation of Art. 26 in Austria has been achieved by the adoption of the administrative assistance implementation act (ADG) which entered into force on the 9 of September 2009.

In particular, this act provides for the unlimited access to any kind of bank information on request of another member state and on the basis of an International measure that allows that.

This means that for the application of the article of ADG which repeals bank secrecy and in order to individuate the type of information which can be requested, the reference is not only to the content of the ADG but it is necessary to take into exam each convention on double taxation or other bilateral treaties or multilateral treaties which regard the exchange of information as disciplined by Art. 26 OECD Model.

The scope of this obligation of communication has to be intended on the basis of the applicable agreement that can extend or limit the exchange of information significantly[6].

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[6] The reference is extend also to all the protocols and technical notes and not only to the mere content of the agreement.

Specifically, ADG provides that credit institutes have to disclose and forward the information on the request of CLO that will inquire them on the basis of the request of information from a foreign competent authority on the basis of an agreement in accordance with the OECD Standard.

In the various phases of implementation and reform of 2009, the Austrian banks were consulted and most of the provisions entered into force in 2012, so it reasonable to think that there was enough time left to allow the credit institutes to properly organize themselves[7].

After the implementation of Art. 26 of the OECD Model, an important question arises, whether it is possible to use the information sent, according to the ADG and an International agreement, which implements the OECD Model, to the foreign competent authority about an Austrian resident.

The difficulties mainly consist in the fact that if this information could be used for the domestic use there could be a violation of the bank secrecy act, which applies to the Austrian residents, which have all their economic activities or interests within the Austrian borders.

As before mentioned, in § 38 Abs 1 Satz 2 BWG the competent body which has received the information through the exchange of information procedures, has to keep them secretly considering that as an official secret according to § 48a BAO.

At the same time § 48a Abs 4 BAO provides that the public authority who has the information covered by the bank secrecy, can use them in cases where there is a tax procedure.

It is then fundamental to establish what is the relationship between these two provisions.

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[7] H. JIROUSEK, *Austria*, in “Exchange of information and cross-border cooperation between tax authorities”, Cahiers de droit fiscal International, IFA, Sdu, 2013, p.125.

Regarding the chance to use the information legally acquired through the exchange of information, there is not yet any decision from *Verwaltungsgerichtshof*[8], but probably, taking into exam two sentences of the same Court of 1986 and 1990[9], this Court would allow the use of this information in a process since in the Austrian system there is not a provision regarding the possibility or not to use some evidences[10].

In the previously cited sentences, the information that fiscal authority wanted to use were illegitimately acquired through the break of the bank secrecy and since the information acquired through the exchange of information on request of a foreign competent authority are legitimate, it seems correct to foresee that the Court would allow these evidences.

Furthermore, in literature, there are discordant opinions about the relationship between these two provisions.

Some think that § 38 Abs 1 Satz 2 BWG must have the priority since §143 Abs 1 BAO provides a secrecy obligation for the bank regarding the tax information obligation[11].

For others § 38 Abs 1 Satz 2 BWG provides the bank secrecy as a type of official secrecy with the same modalities and this would mean that § 48a Abs 4 BAO does not imply a conversion from bank secrecy to official secrecy but it would remain the same[12].

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[8] Supreme Court for the administrative jurisdiction.

[9] VwGH 24.6.1986, 83/14/0174; 6.6.1990, 89/13/0262.

[10] K. DAXKOBLER - E. PAMPERL, *Das schleichende Ende des Bankgeheimnisses? Aufrechterhaltung im Inland bei gleichzeitiger Durchbrechung im Rahmen des internationalen Auskunftsverkehrs?*, in SWK/22/2014, p. 1001.

[11] W. DORALT, *Bankgeheimnis*, p. 35.

[12] G. STOLL, *BAO-Kommentar*, 1994, p. 395 and in this sense also F. SOMMER – C. HIRSCH IN M. DELLINGER, BWG § 38 Rz 124; P. JABORNEGG – R. STRASSER - H.FLORETTA, *Bankgeheimnis*, p. 70 and 124; H. R. LAURER H. R. LAURER – R. BORNS- J. STROBL - M. SCHÜTZ (Hrsg.), *BWG, § 38 Rz 8*; P. APATHY in P. APATHY – G. IRO – H. KOZIOL, *Bankvertragsrecht*, I, Rz 2/58; J. ORTNER, *Das Bankgeheimnis*

On the other hand, a second problem can arise from a possible discrimination between who has all his/her economic activities inside Austrian borders and who has these activities also outside.

