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Discussions on the abolition of Austrian banking secrecy provisions – The end of the EU withholding tax?

During the last few days there have been renewed discussions on the abolition of Austrian banking secrecy provisions for foreign investors. Several Member States of the EU as well as the EU itself are pushing hard to convince Austria to join the automatic information exchange in the EU, despite levying the anonymous EU withholding tax.

So far there has been no final decision on this issue, but Luxembourg has recently announced that it would be able to change to the automatic information exchange system by 1 January 2015 without there being any negative consequences. Thus, there is a certain likelihood that Austria also switches from the anonymous EU withholding tax system to the automatic information exchange within the foreseeable future.

What this means for you

As a consequence of such a switch, no daily/periodic/annual EU withholding tax calculation and reporting will be necessary for reporting funds in Austria any longer. Even though there is no final decision yet, we suggest that you consider these developments when planning investments in IT infrastructure or projects in connection with the EU withholding tax. We will keep you updated on further developments in this field.

Author:
Olivia Stiedl
olivia.stiedl@at.pwc.com
+43 1 501 88-3427

Editorial

Over the last few weeks, the debate surrounding the payment of what is deemed to be a fair amount of taxes has reached its all time high. EU Member States are absolutely determined to take measures against tax havens and to challenge tax driven structures even more aggressively. In the course of this debate, Austria and Luxembourg have both come under significant pressure based on the fact that both countries have been applying the withholding tax instead of the information exchange regime for EU Savings Directive purposes. While Luxembourg has indicated that it will switch to the information exchange regime, Austria is still defending its position....

Thomas Steinbauer

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The FTT Directive – a brief update

This article gives you a general update on the recent developments in connection with the published proposal for an FTT (Financial Transaction Tax) Directive. We have tried to focus especially on the challenges Austria will face in connection with the implementation procedure. Furthermore we want to share with you some of our thoughts about the very ambitious date when the FTT should come into force in Austria, as well as about some practical difficulties the involved parties may have to deal with.

On 14 February 2013, the European Commission published a proposal which provides details on the planned FTT to be implemented by Austria and the 10 other Member States[1] making up the "FTT zone" under the Enhanced Cooperation Procedure (ECP).

The proposed Directive will be discussed by the Member States with respect to its implementation under the ECP. Only those Member States participating in the ECP will have a vote, and they must agree unanimously before the new FTT can be implemented. The current proposal foresees that the 11 participating Member States are to implement the FTT by 1 January 2014. Whether the ambitious schedule can be met or not obviously depends on the Council reaching agreement on the proposal in time.

However, the timeframe seems to be very ambitious given the currently open issues that need to be agreed upon before the regime can come into force (this includes a final form of the FTT and an agreement on the allocation of the received FTT revenues).

Implementation in AUSTRIA

In contrast to France and Italy, which will also participate in the ECP but already have a "national" FTT regulation in place, Austria will not introduce a "national" FTT regulation upfront, but rather will start implementing the FTT as soon as the final EU Directive is published. As stated in the "Erläuterungen zum 1. Stabilitätsgesetz 2012", the Austrian government expects to gain EUR 500 million per year from 2014 onwards as a result of the implementation of the FTT in Austria. This assumption seems to be highly ambitious and puts considerable pressure on the Austrian government and the financial institutions involved (banks, insurance companies, investment funds, etc.) to implement the FTT as soon as possible.

As it happens, there is no information available on the part of the government at the moment as to how exactly Austria plans to implement the FTT. With respect to this and the short transitional period, just how the FTT proposal will be transposed into national law in Austria remains very unclear.

In view of the above, we can expect that the FTT proposal will be transposed into national law in Austria literally straight from the EU Directive. We hope that we will be able to provide you with more detailed information on the progress of the implementation of the FTT in Austria in our next newsletter.

A tentative schedule including the next steps until the implementation of the FTT in the 11 Member States could take the following form:

14 February 2013:	European Commission's "new" FTT proposal issued
21 February 2013:	Start of series of EU 27 Technical Council working group meetings
April 2013:	2nd Technical Council working group meeting
May 2013:	Committee on Economic and Monetary Affairs adopts draft European Parliament Opinion on proposal
Autumn 2013:	Final FTT agreed upon among the ECP 11, followed by EU legal check
December 2013:	Unanimity vote and adoption by the ECP 11 in the ECOFIN Council
2014/2015?:	Implementation, transposition into national laws of the ECP 11

[1] Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain

How the FTT will affect financial institutions dealing with counterparties outside the FTT zone

The new proposal is largely based on the Commission's 2011 proposal, with some minor but still significant modifications.

