

# Tax Games: the Race to the Bottom

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Europe's role in supporting an unjust global tax system

2017



# Austria

"I can't believe that Austria sided with Malta, Cyprus and Great Britain in the fight against tax dodging of multinationals, because then we would be on the wrong side."

## Othmar Karas

Austrian member of the European Parliament, European People's Party (Christian Democrats), in reaction to Austria's unwillingness to accept public beneficial ownership registers.<sup>359</sup>

## Overview

Some of this year's international scandals have had strong links to Austria. According to the journalist network Dossier, €4.1 million was transferred to 32 bank accounts in Austria (involving 88 transactions) from Russia, as part of the 'Laundromat' scandal.<sup>360</sup> The Austrian Finance Ministry reacted cautiously, stressing that all relevant leads with links to Austria would be investigated. But the Ministry also highlighted that if financial flows and benefits turn out to have been taxed correctly, Austria will have nothing to object to. Especially when the money is transferred from another EU country, this might not cause concerns in Austria.<sup>361</sup>

During the 'Malta Files' scandal, Austrian newspaper Kurier reported on the involvement of numerous Austrian companies and citizens, including in the gaming industry, Austrian company service providers, airlines, leasing companies, financial service providers and wealthy Austrians owning expensive yachts registered in Malta.<sup>362</sup> The Kurier reported that a 2.63 gigabyte file with 2,553 links to Austria had been sent to the media and the Ministry of Finance.<sup>363</sup> The Ministry said it would check all entries, but underlined that being on the list did not automatically mean that anyone was guilty of tax evasion.<sup>364</sup>

## Blacklisting of 'tax havens'

The Austrian government considers the creation of an EU list of 'non-cooperative' third-countries (i.e. non-EU tax havens) as a 'high priority'.<sup>365</sup> However, some features of the Austrian tax system are themselves coming under increasing scrutiny internationally. In 2016, the Brazilian National Revenue Agency added Austrian holding companies to a Brazilian 'grey list' of 'privileged' tax regimes (PTRs). This listing only applies to holding companies without 'substantial economic activity in Austria, judged by the existence of qualified employees in sufficient number and appropriate management facilities'.<sup>366</sup>

Austria also came close to receiving a disastrous rating when the country's anti-money laundering system was reviewed by the Financial Action Task Force (FATF) in 2016. According to media reports,<sup>367</sup> a big Austrian delegation went to the FATF meeting in Busan, South Korea, where the assessment of Austria was being discussed, to prevent the worst outcome – which would have been to end up on the FATF grey list. In the end, Austria avoided the grey list.<sup>368</sup>

## Political proposals

In June 2017, the conservative Finance Minister, Hans Jörg Schelling, presented the 'Schelling's plan to eliminate opportunities for tax avoidance and evasion', which among other things proposes stronger measures to prevent tax avoidance caused by digitisation (by having virtual corporations); a common EU model for tax treaties with low-tax jurisdictions; and a common corporate tax base in the EU to 'ensure a more transparent tax competition between member states'.<sup>369</sup>

Schelling's conservative People's Party wants to lower taxes and other costs to business by maximum €12.7 billion per year. The party's election programme suggested it would allow more flexible depreciations and reduce corporate income taxes – retained business profits would not be taxed any more. The programme estimates the costs to be €1 billion,<sup>370</sup> partly financed by counter measures against tax evasion (estimated to generate €0.8 billion), as the Conservatives want to 'close tax evasion routes and fight tax fraud' by multinationals by introducing digital permanent establishments, prohibiting 'dubious transfers' to 'tax havens', and offering better protection for whistleblowers. They also want to fight fraud with value added tax (VAT), criticising the EU common VAT system as being vulnerable to carousel fraud.<sup>371</sup>