This last one, in fact, could not benefit from the bank secrecy differently from who concentrates all his/her business activities in Austria[13].

Recently, part of the literature has also reflected on the possibility of a discrimination relevant also from the European level point of view.

The legal measures adopted by Austria appear, in fact, to privilege the taxpayers who have businesses only at national level and in this case no other foreign state would be interested in asking any information about them.

Nevertheless, even if a difference of treatment between these two categories would be admitted, this difference could be justified in order to fight tax evasion, elusive practices and because of the need of an effective assessment.

Furthermore, the European Court of Justice does not believe that it is compulsory to ensure a level of protection to the potential tax[14].

This problem, however, could become a false one since on the 12th of May 2015, there has been the presentation of an amending proposal for § 38 Abs 1 Satz 2 BWG, contained in the "Bankenpaket" which, if approved as proposed, will let the bank secrecy protection fall also for who has business activities and interests within the Austrian borders[15].

(1995), p. 63; N. SCHAUBMAIR, *Bankgeheimnis* , in W. KOLLER – H. SCHUH – H. WOISCHITZSCHLÄGER (Hrsg.), «Handbuch zur Praxis der steuerlichen Betriensprüfung», 2010, p. 258.

[13] W. DORALT, *Aus für Bankgeheimnis könnte gegen die Verfassung verstossen*, in «Die Presse» vom 22.3.2014.

[14] K. DAXKOBLER - E. PAMPERL, *Das schleichende Ende des Bankgeheimnisses? Aufrechterhaltung im Inland bei gleichzeitiger Durchbrechung im Rahmen des internationalen Auskunftsverkehrs?*, in "SWK" 22/2014, p. 1004.

[15] For a more detailed overview of the amending proposal, see last paragraph of this contribution.

On the other hand, from the point of view of the Financial Committees of the National Council, the ADG should not affect the bank secrecy, but it should matter only in terms of International exchange of information because this last one is a special provision which derogates the general one (as the one on the bank secrecy), consequently for the Austrian legislator, the ADG should not damage the bank secrecy at domestic level in general[16].

3. Possible reasons which have brought to the abandonment of the bank secrecy

As long as it concerns the reasons of the abandonment of the bank secrecy in Austria, different explanations can be found in literature.

Together with Luxembourg, they were the countries with the highest number of foreign investments in common funds in Europe[17] and at the same time in 2013 Austria was placed at the 18th position in the list of the 82

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[16] AB 323 BlgNR 24, GP, 3. and K. DAXKOBLER - E. PAMPERL, *Das schleichende Ende des Bankgeheimnisses? Aufrechterhaltung im Inland bei gleichzeitiger Durchbrechung im Rahmen des internationalen Auskunftsverkehrs?*, in “SWK” 22/2014, p. 1001.

[17] See V. H. DEHEJIA – P. GENSCHEL *Tax competition in the European Union*, MPIfG Discussion Paper 98/3, Cologne, Max Planck Institut für Gesellschaftsforschung, 1999 and J. C. SCHARMAN , *Regional Deals and the Global Imperative: the External Dimension of the European Union Savings Tax Directive*, in “Journal of Common Market Studies”, 46, 2008, p. 1049-1069.

less cooperative jurisdictions[18], but in the last years something seems to have changed.

Trying to explain these different approaches with the theories on fiscal competition appears as useless for some authors and literature seems to prefer the reference to internal constraints[19].

These constraints consist mainly in institutional restrictions[20]or pressures related to budget constraints or the necessity of more equity[21].

For other authors, these factors are however still unable to explain this change of opinion in Austria and Luxembourg because they do not pay any attention on the effects of fiscal competition on countries of small or big size[22].

For example, the constraints linked to budget should motivate a State of small size to be more competitive in fiscal matters.

