

Themis competition – 2016 edition

Semi-Final A – International Cooperation in Criminal Matters

Facing tax fraud in the European Union

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Challenges and perspectives

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Every year, an estimated €1 trillion in public money is lost in the European Union, due to tax fraud. This wide phenomenon is an unprecedented challenge for the European Union and its Member States, and deeply questions the ways and means of cooperation, not only for the Taxation and Customs Union, but also within the area of Freedom, Security and Justice, put forward by the Lisbon Treaty.

What is at stake when it comes to tax fraud? First, it is essential to bear in mind that taxes represent the collective contribution from the citizens dedicated to the administration expenses. On one hand, tax collection mechanisms are essential to a collectivity, thus to a State, in order to function normally. So as to guarantee health facilities, public transportation or public safety, every resident living within state borders has to participate, according to their means¹. On the other hand, taxation lies upon the principle of equality. If the contribution is collaborative, it also needs to be equally shared between residents or citizens. Tax fraud – also called tax evasion, as it aims to avoid the payment of tax, consists of benefitting from the State’s advantages and infrastructures without bearing this fundamental citizen’s responsibility.

Furthermore, tax fraud is known to be one of the most effective tool for financing organized crime or terrorism. The resources involved are in fact concealed from the administrations, which makes them extremely useful to finance illegal activities without being spotted by state authorities. The transnational nature of these cash flows, and the activities they tend to finance justify the will of the European Union Member States to fight globally against this phenomenon.

Tax fraud can affect direct taxes – income or profit taxes – as well as indirect taxes – the Value-Added Tax (VAT), for instance, which suffers from widely spread frauds within the European Union. VAT fraud is particularly linked with organized crime: according to Europol’s representatives, 2% of crime groups are behind 80% of VAT fraud concerning trading between the Member States of the European Union.

Lastly, even though tax regulations and policies are deeply rooted in national sovereignties, it seems more and more essential for the European Union Member States to cooperate with each other against tax fraud, given the scale of the phenomenon. The European institutions, such as the Commission, advocate for strong policies against tax fraud and tax evasion, in order to

¹ Declaration of the Rights of Man and the Citizen, 26 August 1789, article 13: “A general tax is indispensable for the maintenance of the public force and for the expenses of administration; it ought to be equally shared between all citizens, according to their means.”

win back what they call the “Missing Part”². The hybrid nature of tax fraud, half criminal law, half administrative law, justifies the importance recently given to prevention in this field. This explains why exchanges of information between EU Member States, harmonization of legislations and common investigations have been developed simultaneously in the last few years.

I. Defining tax fraud and its environment

A) Various definitions

1- Distinguishing tax avoidance, tax fraud, tax planning...

The first issue one has to address when it comes to define these concepts is the thin line between them. As a matter of fact, the lines that separate tax planning from tax avoidance and tax fraud are dangerously porous. It is thus essential to have clear definitions of these three processes, in order to avoid any confusion.

First, **tax planning** can help to reduce tax liability, through the best and ingenious use of allowances, deductions, or exemptions that are legally planned. As it is a loyal use of the regulation, tax planning cannot be considered as a felony, and is completely legal.

Secondly, what is **tax avoidance**? It can shortly be defined as the process whereby a person or a business, pays less tax than the law demands. It is essential to remember that tax avoidance is perfectly legal. Though it allows a taxpayer to pay less taxes, it is allowed. Tax payers literally avoid taxes, but they do so through legal means. In the case of international tax avoidance, the taxpayer actually moves their holdings, their interests or their property in another jurisdiction, in order to reduce the amount of tax due in the country of origin. The interest of the process thus lies in the fact that the countries favored by tax evaders provide for advantageous tax policies.

This definition underlines the difficulty that arises when it comes to draw a line between tax avoidance and **tax fraud**. Whereas the first can be obtained through legal means, and is not automatically punished by fiscal or criminal law, the second is incriminated and punished.

Fraud is defined, on an international scale, as “*an intentional act by one or more individuals among management, those charged with governance, employees, or third parties, involving*

² http://ec.europa.eu/taxation_customs/taxation/tax_fraud_evasion/missing-part_en.htm

the use of deception to obtain an unjust or illegal advantage".³ To demonstrate fraud, three conditions need to meet:

- An action – not just a thought or a desire to fraud;
- An intentional maneuver – one has to know the process is forbidden by law;
- The advantage obtained must be illegal or unjust, whatever form it takes.

In fact, tax fraud occurs when an individual or business entity intentionally and willfully falsifies information, in order to limit the amount of their tax liability. In other terms, one deceives the State in order to pay less taxes.