The Social Democrats – who were, together with the People's Party, part of the coalition government until parliamentary elections in October 2017 – proposed an 'anti-profit shifting law' (Gewinnverschiebungs-Bekämpfungsgesetz).<sup>372</sup> Their election programme foresaw amongst other things, public country by country reporting; providing protection for all whistleblowing employees; stronger penalties for corporate tax dodging; and new measures against corporations that use letterbox companies in tax havens.<sup>373</sup> Chancellor Christian Kern mentioned tax as one of his seven priority areas and called for tax justice, common rules against tax competition (meaning measures against tax havens and against tax incentives for big corporations), and a common EU tax base with a minimum tax rate. He has also underlined that he considers corporate tax avoidance an abuse of European solidarity.<sup>374</sup>

The economic programme of the nationalist Freedom Party, which is likely to be part of the next Austrian coalition government, is very close to the programme of its possible coalition partner, the Conservatives. They also want to reduce taxes and other costs by €12 billion per year, saying businesses should be supported by lower taxes on profits and more flexible depreciations. As with the Conservatives, the Freedom Party is against wealth and inheritance taxes.<sup>375</sup>

### EU Common consolidated corporate tax base (CCCTB)

In 2012, after the European Commission had first proposed a CCCTB, Austria was very sceptical and doubted that it would simplify administrative processes.<sup>376</sup> In 2017, however, the Austrian Finance Minister, Hans Jörg Schelling, expressed support for a 'common corporate tax base',<sup>377</sup> although it is unclear whether this also includes support for consolidation.

In January 2017, the Austrian Federal Council (the chamber of the nine federal provinces) drew attention to some problematic areas of the European Commission's proposal for a CCCTB. Among other things, they criticised that the 'envisaged tax privileges' (e.g. for research and development expenses) would lower tax revenues and be undesirable and difficult to explain to the population, as citizens expect CCCTB to generate higher tax revenues and/or impose higher taxes on multinational corporations. Moreover, they highlighted the risk of a high administrative burden as a result of the EU running one system for internal transactions (i.e. the CCCTB), and another for international transactions. Finally, they argued that '*a minimum tax rate should be established as a matter of urgency, to avoid further intensifying tax competition within [the] EU*'.<sup>378</sup>

Already in December 2016, Schelling told members of the EU sub-committee of the Austrian parliament that he had tried to raise the issue of minimum tax rates in the EU, but that his arguments were 'crushed' by other member states.<sup>379</sup>

### Tax and development

The Austrian government states that it provides bilateral tax capacity building assistance to Macedonia without conditionalities.<sup>380</sup> The Austrian government does not have a strategy that specifically links tax issues with policy coherence for development,<sup>381</sup> and is not planning to conduct any impact assessments to measure the effects of its tax policies on developing countries.<sup>382</sup>

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## Transparency

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### Public country by country reporting (CBCR)

The conservative Austrian Finance Minister Schelling repeatedly spoke out against public country by country reporting and cited 'taxpayer confidentiality' as a key reason for his opposition.<sup>383</sup> However, the Social Democrats have spoken out in favour of public country by country reporting.<sup>384</sup>

### Ownership transparency

Austria has implemented the EU's 4<sup>th</sup> Anti-Money Laundering Directive (AMLD) in two steps. In December 2016, a new anti-money laundering law for the financial sector was created (Finanzmarkt-Geldwäschegesetz).<sup>385</sup> In July 2017, this was supplemented with, among other things, a beneficial ownership register law (Wirtschaftliche Eigentümer Registergesetz), in which Austria has committed itself to setting up a beneficial ownership register.<sup>386</sup> This law will come into force on 15 January 2018, but the register will not be public. Access to the register will be completely open only to designated people who need access because of their anti-money laundering duties within the framework of customer due diligence, i.e. banks, attorneys, notaries, business consultants, estate agents, insurance brokers, members of the gambling and betting industry, tax consultants, accountants, etc.<sup>387</sup>

For other people, the register will be less accessible. Upon written request, individuals and organisations can get access if they can demonstrate a 'legitimate interest' in connection with the prevention of money laundering and terrorist financing. 'Legitimate interest' means that prevention of money laundering or terrorist financing must be laid down in the organisation's mission statement or statutes, or that he/she can already prove 'successful activities' in that area. Additionally, the person has to prove how access to the register can contribute to preventing money laundering or terrorist financing.<sup>388</sup>