Others tend to believe that the real engine, that brought Austria and Luxembourg to the almost total removal of the bank secrecy, was the threat from U.S.(dominant power in the International economical businesses) to proceed to a partial closure of the United States financial market for these

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[18] Tax Justice Network, *2013 Results- Financial Secrecy Index, Brussels*, Tax Justice Network, 2013, http://www.financialsecrecyindex.com/introduction/fsi-2013-results.

[19] Example that can be found in P. GENSCHEL- P. SCHWARZ, *Tax competition: a literature review*, in “Socio-economic Review”, 9, 2011, p. 339-370.

[20] M. HALLERBERG - S. BASINGER, *Remodeling the Competition for Capital: How Domestic Politics Erases the Race to the Bottom*, in “American Political Science Review, 98, 2004, p.261-276.

[21] T. PLÜMPER – V. E. TROEGER - H. WINNER, *Why is There No Race ti the Bottom in Capital Taxation?*, in “International Studies Quarterly”, 53, 2009 p. 761-786, also D. SWANK – S. STEINMO, *The New Political Economy of Taxation in Advanced Capitalist Democracies*, in “American Journal of Political Science”, 46, 2002, p. 642-655.

[22] I. RADEMACHER, *Tax Competition in the Eurozone: Capital Mobility, Agglomeration, and the Small Country Disadvantage*, in “MPIfG Discussion Paper” 13/13, Cologne, Max Planck Institut für Gesellschaftsforschung, 2013.

two countries if they would not have accepted the automatic exchange of information through the FATCA instruments[23].

This threat has had a strong impact on Austria and Luxembourg since the new European Directive on the administrative fiscal cooperation (Directive n. 2011/16/EU) establishes in Art. 19 the “most favored nation clause” so that the same level of cooperation between Austria and United States through FATCA has to be agreed also to the other Member States which will request the same level of assistance to Austria[24].

Another important event was the entrance into force of the new so-called “Savings Directive[25]” that, even if it provides for transition provisions for Luxembourg and Austria (where it would be still possible to apply the withholding tax), represents surely a thrust for Austria in order to adopt an automatic exchange of information, inspired to the one provided by FATCA.

Of fundamental importance is also the adoption of the European Directive n. 2014/107/EU which obliges the Member States to automatically exchange information, also allowing the automatic exchange of bank information from Austria towards the other States.

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[23] For detailed information about FATCA, look at C. P. TELLO – J. MALHERBE, *La Foreign Account TaxComplianceAct (FATCA) américain: un tournant juridiquedans l’échange d’informations fiscales*, in “Rivista di diritto tributario” n. 3/2014, p. 300; P. VALENTE - L. VINCIGUERRA, *Scambio di informazioni*, Ipsoa, Milano, 2013, p. 171, R. DOLCE, *Normativa FATCA: l’identificazione delle Financial Institution alla luce dell’IGA Italia Usa e della bozza di decreto attuativo*, in “il fisco” n. 23/2014, p. 2285, M. SAPIRIE, *Model Agreements Signal U.S. move to Automatic Information Exchange*, in “Tax notes”, 136, 2012, p. 633, A. BRODZKA, *The Road to FATCA in the European Union*, in “European Taxation”, October 2013, T. PEDIADITAKI, *FATCA and Tax Treaties: Does It Really Take Two to Tango?*, in “European Taxation”, September 2013.

[24] L. HAKELBERG, *The Power Politics of International Tax Cooperation. Why Luxembourg and Austria accepted automatic exchange of information on foreign account holders’interest income*, in “EUI Working Papers”, RSCAS 2014/26.

[25] Directive n. 2014/48/EU.

However, the path which has brought to the 2013 modification of ADG is connected to the so-called “peer review”, a checking procedure divided in two phases to which Austria was subjected for the implementation of the provisions on the transparency and mutual assistance.

The first phase consists mostly in a revision concerning the juridical frame and this phase has reached its climax with the Global Forum Report of 12 September 2011[26].

This report underlines how the ADG of 2009 provides for an obligation of notification for the bank to its clients concerning the request for the exchange of information from the foreign competent authority.

In this way, the customer can oppose to this decision and appeal to the VfGH or to the VwGH.

Interesting is that the ADG does not provide any derogation to this obligation neither if there are cases of necessity or urgency and these are provisions which, on the other hand, the OECD invites Austria to adopt.