2- Different definitions

As a symbol of national sovereignty, tax regulation is submitted to a unanimous vote when it comes to European rulings. Every member state has its own definition of tax fraud, which makes it even more difficult to address for the European authorities. Two examples of these differences will be developed in this paragraph: France and Luxemburg.

France – Tax fraud is forbidden by the article number 1741 in the French General Tax Code. The fraudulent behavior can take various forms: it can be a misrepresentation of a person's affairs, a willful concealment of income or profits, or the organization of one's insolvency, all aiming to reduce or suppress their tax liability.

It is interesting to point out that the text banning tax fraud is not in the Criminal Code. Furthermore, the procedure that has to be followed during the investigations cannot be found in the Code of Penal Procedure, but in another code⁴. This underlines the peculiarity of tax crimes, not only in France but in every country wanting to fight tax fraud.

Luxembourg – As a country with a privileged tax system, it is interesting to know how Luxembourg defines tax fraud. Tax fraud is prohibited by paragraph 396 in the General Tax Law, from May 21st, 1931. In order to demonstrate fraud, Luxembourg authorities require a significant amount of unpaid taxes, and the systematic use of fraudulent maneuvers in order to conceal facts or profits to the administration⁵. The high degree of gravity that needs to be demonstrated in order to punish tax fraud leads to a different form of fraud: in Luxembourg, tax fraud is much more linked to counterfeit accounting in business entities and firms than in

³ IFAC (International Federation of Accountants), ISA norm 240

⁴ French Tax Procedure handbook

⁵ "If the fraud concerns a significant amount of taxes and was committed through the systematic use of fraudulent maneuvers in order to conceal pertinent facts from the authority or to persuade it into the existence of false facts"

France. If a Luxembourger, as an individual taxpayer, declares their income over the deadline, it is not considered as a maneuver and will not be pursued as a fraud.

Finally, the differences between the persons who can be sentenced for tax fraud are essential. In France, a line is drawn between the physical person and the moral person. Even if the physical person committed tax fraud within the firm he or she was running, the sentence will only be pronounced against the individual who concealed profits from the administration. On the contrary, in Luxemburg, firms and enterprises can be criminally responsible for a tax fraud. This difference points out a distinct conception of tax crimes in these two close neighbor States.

The OECD – The Organization for Economic Co-operation and Development is concerned with financial stability for its members, thus concentrates its interests on the issues of tax avoidance and tax fraud, which deprive state authorities of an important amount of financial resources. Concerning tax fraud, the definition is deliberately vague: *“Tax fraud is a form of deliberate evasion of tax which is generally punishable under criminal law. The term includes situations in which deliberately false statements are submitted, fake documents are produced, etc.”*

The European Union – The EU hardly defines tax fraud in its recent legislation. As it is a crime acknowledged by a majority of Member States, this lack of a common definition might be due to the variety of national incriminations.

3- Main kinds of tax fraud

In spite of this difficult definition, there are two main kinds of tax fraud that can be distinguished:

- The tax fraud from individuals;
- The tax fraud from firms, or business entities.

Although it is given a lot of media coverage, tax fraud committed by business entities is the most difficult to grasp. It is where the limit between avoidance and fraud is the thinnest, given the various schemes and strategies adopted by business entities. Multinational firms can – and will – obviously take advantage of the differences in taxation rates and policies between the various countries they have a branch settled on. However, if an entity avoids paying taxes through legal means, benefitting from tax agreements signed between countries, no crime was

committed. Nevertheless, fraudulent tax avoidance is made easier for firms than individuals: a firm can create a branch or an affiliate on any territory, following the legal evolutions.

In the last few years, the patterns followed by big international firms in order to avoid taxes have been given a lot of media coverage. The so-called “double Irish” or “Dutch sandwich” took on by well-known companies like Google, Amazon or Microsoft, widely offended the public, even though they are not fraudulent.

As far as the European Union is concerned, the **VAT fraud** is one of the most widespread types of tax fraud. It benefits from the indirect nature of the VAT: the taxpayer does not pay the VAT he owns, or claims a debt to the administration that is actually not due. The overall VAT gap, which is the difference between the amount of VAT actually collected and the VAT Total Tax Liability, reached €168 billion in 2013 for the 26 Member States of the EU, according to 2015 reports requested by the European Commission⁶. VAT represents about 20% of the Member States' tax revenue and about 12% of the European Union's budget⁷. Thus, these fraud figures are very worrying and the VAT gap has to be reduced.