Just to pick one example: The new proposal adds the "issuance principle" to the already existing "residence principle" regarding the definition of establishment, which will have a wide effect on transactions outside the EU or the FTT zone.

As already under the old proposal, financial institutions resident in the FTT zone will be subject to FTT for all of their transactions and, at the same time, financial institutions not resident in the FTT zone will be taxed whenever transactions with counterparties in the FTT zone are made.

Further, the new "issuance principle" means that a financial institution with no link to the FTT zone can now be liable to the FTT when it is involved in a transaction over instruments issued by a company established in the FTT zone.

Newsticker:

EU Commission stated early this week that they do not expect that the FTT regime will come into force 1 January 2014 but at a later point in time.

Examples of transactions which will trigger FTT in Austria are as follows:

Residence principle
- A Hong Kong fund undertaking transactions with an Austrian broker as counterparty
- Transactions undertaken by a UK branch of an Austrian insurance company
- Transactions undertaken by an Austrian branch of a US based fund manager

Issuance principle
- When a US bank sells shares of an Austrian company to an Irish fund, both the US bank and the Irish fund will become subject to the FTT in Austria, notwithstanding that neither the US nor Ireland are FTT participants.

  "Economic substance" exemption: But, if a party in a non-FTT country can prove that there is no link between the economic substance of the transaction and the territory of an FTT country, the underlying financial transaction will not be subject to the FTT. Unfortunately, there is currently no further guidance on how this exemption can/will be applied in practice.

Conclusion

The draft Directive still proposes that the FTT regime should come into force as from 1 January 2014. In our opinion this timeframe is very ambitious given the fact that existing systems and processes of financial institutions have to be adapted to cope with the requirements under the FTT regime. Furthermore it is currently unclear who will be responsible for the deduction of the FTT and how the FTT should be levied in practice.

Authors:
Stefan Perklin
stefan.perklin@at.pwc.com
+43 1 501 88-3735

Ewald Scharzinger-Fuchs
ewald.schwarzinger@at.pwc.com
+43 1 501 88-3654

Tax agreement between Austria and Liechtenstein

On 29 January 2013, a bilateral tax agreement on withholding taxes was signed between Austria and Liechtenstein.

Purpose of the agreement

The purpose of the agreement is to guarantee that the tax on income from capital assets held by Austrian investors on a bank deposit in Liechtenstein is actually imposed and paid to the Austrian tax office.

To achieve this, the agreement places an obligation on Liechtenstein banks to levy the Austrian 25% tax on income from capital and to pay this tax to the relevant Austrian tax office as from 1 January 2014. Further, Liechtenstein banks are to levy a lump sum tax on income from capital generated in the past. The lump sum tax, which amounts to up to 38% of the capital assets held on the Liechtenstein deposit, can be avoided by instructing the bank to disclose the deposit to the relevant Austrian tax office.

The tax agreement between Austria and Liechtenstein generally corresponds to the tax agreement between Austria and Switzerland which came into effect on 1 January 2013. However, there is one major difference: The tax agreement between Austria and Liechtenstein also widens the withholding obligation to Liechtenstein trustees who manage capital assets of Austrian investors in trusts all over the world.

For capital investment companies it is important to know that the withholding tax on income from investment funds in Liechtenstein is expected to be subject to the same rules as the taxation of foreign investment funds in Austria. Thus, investment funds held by Austrian investors on Liechtenstein deposits will also need the reporting fund status in order to avoid lump sum taxation in relation to investor deposits at calendar year-end.

Are you concerned?

To analyse the potential consequences of the tax agreement for your business, you should think about the following questions:

- Do you have a Liechtenstein bank subsidiary or branch and do you have Austrian residents in your client portfolio?
- Do you administrate Liechtenstein trusts with Austrian investors?
- Do you sell non-reporting funds via Liechtenstein distributing partners?

If the answer to any of these questions is yes, please contact your main contact person at PwC Austria who will be able to analyse potential implications in relation to your business model and discuss the next steps with you. We will also be pleased to provide you with more details on the tax agreement upon request.