The second phase focuses mainly on the practical application and the effective working of the exchange of information and was completed only in July 2013.

According to this second report[27], Austria resulted “partially conformed”, and this implies that was compatible with the OECD standard on transparency and mutual assistance.

The Federal Republic of Austria is then, newly invited to adopt derogations to the preliminary notification in some cases[28].

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[26] Peer Review Report, *Phase I*, *Legal and Regulatory Framework*, Austria. Online: www.eoi-tax.org/jurisdictions/AT#previous_8ba8b2ba1d4e5de3190ed58a951e76f5.

[27] Peer Review Report, *Phase II, Implementation of the Standard in Practice*. Online: www.eoi-tax.org/jurisdictions/AT#latest.

[28] P. UNGER, *Umfang und Grenzen der internationalen Amtshilfe*, in “Taxlex”, 2014, p.266.

In addition, the new version of the OECD Standard of July 2012 expressly provides for the so-called “group requests”, the requests directed not to a single taxpayer but to a group of them who are believed to have violated fiscal provisions.

About this type of request, in Austria, there has been a lively debate on the possibility to propose them since some treaties require detailed information on the individual taxpayer[29] while for others the presence of other elements, able to allow the competent authorities to determine the subject, is sufficient[30].

These two reports of the Global Forum together with the other reasons above described brought to the amendment of the ADG through the BBG, which entered in to force on the 13 June 2014.

These modifications contain the advices of the OECD Reports of 2011 and 2013 and the most important innovations regard on one side the notification to the taxpayer and on the other side the group requests.

4. How these new provisions affect the level of protection of the taxpayer

Starting from the procedure for the exchange of information, the requests coming from the foreign States are forwarded to the Central Liaison Office (CLO) that checks the formal correctness and the completeness of the request, which then, is transmitted to the competent authority.

[29] An example is the DBA (Double Taxation Agreement) with Switzerland.

[30] Examples are the Agreements on the Double Taxation Agreements signed with Germany and French.

Before the ADG amendment through the BBG of 2014, there was an obligation of notification for the taxpayer, which was informed of the request and as previously described, could oppose to the request.

From 2014, the CLO does not have any obligation to inform the taxpayer on the request of information concerning him/her and consequently he/she will not be able to verify the request and oppose preventively to the exchange of information.

Thus, in literature there have been amendments proposals, which were in favor of a more effective protection of the taxpayer (for example the extension of the old procedure provided for by the ADG in each case of assistance) and the 2014 legislator seems to have been of a different opinion and has tried to justify itself by sustaining that this modification was needed in order to fully respect the OECD standard.

In the Peer Review Report, however, the Global Forum was hoping for the prevision of derogation to this notification obligation in certain circumstances, but it did not require the complete abolition of the notification.

In addition, among the authors who have tried to justify this abolition, Jirousek[31] thinks that the adoption of provisions applicable in exceptional circumstances would have created situations of juridical uncertainty.

Nevertheless, this abolition, particularly after the sentence of the European Court of Justice on the Sabou Case, arises several perplexities.

These perplexities concern the compatibility of the ADG to Art. 6 of ECHR that in paragraph 3 provides that everyone that has been accused has the right to be immediately informed in a detailed way and in a language

[31] H. JIROUSEK, *Die Revision des Amtshilfe-Durchfürungsgesetzes*, “SWI” 2014, p. 299.

that he/she is able to understand the nature and reasons of the accusation against him/her.

But, Art. 6 of the Convention can be applied only in criminal or tax-criminal procedures and not in administrative and tax procedures and this has brought Bayer[32] to ask herself if only for the fact of being interested by a request of information, a person could be defined as accused and can rely on the application of Art. 6 ECHR.

Other doubts emerge from the analysis of some article of the European Chart of Fundamentals Rights.

Particular relevance is given to Art. 8 that protects the respect of private and familiar life and Art. 7 which concerns the protection of personal data.

The formulation of a request of cooperation implies the intrusion inside these rights and this intrusion will be admitted only in absence of any other less invasive means or way to acquire the information, subsequently there is the need of a proportionality evaluation in order to protect these rights.

In each case, where there is the violation of articles 7 and 8 there is the chance to appeal according to Art. 47 of the same Chart that provides for an effective remedy.