Two schemes can be used by fraudulent taxpayers: the simple VAT fraud, or what is called a “carrousel” fraud. In order to succeed, the carrousel needs three fraudulent firms, two of them being located in the European Union. The first (firm A, in Portugal) buys goods or services from firm B (in Italy), without paying taxes, it being a sale within the Union. A sells the same goods to the firm C, settled outside of the EU, and gets the VAT from C. As C can get the amount of VAT back from Portugal, as a non-resident of the EU, A has to pay its amount of VAT to the Portuguese administration, within three months. The fraud lies here: within this delay of three months, A will disappear. This “wheel” of the carrousel is called the Missing Trader. For the phony firms, the aim is to turn the carrousel around several times within these three months of delay, before any VAT control. To achieve that, the firm B will sell the same goods back to C, and so on until the goods exit the circuit.

Given these definitions, it is now essential to analyze the role of a principal actor in these matters: the tax haven.

B) The role of tax havens

⁶ Study to quantify and analyze the VAT Gap in the EU Member States, 2015 report

⁷ <http://www.vie-publique.fr/decouverte-institutions/union-europeenne/action/financement/quelles-sont-ressources-union-europeenne.html>

Tax havens are not always involved in tax fraud. On the one hand, tax havens and the advantages they offer can be perfectly legal, whereas tax fraud will always be a felony. On the other hand, tax fraud can happen outside a tax haven, or thanks to the various policies it offers. Nevertheless, tax havens provide significant help to tax offenders.

Every entity – country, firm, international organization – has a different **definition** for the concept of tax haven. In general, tax havens are known for their privileged tax regulation, and for the few restrictions imposed on regulated activities. It would be too narrow to limit the conception of tax havens to whole States. Even if for some countries the qualification is not debated – Cayman Islands for instance, for others the qualification is questionable. In fact, some States can develop an advantageous tax policy for a specific operation, in order to attract investors, without being particularly considered as offshore havens.

As a means of clarification, the OECD developed a list of three criteria to qualify a country as a tax haven⁸:

- Low taxation;
- Low transparency;
- Lack of cooperation.

This variety of definitions, actors and mechanisms led to the development of national and EU wide frameworks to effectively fight against tax fraud and its cross-border dimensions.

II. Fighting tax offences: National and European frameworks

A) Fighting tax offences: similar national frameworks

Knowing the different national tax fraud repression frameworks in Europe is a key condition to best organize the European cooperation against tax offences in the future.

Fighting against tax fraud implies different steps and missions (from prevention to prosecution or the recovery of the proceeds of the fraud) that all European countries tend to follow. However, the way countries proceed in their fight against tax fraud can vary. If European countries may not all have the same approach, some common trends and features can be underlined. These common trends obviously facilitate the cooperation between

⁸ Dessine moi l'éco, « Les paradis fiscaux », April 2013, 2'57, <http://dessinemoileco.com/les-paradis-fiscaux-2/>

Member States in the fight against tax fraud.

As it was previously pointed out, European countries have various incriminations of tax offences. They also have similar ways to punish them. However, the actors and agencies involved in fighting against tax fraud are pretty much the same from one country to another. The tax administration, the customs administration, the police, a prosecution authority and even specialized law enforcement agencies are always in charge, to different extents, of fighting against tax fraud⁹.

1- National sanctions

As studied above, all European countries incriminate tax and financial offences from tax fraud to money laundering, or VAT fraud. The sanctions provided for tax offences are generally prison sentences and criminal or administrative fines. For instance, the French General Tax Code provides (article 1741) that tax fraud is punished by a 37,500 Euro fine and of five years of imprisonment. When fraud is facilitated by the use of false invoices, the French General Tax Code provides a 75,000 Euro fine and five years of imprisonment¹⁰. The Italian legislative decree on tax offences of 24 September of 2015 provides a sentence from one year and a half to six years of imprisonment for committing a tax fraud using false documents for non-existent transactions¹¹.

In similar ways, the article 370 of the German Tax Code and the German Federal Court of law (*Bundesgerichtshof*) jurisprudence¹² provide fines and imprisonment sentences that varies according to the amount of the fraud. For instance, under 50,000 Euros, the tax offender is only punished by a fine. Above 50,000 Euros, a fine and an imprisonment sentence, generally suspended, is provided except for massive tax fraud (above 1,000,000 Euros) for which imprisonment cannot be avoided.

The common trends in sanctions provided for tax offences by the European Member States is an effective way of collectively fighting against tax fraud since it prevents the creation of safe heaven, regarding criminal charges, within the EU. Not only the European countries have similar ways to punish tax offences but they also have developed close fighting organization, especially regarding the key institutional actors.