The register will contain data on any person who ultimately owns (25 per cent or more) or controls (as a senior manager or board member) entities such as limited liability companies, partnerships, private foundations and (foreign) trusts managed in Austria. The law's commentary<sup>389</sup> explains that trusts of the (widely used) Treuhand kind, which is sufficiently similar in its functioning and structure to ordinary trusts, will fall under the scope of the law.<sup>390</sup> This is a welcome step forward, since Treuhands have previously raised concerns. For example, in its 2016 evaluation of Austria, FATF highlighted that: '*measures to prevent the misuse of Treuhand arrangements are limited*'.<sup>391</sup>

There will be penalties of up to €200,000 for not registering beneficial owners, a penalty of €10,000 for unauthorised access, and of €30,000 for transferring confidential data to third parties.<sup>392</sup> The register has been developed with Statistics Austria, and will be operated as a supplement to their Business Service Portal.<sup>393</sup> The register cannot be accessed cost-free, and the user fee has yet to be decided.<sup>394</sup>

### Automatic exchange of information – a loophole for Austrians

In response to international developments, Austria has implemented automatic exchange of financial account information.<sup>395</sup> However, due to a loophole in the automatic exchange agreement between Austria and Liechtenstein, Austrian residents will still be able to hold certain types of assets secretly in Liechtenstein.<sup>396</sup>

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## Taxation

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### Tax treaties

In total, Austria has 42 tax treaties with developing countries, which is just above average (41.77) among the countries covered by this report.<sup>397</sup> The average reduction of developing country tax rates within those<sup>398</sup> treaties – 3.9 percentage points – is also above the average (3.39 percentage points) among the countries covered in this report.<sup>399</sup>

Austria re-negotiated a double taxation agreement with India, ratified in May 2017, which now allows for automatic exchange of information and mutual administrative assistance. Since 2015, Austria has also been in tax treaty negotiations with Kosovo.<sup>400</sup>

In general, according to the Ministry of Finance, Austria's double tax treaties are 'largely' oriented by the OECD Model Tax Treaty.<sup>401</sup>

### International commitments

Although Austria has participated in the OECD BEPS negotiations, Austria has in the end chosen to make a lot of reservations when signing the BEPS Convention. Out of the 11 articles that civil society organisations have called on governments to adopt, Austria has made reservations (opted out) of seven (see table 7 in chapter 5.1.2 on 'Tax sudoku – the OECD's BEPS Convention'). At the same time, Austria has opted in to the articles that civil society organisations have warned against, including secret binding arbitration (see chapter 5.1.2 on 'Tax sudoku – the OECD's BEPS Convention', including table 8).

### Tax practices

ABA – Invest in Austria, the national investment promotion company – promotes Austria on its website for its tax advantages, especially for holding structures. It refers to Austria as an 'outstanding holding location'. For example, ABA highlights that profits from foreign subsidiaries can be pooled tax-free in an Austrian holding company; profits from the disposal of foreign subsidiaries are tax-free; losses of foreign subsidiaries can be offset against the domestic profits of the holding company (group taxation); interest expenses on borrowings used to acquire third-party equity interests are tax deductible, and dividends and capital gains from foreign subsidiaries are, for the most part, tax free.<sup>402</sup>

Austria also allows corporations to consolidate foreign losses with domestic profits for tax purposes.<sup>403</sup>

According to the OECD, special purpose entities account for 25 per cent or more of inward foreign direct investments in Austria.<sup>404</sup>