However, the remedy disciplined in Art. 47 is normally admitted only after a definitive decision or in presence of an independent action, profiles that are not matched by the request of exchange of information[33].

Another doubt for literature is the possible conflict of constitutionality of § 4 paragraph 1 last sentence, the ADG, as modified by

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[32] A. BAYER, *Das Amtshilfe-Durchführungsgesetz im rechtlichen Kontext - eine Replik*, in "Taxlex", 2014, p. 372.

[33] S. GRILL, *Amtshilfe: Abschaffung des Notifikationsverfahrens im Einklang mit EuGH*, in "RdW" v. 17.11.2014, p. 687.

BBG 2014 with the § 1 DSG 2000 stand., a constitutional provision that ensure the privacy of personal data and the right to be informed.

In this case, on one side ADG prohibits to the credit institutions to give information to the client on the request for the exchange of information (it provides only a few exception[34]), so that in this case, the taxpayer protection will be a deferred juridical protection and the requesting state will have adopted a decision on the acquired information and will have to ensure a fair process but on the other side § 26 DSG, which is the Austrian implementation act of the European Directive on data protection, wards the right of information on the use of a person's data.

In § 26 DSG, there are also some exceptions where this right would be unprotected and these are: the necessities of protecting the concerned person for particular reasons, the presence of a conflict with legitimate interests of thirds, the presence of imperatives of public interest and the exchange of information (§ 26 comma 2 DSG).

The prevalent public interests, to which the § 26 DSG refers, can result from the necessity of protecting the foreign politics but also important economic or financial interests of Austria and the European Union (§ 26 comma 2 4 DSG), or they can also result from the necessity to anticipate or persecute crimes (§ 26 comma 2 Z 5 DSG), like tax evasion.

For this last reason, the limitation of the right of information from banks to their customers appears to be justified and legitimate because it is possible that when the customer is informed he/her could commit crimes in order to avoid the forward of information[35].

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[34] Exception will be the presence of an immediate danger or a danger of collusion.

[35] S. GRILL, *Amtshilfe: Abschaffung des Notifikationsverfahrens im Einklang mit EuGH*, in "RdW" v. 17.11.2014, p. 685

With reference to group requests, § 4 paragraph 2 ADG, as modified in 2014 by BBG, seems to have transposed, the guidelines as described in the commentary to the OECD Model.

For some part of the literature it was already possible, before the reform, to forward group requests since the condition provided for the exchange of information was related to the "foreseeable relevant information".

But because of the provisions contained in ADG (BGBl I 2009/102), the CLO had to inform every concerned person and this was not possible due to the fact that in group requests the people are unknown.

Their identity is acquired by the CLO only during the transmission of information by the credit institute but since the process provided by ADG could not be observed for group requests, the exchange of information was not possible.

For the same literature, the concrete chance to answer to the group request does not lay on the new § 4 paragraph 2 ADG (BBG 2014), but in the abolition of the notification.

It was then suggested by part of the literature that § 4 paragraph 2 ADG (BBG 2014) applies only to the process of request where the bank secrecy has to fall but it must be taken in consideration that group requests can also be asked according to situations where the bank secrecy does not find application.

Thinking that § 4 paragraph 2 ADG (BBG 2014) applies only in situations under bank secrecy would mean admitting that the Austrian legislation on the cross-border exchange of information does not correspond to the OECD Standard.

For this side of literature, then, § 4 paragraph 2 ADG (BBG 2014) should be seen as a clear commitment of Austria to group requests.

In order to individuate the group, which interpretation is given to the words "*forseeably relevant*" has an important significance.

In fact, since there is no mention of precise data of the taxpayers involved, in group requests it is easy to have cases of “fishing expedition”.

From the 20 July 2012, the commentary on the OECD Convention seems to have cleaned these doubts providing that even if the taxpayers cannot be determined by the name is sufficient if he/she can be individuated on the basis of other characteristics.

The group can, in fact, be individuated by an accurate description of the characteristics, the reference to the applicable act and a declaration of reasons that have led to the request.

Where these prerequisites are absent then it is possible to have a “fishing expedition” and it is possible to reject the request.