⁹ *Effective inter-agency co-operation in fighting tax crimes and other financial crimes*, 2nd Edition, 2013, OECD

¹⁰<https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006069577&idArticle=LEGIA RTI000020630646&dateTexte=20100312>

¹¹ <http://www.altalex.com/documents/codici-altalex/2014/04/15/legge-sui-reati-tributari>

¹² <http://www.hrr-strafrecht.de/hrr/1/08/1-416-08.php>

2- Essential national actors

Tax administration – Usually, tax administrations play a central role in fighting against the tax offences as they are responsible for gathering the information concerning the individuals and firms subject to tax. Tax administrations have an extensive knowledge and access to financial data of both individuals and businesses since they collect people and corporations' tax return. Therefore, tax administrations usually have great powers to investigate and even prosecute tax offences. In some countries, the tax administration can obtain any information needed from the other institutional actors involved in fighting against tax fraud. In those countries, the tax administration is usually directly in charge of the investigations sometimes under the direction of a public prosecutor like in the Netherlands but not necessarily, for instance in Germany. In France, a public prosecutor directly conducts the investigations¹³.

Customs administration – Globally speaking, customs administrations have to collect the customs information and estimation. In this perspective, Customs administrations are responsible for assessing the cross-border flows of money and goods. In some European countries, the tax administration may be part of a joint tax and customs administrations but it can also be an independent administration. Tax administrations have a major role when it comes to prevent offences related to customs and to forbidden flows of goods and money. In some European countries, customs administration can direct and conduct investigations related to tax offenses, sometimes without the supervision of a public prosecutor like in Germany. In France or in Portugal, the Custom administration conducts the investigations under the direction of a public prosecutor¹⁴.

Police – Very naturally, the police is the first institutional body to cope with tax offences and fraud since it plays a main role in enforcing criminal law and protecting people and private property. Most European countries have implemented specialized police units that only deal with financial crimes. It can be criminal intelligence units like in the Netherlands or in the United Kingdom or assets recovery units like in Spain. Some countries have both kinds of units (The Netherlands or the United Kingdom). Some countries also have set up special task force to fight against massive financial crimes.

¹³ *Effective inter-agency co-operation in fighting tax crimes and other financial crimes*, 2nd Edition, 2013, OECD

¹⁴ *Effective inter-agency co-operation in fighting tax crimes and other financial crimes*, 2nd Edition, 2013, OECD

Prosecution authority – The prosecution authority represents the Society and the State in criminal cases. From one country to another, the public prosecutor can play a slightly different role in the prosecutions organization. For instance, in some countries, the public prosecutor is in charge of investigating the potential offence and conducting the whole criminal prosecutions like in France or in Germany. This organization usually implies for the public prosecutor to outsource a number of investigation steps to the tax or/and customs administrations and to the police. In some other countries like the United Kingdom, the public prosecutor is in charge of all the criminal prosecutions but plays no role in investigating the alleged offenses¹⁵.

Financial Intelligence Unit – The financial intelligence unit plays a key-role in fighting against financial and tax crimes. In order to prevent fraud, money-laundering and terrorist financing, most countries legislation requires from banks, money transfer businesses and some retailers that accept important amount of cash to submit reports when there is a suspicion about the transaction they have recently made. The financial intelligence unit is later in charge of analyzing the seriousness of the suspicion and to either conduct an investigation or to inform the suitable authority. European countries have designed different kinds of frameworks to settle their financial intelligence unit within their organization to fight against tax and financial crimes. For instance, in some countries, this unit is part of the Police or the public prosecutor office (Germany or Portugal) but it can also be established under the direction of the Ministry of Finance or under the Ministry of Justice (France or Spain)¹⁶.

B) Fighting tax offences: the European cooperation system

For almost two decades, the European Union and especially the European commission has been involved in developing and improving the cooperation of its Member States to fight more effectively against tax crimes.

In that perspective, the EU tries to provide a framework and some instruments that help to handle the cross-border dimension of tax offences. The EU also encourages cooperation through its legislation. The EU organizes the cooperation and the exchange of information among its Member States on different kind of taxes.

¹⁵ *Effective inter-agency co-operation in fighting tax crimes and other financial crimes*, 2nd Edition, 2013, OECD

¹⁶ *Effective inter-agency co-operation in fighting tax crimes and other financial crimes*, 2nd Edition, 2013, OECD

1- Information exchanges

a) *Administrative cooperation*

Administrative cooperation - The *Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation* sets up a framework to organize the administrative exchange of tax information between the Member States. The directive creates mandatory automatic exchange of information between the European countries. This mandatory exchange mainly concerns every kind of income and capital held by taxpayers in the Member States other than their country of residence. Therefore, a wide range of taxes are targeted from VAT to the taxation of savings. This exchange program has extended throughout the years to integrate numerous categories of income and capital.

The Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation deepens the administrative cooperation set up by the Council Directive. The 2014 Directive removes the condition that, to be shared, the information should be available. Also, the 2014 Directive removes the thresholds that should not be overtaken to avoid a mandatory exchange of information between Member States. Thus, the European Union aims at preventing the tax payers from splitting their income into different accounts and therefore to remain undetected:

“Thresholds should not be generally included in this Directive as they could be easily circumvented by splitting accounts into different Financial Institutions”.

Automatic Exchange of Information: EU agreements with tax havens

Today, the European Union leads a strong policy regarding tax havens. European countries showed that they were willing to cooperate in the fight against tax fraud committed via tax havens, both inside and outside the European Union. The European Commission published a list of thirty tax havens in June 2015, including third States, such as Brunei, Hong Kong, Andorra or Liechtenstein. The European authorities, if they made a strong point with this so-called “blacklist”, also developed various partnerships with traditional tax havens, on the European continent. On 27 May 2015, the European Union and Switzerland signed a Protocol amending their existing Savings agreement, transforming it into an agreement on automatic exchange of financial account information based on the Global Standard, developed by the G20 and the OECD. This agreement, which will come into force in 2018, will “*spell an end to*

*banking secrecy for EU residents*¹⁷. More recently, agreements were also signed with Liechtenstein in October 2015, San Marino on 8 December 2015, Andorra on 12 February 2016 and Monaco, on 22 February 2016. The terms of the agreements are quite similar, and lead to an automatic exchange of information between authorities when a EU resident is involved and suspected of fraud. This Automatic Exchange of Information (AEOI) created by the latest agreements between the EU and well-known tax havens seems to weaken the principle of **bank secrecy** – a key to understand the relations between tax havens and other States when it comes to international tax fraud. Today, bank secrecy cannot be easily advertised for EU residents, that is, if the agreements are actually enforced by national authorities in the near future.

Taxpayer identification numbers web portal - Most of the EU Member States use Taxpayer identification number (TIN) to identify their national taxpayers and to simplify their tax administration activities within their borders. Those TINs are also used to identify non-national taxpayers. A taxpayer identification number is a more reliable kind of information than a simple name and address. To this end, and to improve the exchange of tax information between its Member States, the EU has developed a web portal where the Member States gather general information related to their national TINs (only under the condition that the State has agreed to participate to this portal). The web portal also provides for an online monitoring module to verify TIN's structure in case of doubts about the reality of a TIN given by a taxpayer.

Eurofisc – Eurofisc is a decentralized network of representatives of Member States' tax and customs administration. The network aims at organizing exchanges targeted and precise information about suspicious companies and transactions that could be guilty of VAT fraud. Eurofisc technical and logistical support is provided by the European Commission. However, the Commission does not daily participate to Eurofisc activities and do not have access to the information exchanged. According to a survey realized by the European Court of Auditors in 2015:

¹⁷ European Commission, Press release – « Fighting tax evasion: EU and Switzerland sign historic tax transparency agreement », Brussels, 27 May 2015

“27 Member States consider Eurofisc to be an efficient early warning system for fraud prevention”¹⁸

In order to continuously improve the quality of the information exchanged, the Member State that received the information regarding a possible fraudulent company is supposed to give the Member State that provides the information some feedbacks and follow-up to confirm or disprove the suspicion.

b) Criminal cooperation

Europol – Europol was created to gather intelligence related to any kind of criminal offences with a cross-border dimension in Europe. Therefore, financial or VAT frauds are among offenses that fall under Europol skills. In that perspective, Europol tries to provide accurate and precise pictures of the state of financial fraud in Europe and in their countries to the judiciary and law enforcement officers. It enables them to conduct investigations, not only based on their national intelligence but also in awareness of the European or International context¹⁹.

OLAF - The European Anti-Fraud Office (OLAF) investigates corruption and serious misconduct within European Union (EU) institutions, as well as fraud against the EU's budget. OLAF has no legal remit to prosecute wrongdoers itself but it helps Member States and institution to gather and exchange information, it can conduct investigations and provide advice to the European Commission concerning prevention policies and fraud detection regulations. If OLAF is not competent in most of the cross border tax fraud cases since they are not considered as frauds against the EU's budget, the question arises as to whether cross-border VAT fraud is a fraud against the EU's budget (see part IV of this work). If it was considered as a fraud against the EU's budget, OLAF would be competent and could significantly improve the cooperation in this matter.