Please also think about the consequences for your business model from the Swiss/Austrian tax agreement when you have a Swiss bank subsidiary or branch or distribute non-reporting funds via Swiss distributing partners.

Authors:
Johannes Edlbacher
johannes.edlbacher@at.pwc.com
+43 1 501 88-3627

Olivia Stiedl
olivia.stiedl@at.pwc.com
+43 1 501 88-3427

AIFM – Austria still lagging behind

With regard to Article 66 of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (AIFMD), the Member States of the European Union are to adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 22 July 2013. In Austria the government has not yet published a corresponding draft law, even though it had been announced for the end of March.

Who is affected by the new Austrian regulation?

The upcoming Austrian regulation directly affects Alternative Investment Fund Managers with registered offices in Austria which manage one or more Alternative Investment Funds (AIFs), irrespective of whether such AIFs are EU AIFs or non-EU AIFs. It also affects non-EU AIFM intending to manage AIFs and/or market AIFs managed by them in the European Union if Austria is the Member State of reference. According to Article 37 AIFMD, Austria is the Member State of reference if

a) the non-EU AIFM intends to manage only AIFs established in Austria and does not intend to market AIFs in the EU,

b) the non-EU AIFM intends to manage several EU AIFs in different Member States and does not intend to market AIFs in the EU and either most of the AIFs are established in Austria or the largest amount of assets is managed in Austria,

c) the non-EU AIFM intends to market only one EU AIF in Austria or Austria is the home Member State of an AIF which is marketed in only one other country,

d) the non-EU AIFM intends to market only one non-EU AIF in Austria,

e) the non-EU AIFM intends to market only one EU AIF in different Member States and Austria is the home Member State of the AIF or the AIFM intends to develop effective marketing in Austria,

f) the non-EU AIFM intends to market only one non-EU AIF in different Member States and Austria is selected to be the Member State of reference,

g) the non-EU AIFM intends to market several EU AIFs and Austria is the home Member State of these AIFs or the AIFM intends to develop effective marketing for most of these AIFs in Austria,

h) the non-EU AIFM intends to market several EU and non-EU AIFs and the AIFM intends to develop effective marketing for most of these AIFs in Austria.

Upcoming implementation in Austria

We hope we can inform you on the implementation of the AIFMD in Austria in our next newsletter.

Authors:
Peter Gross
peter.gross@at.pwc.com
+43 1 501 88-3643

Johannes Edlbacher
johannes.edlbacher@at.pwc.com
+43 1 501 88-3627

Who we are and how our Asset Management team can assist you

We are the Austrian market leader with regards to the tax representation of foreign funds in Austria. Thus, our clients are benefiting from our extensive experience with the calculation of the annual DDI and distribution figures as well as the reporting process itself.

This includes also support with the implementation, analysis and testing of technical tax and regulatory reporting requirements for funds and fund management companies.

We use high-end technical infrastructure for data processing and have a dedicated team of eight senior staff and about six junior level staff to support you with your business challenges. Since two year's we have broaden our service with a separate Consulting branch, also working closely together with the Asset Management team of PwC Germany.

Our Asset Management Consulting services include transformation and distribution services, clearing, depositary and custodian issues, portfolio and collateral management as well as regulatory consulting.

Our Asset Management Team

Thomas Steinbauer Asset Management Tax Leader Partner, Tax	+43 1 501 88-3639	thomas.steinbauer@at.pwc.com
Johannes Edlbacher Senior Manager, Tax	+43 1 501 88-3627	johannes.edlbacher@at.pwc.com
Stefan Perklin Manager, Tax	+43 1 501 88-3735	stefan.perklin@at.pwc.com
Johanna Schaller Manager, Tax	+43 1 501 88-3635	johanna.schaller@at.pwc.com
Olivia Stiedl Manager, Tax	+43 1 501 88-3427	olivia.stiedl@at.pwc.com
Christian Gürtler Director, Advisory	+43 1 501 88-3681	christian.j.guertler@at.pwc.com
Peter Ivancsits Senior Manager, Advisory	+43 1 501 88-1210	peter.ivancsits@at.pwc.com

PwC Austia
Erdbergstraße 200, 1030 Vienna
www.pwc.at