### Tax rate

The Ministry of Finance has been keeping an eye on possible new tax breaks in the wake of Brexit and the plans of other EU countries to lower their corporate taxes.<sup>405</sup> The Ministry has already calculated the impact of a decrease in corporate income tax from 25 to 20 per cent, estimating the cost to be €1.5 billion per year.<sup>406</sup> According to the Ministry, this loss would only be compensated by an economic stimulus of €300 million, leaving net costs of €1.2 billion.<sup>407</sup> A precedent came in 2005, when the corporate income tax rate was reduced from 34 to 25 per cent, prompting many German companies to return to Austria. Back then, after some irritation with Austria, Germany also lowered its corporate income tax rate.<sup>408</sup>

However, the People's Party as well as the Freedom Party – who might form the next coalition government – have announced that they are more in favour of tax incentives (for example, no taxation of retained profits) than in a cut in headline tax rates.<sup>409</sup>

Austria regularly calculates the costs of tax incentives (as indirect subsidies). For example, in 2015 it calculated foregone annual tax revenues caused by group taxation to be €250 million. However, the indirect costs for some tax exemptions are not calculated, such as tax-free profits from 'international intercorporate stock holdings' (internationale Schachtelbeteiligungen).<sup>410</sup>

## Tax rulings

Austria has a formal procedure for obtaining unilateral advance pricing agreements (APAs) (see also chapter 4.4 on 'Sweetheart deals') since 2011.<sup>411</sup> Taxpayers can ask for binding APAs regarding certain issues in taxation such as transfer pricing, but also for corporate restructurings or for group taxation. Bilateral APAs are possible in cases where a tax treaty provides for the procedure. A procedural document on APAs, released in December 2014, concerns APA applications submitted by multinational corporations, containing specific criteria to prevent aggressive tax planning. The Ministry of Finance also considers the economic substance of the company's activities performed in Austria, liaising with other jurisdictions when necessary. PwC comments that although the *'document represents rather a formalisation of the existing APA practice, it also reduces the room for potential negotiation with the tax authorities during the application process that might have been the case in the past.'*<sup>412</sup>

In answering a written parliamentary question, the Ministry of Finance has given details on the APAs provided between 2011 and 2014. For 2014, 26 rulings have been issued, of which 13 were for restructurings, two for group taxation and 11 concerned transfer pricing.<sup>413</sup> The fee charged for issuing APAs varies with the size of the corporation,<sup>414</sup> and data provided shows that most APAs have been issued to large corporations: between 2011 and 2015, the maximum fee of €20,000 has been paid for 68 APAs (out of a total of 137).<sup>415</sup>

Austria's APAs are not included in the official statistics of the European Commission because, according to the Commission, the data has not been made available to them.<sup>416</sup>

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## Global solutions

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The government says it is *'doubtful about the added value of an intergovernmental body on tax cooperation under the auspices of the UN'*. Instead, it *'believes that the existing panels in the EU and OECD are suitable for holding a dialogue with partner states in the topic area'*. Furthermore, Austria believes that it is crucial to develop capacities of those actors in partner countries who are – in their respective field – drivers of change (governmental offices, non-governmental organisations, e.g. local chapters of Transparency International, national auditing authorities or universities).<sup>417</sup>

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## Conclusion

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Austria has taken a cautious approach to international tax reforms, trying to rely mainly on its domestic tax laws and anti-abuse measures. What is also striking is the government's reluctance to allow greater transparency, being against both public country by country reporting, and public registers of beneficial owners. Although Austria has partly given up its strict banking secrecy, it seems the country is still hesitant towards transparency.

The Austrian tax treaty network is an issue of concern. Both the total number of tax treaties with developing countries, as well as the average reduction in developing country tax rates, are above average. Thus, one can assume that the Austrian treaty network has a negative impact on its developing country partners. Unfortunately, Austria has no plans to conduct an analysis of these impacts.

Another issue of concern is Austrian holding companies, which have caused the country to be grey-listed by Brazil. The possible tax cuts, especially for corporates, that are envisaged by a possible coalition between the Conservatives and the Freedom Party might further tax competition within the EU and globally.

Finally, it is problematic that the Austrian government does not support the establishment of an intergovernmental UN tax body, which would give developing countries a truly equal say in global decision-making on tax matters.