Financial intelligence cooperation within the EU - The FIUs network was created under the Council of Europe *decision 2000/642/JAI concerning arrangements for cooperation between Member States' financial intelligence units in respect of exchanging information*, in order to give the European Union members a safe and decentralized network, to allow the operational data exchange between all Units. The network is funded by the European Union and by the

¹⁸ *Special Report pursuant to Article 287(4), second subparagraph, TFEU, Tackling intra-Community VAT fraud: More action needed*, The European Court of Auditors, 2015.

¹⁹ *Eurojust News*, Issue 4, July 2011

national financial intelligence Units. This platform shortens the time usually needed for a data exchange between units. The article 4 of the decision states that:

“2. When a request is made in accordance with this Decision, the requested FIU shall provide all relevant information, including available financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between Member States.”

2- Cooperation tools

a) *Administrative tools*

Recovering unpaid tax - Since recovering taxes is a sovereign power, States can not recover taxes outside of their national borders. This is why the EU promotes a system of “tax recovery assistance” that enables the tax authorities of a member state to ask for help from another EU country to access the money owed. According to the European Commission, this “recovering unpaid tax” system is a key to reduce tax fraud, protect the Member States financial interest and make sure that the taxpayers do not evade their tax payment duties. Since 2012, mutual recovery assistance is run by the *Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures*. This Directive organizes the rules governing the recovery of taxes on behalf of another country such as the “Request for recovery” rules (article 10):

“1. At the request of the applicant authority, the requested authority shall recover claims which are the subject of an instrument permitting enforcement in the applicant Member State.

2. As soon as any relevant information relating to the matter which gave rise to the request for recovery comes to the knowledge of the applicant authority, it shall forward it to the requested authority.”

Multilateral controls - The Eurofisc network enables to conduct coordinated controls and investigations (two or more Member States) of tax liability of businesses if those controls seem to be more efficient if conducted collectively. The survey realized by the European Court of Auditors in 2015 displays that:

“27 Member States consider multilateral controls (MMCs) a useful tool for combating VAT fraud²⁰.”

b) Criminal tools

Eurojust is a European Union body working to improve cooperation between the EU Member States on cross-border crime investigations and prosecutions. Eurojust can coordinate cross-border investigations by setting up joint investigations teams (gathering law enforcement officers and Judiciary representatives from different countries) and joint prosecutions. Eurojust also helps to resolve conflicts of jurisdictions in any kind of criminal case and for instance in fraud-related criminal cases. Tax fraud is an important activity for Eurojust: in 2010, 229 fraud-related cases were registered at Eurojust, which represents 14% of total cases. For example, Hungary asked for Eurojust and Europol’s support in a large VAT fraud case. The activities of the companies involved were already under investigation in other Member States since it was part of a wider criminal network. Eurojust helped organizing a coordination meeting in 2010 with prosecutors and investigators from Bulgaria, Cyprus, Germany, Greece, Latvia, Lithuania, Poland, Romania, Spain and Slovak Republic. They shared information and prepared letters rogatory. These letters were then executed quickly, thanks to this meeting²¹.

The European Arrest Warrant was created by the *Council framework decision of 13 June 2002*²² and allows, in extended criminal cases such as massive tax-fraud, a member state to issue a warrant valid throughout the European Union and makes it mandatory for the other member state to arrest and transfer the criminal suspect. The European Arrest Warrant is an effective cooperation tool to fight against tax offences since it facilitates prosecutions and punishment of tax offenders throughout the European Union.

Although the cooperation system can be improved, it has shown satisfying results, especially in the fight against tax havens, and information and intelligence exchanges. Nevertheless, improvements are needed, for example, in the collective fight against VAT

²⁰ *Special Report pursuant to Article 287(4), second subparagraph, TFEU, Tackling intra-Community VAT fraud: More action needed*, The European Court of Auditors, 2015.

²¹ *Eurojust News*, Issue 4, July 2011

²² The Council framework decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States

fraud. Furthermore, the traditional cooperation tools are particularly unsuitable in this field, but their evolution could lead to the development of accurate harmonization, regarding whistleblowers for instance.

III. Limits and prospects and of an increased cooperation

A) The limits of cooperation: the ne bis in idem principle

Tax fraud is often punished in Europe by both administrative penalties and criminal sanctions. But this system is now being questioned by the European Court of Human Rights (ECHR) and the CJEU, which shows that **the harmonization of the practices in fighting against tax fraud can threaten the effectiveness of the repression**, given that it could lead countries to pursue tax offenders only via administrative means.