Furthermore, still related to the individuation of the person, § 4 paragraph 3 ADG (BBG 2014) provides the possibility that in a request of exchange of information the identity can be revealed not by the name but thanks to a different factor, like the number of a bank account[36].

5. Future perspective: a new amending proposal for § 38 BWG on the horizon

On the 12th May 2015, the Austrian government has presented a proposal for a new “Bankpaketen” which contains several important modifications and new institutes concerning the exchange of information and the bank secrecy.

The approval of this new act requires the same majority requested for the modification of a constitutional provision, and even if this it is still

[36] S. GRILL, *Amtshilfe: Abschaffung des Notifikationsverfahrens im Einklang mit EuGH*, in “RdW” v. 17.11.2014, p. 688-689.

only a proposal, that could obviously be subjected to modifications, it is however interesting to have an overview on its main focus points since from this proposal, clearer as ever, emerges the intention of the Austrian government to reduce the bank secrecy down to the bone from all the perspectives.

Above all, especially relevant for this contribution, is the proposal of amendment regarding § 38 BWG, with the main consequence consisting in the possibility to break the bank secrecy also for internal investigation proceedings.

At the same time the proposal also introduces two new provisions: the Accounts Registration Act and the Capital Outflows Registration Act.

With reference to the Accounts Registration Act, the amending proposal provides for the introduction of a register of bank accounts by the Finance Ministry.

In fact, according to this act, each credit institute, even if the proposal does not specify if a request should be necessary or not, will have to electronically submit to the Finance ministry the information concerning: the number, date of opening and closing, the data necessary to identify the natural and juridical person for fiscal purposes and general data in cases where they are not taxable[37] in presence of three hypothesis (for criminal procedural, criminal-fiscal procedural purposes and in presence of an appropriate and adequate interest for the recovery).

Particularly important are the heavy sanctions provided, which amount up to 300 000 euro for the intentional violation of the provision and to 150 000 euro for the negligent violation.

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[37] The information that will be transmitted to the Finance Ministry refers to data from 01/03/2015

On the other hand, the Capital Outflows Registration Act, provides for the obligation for the credit institutes to report to the Finance Ministry the capital outflows of a high amount (starting from a minimum of 50 000 euro), which take place from accounts or deposits of natural people with the exception of business accounts of the entrepreneur (of which the proposal does not give any definition).

At the same time, there is an obligation to report also the flows of capital which are characterized by a manifestly connection (so-called "Anti-abuse rule").

The information about the capital flows will be transmitted on the last day of the month subsequent to the capital flow and this procedure, according to the proposal, will take place for the first time for the period going from the 31 March 2015 and the 31 December 2015 and for the last time in December 2020[38].

This amendment proposal contains also the implementation act of the new Directive n. 2014/107/EU, which pushes for a stronger automatic exchange of information.

The main purpose of this amendment proposal (*Gemeinsamer Meldestandard-Gesetz* – GSMG), in fact, consists in the implementation of the obligation of exchanging information in the frame of both the Directive on the mutual administrative assistance and of the other bilateral agreements.

In concrete, the *Gemeinsamer Meldestandard-Gesetz* – (GSMG) provides for an obligation for the financial institutions to forward the

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[38] The sanctions provided for the violation of these provisions are the same provided in the case of the Accounts Registration Act.

comprehensive information about accounts for which they have a registration obligation towards the *Bundesminister für Finanzen* (BMF)[39].

This new act will enter into force from the 1st January 2017, it will concern information related to the tax period from 1st January 2017 and it obliges to forward the information by 2018.

The transmitted information will regard the account holder as well as the account balance and the interest earnings of the past calendar year, and the information will have to be forwarded to the Member States automatically within 9 months upon expire of the calendar year..

The reportable people, on the other hand, are the ones that have their residence in another Member State and the verification of the existing accounts will have to be ended by the 31.12.2017 for the natural persons while by juridical persons by the 31.12.2018.

Conclusively, it seems that the 2014 ADG modification and in general the implementation of the new European Directive (n. 2011/16/EU), the FATCA agreements and this last proposal have undoubtedly led to a strong and heavy restriction of bank secrecy in the Austrian system, thus, important questions on the taxpayer protection have not found a proper answer yet, nor in the Austrian legal system or at European level.

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[39] The amends will be up to 300.000 EUR.