The article 4 of protocol n° 7 of the *European Convention on Human Rights* recognizes the right not to be tried or punished twice (also called *ne bis in idem*). It prevents someone from being tried twice for the same facts, when the same interests are protected by both sanctions and when the potential sentences are of the same nature. When this protocol was ratified, some countries such as France, Austria or Italy made reservation to this article, stating that it did only apply to offences classified as “criminal” by their law. Thus, the fiscal administrative penalties considered as criminal penalties by the ECHR²³ but not by Italian, French or Austrian law could not be taken into account. Nevertheless, the ECHR considered that this reservation was not specific enough and did not meet the requirements of Article 57 and was accordingly invalid in the case of Austria (ECHR, 23 October 1995, n° 15963/90, *Gradinger v. Austria*) and Italy (ECHR, n° 18640/10, n° 18647/10, n° 18663/10, n° 18668/10 et n° 18698/10, 4 march 2014, *Grande Stevens and Others v. Italy*). French reservation is also likely to be considered as invalid by the ECHR.

Thus, *ne bis in idem* principle is now compelling for any country of the Council of Europe. The ECHR applied this principle to tax fraud in numerous cases. For example in *Ruotsalainen v. Finland*²⁴, the Court found that there had been a violation of Article 4 of Protocol No. 7 since the applicant was fined for tax fraud in the penal order and was also ordered by the administration to pay the difference between the tax he actually paid and the tax he should have paid, multiplied by three because he had failed to inform the competent authorities. The court decided that both sanctions were criminal. If France has still not been sentenced by the

²³ For example ECHR, 24 February 1994, n° 12547/86, *Bendenoun v. France*

²⁴ ECHR, 16 June 2009, n° 13079/03, *Ruotsalainen v. Finland*.

ECHR for the cumulated sanctions concerning tax fraud, the French Constitutional court anticipated a potential European sentence and decided to apply *ne bis in idem* in matters relating the stock exchange²⁵ and is now studying a « priority preliminary ruling on constitutionality » concerning tax fraud²⁶.

But *ne bis in idem* principle is also a fundamental right enshrined in Article 50 Charter of the Fundamental Rights of the European Union. In a judgment of the 26 February 2013²⁷ concerning cumulative administrative and criminal sanctions for VAT fraud, the Court of Justice of the European Union (CJEU) decided that the Charter was applicable, since VAT fraud concerns the implementing of Union law (common system of VAT). The Court decided that the “*principle preventing a person from being punished twice [...] does not preclude a Member State from imposing, for the same acts of evading declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties* », except “*if the tax penalty is criminal in nature*”²⁸. The question whether tax penalties are criminal in nature must be assessed **by the national courts** regarding 1) the legal classification of the offense, 2) the nature of the offense, 3) the nature and degree of severity of the penalty. The CJEU is thus adopting the same conception of the *non bis in idem* principle as the ECHR, despite the opinion of the Advocate General of the CJEU²⁹. Indeed, he had reminded the Court that the European Union had not ratified the European Convention of Human Rights yet and that it could consider, contrarily to the case law of the ECHR³⁰ that if the criminal judge takes into account the administrative sanction to mitigate the criminal sanction then there is no violation of the *non bis in idem* principle. But the CJEU decided not to follow its advocate general, despite the absence of a consensus between the Member States on this principle.

European countries are thus compelled to bring their legislations concerning tax fraud into harmony with the European Convention on Human Rights and the Charter of the Fundamental Rights of the European Union for VAT fraud. If this harmonization aims at enforcing human rights, it threatens the fight against tax fraud in the short run (procedures cancelled etc.) and will threaten it in the long run if it leads the Member States to

²⁵ Constitutional court, 18 march 2015, Decision n° 2014-453/454 QPC and 2015-462 QPC.

²⁶ Dalloz Actualités, Marie Babonneau, *Procès Cahuzac : l'ombre planante du non bis in idem fiscal*, 11 février 2016.

²⁷ CJEU, 26 February 2013, Åklagaren v Hans Åkerberg Fransson,

²⁸ <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-02/cp130019en.pdf>

²⁹ Le principe *ne bis in idem* : entre harmonisation et dissonance européennes, Carine Copain, AJ Pénal 2013 p.270.

³⁰ ECHR, 18 October 2011, *Tomasovic v Croatie*.

decriminalize tax fraud while the perspective of a prison sentence still has a deterrent effect on potential tax offenders.

B) Future prospects of the cooperation on the fight against tax fraud

1- Intra-community VAT fraud

If some fraud cases do not need specific cooperation between the European countries, VAT fraud does and especially intra community VAT fraud. Indeed, VAT fraud is a specifically European issue because of the VAT exemption on the intra-Community supply of goods which has created new fraud patterns. Thus, the fight against intra-Community VAT fraud is now a priority for the European Union, and a wider cooperation between the Member States is required in this area.

In 2015, the European Court of Auditors of the European Union published a report entitled *Tackling intra-Community VAT fraud: More action needed*³¹. In this report, the Court first regrets that there is no comparable data and indicators on intra-Community VAT fraud but this should be partly resolved with the report, prepared by the Fiscalis Tax Gap Project Group and published in march 2016³² which provides an introduction to the methodologies currently applied in each country to estimate tax gaps, with its main focus on VAT gap estimations.

Concerning the electronic exchange of information on request already implemented between the Member States, the survey conducted by the Court established that it was a useful tool. Nevertheless, even though Member States do answer to the request they receive, 41 % of the answers were late in 2013. Efforts should be done in order to reduce these delays.

Regarding the exchange of information without prior request (in case of suspicion of VAT fraud for example), the performance indicators set by the Commission (i.e. increasing by 10% the number of exchanges) was achieved in 2013.

As for bilateral controls (simultaneous controls of the tax liability of a trader in two or more Member States), even if they are considered as more effective than the controls carried out by one Member State only the survey showed that they are not fully exploited and their use is decreasing (52 in 2011, 42 in 2012 and only 33 in 2013). The European Court of Auditors of the European Union notes that these coordinated controls are particularly slow (most of them

³¹ http://www.eca.europa.eu/Lists/ECADocuments/SR15_24/SR_VAT_FRAUD_EN.pdf

³² http://ec.europa.eu/taxation_customs/resources/documents/common/publications/studies/tgpg_report_en.pdf

are not finished within the intended period of 1 year), which can explain that they are not used as they could be.

The Court did also criticize Eurofisc network's functioning. This network collects the fraud signals of the Member States and distributes the information to the other Member States. First, the processing and upload of fraud signals is a too cumbersome process (rudimentary information on excel sheets, long process...). Second, each Member State carries out its own risk analysis without any common criteria. Furthermore, there are no feedback on the usefulness of the data that has been shared (no feedback for the non-dubious traders signaled for example) so the fraud signals cannot be improved. Besides, OLAF doesn't have access to Eurofisc data. Thus, the Court did recommended a common risk analysis to be implemented, feedbacks to be set up and recommended for OLAF to have access to Eurofisc data.

Finally, since a more efficient cooperation between the administrative, judicial and law enforcement authorities at the national and international level is needed, the Court proposed to include VAT fraud within the scope of the directive on the fight against tax fraud to the European Union's Financial Interests by means of criminal law and in the European Public Prosecutor's Office (EPPO) regulation. It would involve considering VAT fraud as a threat to EU's financial interests. Actually, both the European Parliament and the Commission are willing to consider VAT fraud as such³³, but the Council firmly opposes it and considers it remains a matter of national sovereignty. This debate might have been solved by the Court of Justice of the European Union (CJEU), since the Court considered in two recent decisions³⁴ that VAT fraud did affect the financial interests of the European Union. Considering that VAT fraud threatens EU's financial interests could increase cooperation and improve the fight against this fraud, allowing in particular the future EPPO to be competent and to help prosecuting VAT frauds.

2- Whistleblowers

Tax fraud repression also brings up the topic of whistleblowers and the possibilities of cooperation to offer them better protection, or on the contrary, to pursue them.

Recent whistleblowers such as Hervé FALCIANI who exposed fiscal evasion at HSBC and Antoine DELTOUR (Luxleaks) made possible for many Member States to investigate and to

³³ <http://data.consilium.europa.eu/doc/document/ST-12549-2015-INIT/en/pdf>

³⁴ CJEU, 26 February 2013, *Åklagaren v Hans Åkerberg Fransson* and ECHR, 8 September 2015, *Taricco*, C-105/14

judge fraud cases. By revealing the frauds and transmitting the evidences of it they provided significant help to fiscal administrations. For example, Swiss leaks files revealed by Hervé FALCIANI enabled the French administration to charge HSBC for laundering of tax fraud proceeds and the French courts to convict tax offenders such as Arlette Ricci (heir of Nina Ricci) of fiscal fraud. Antoine DELTOUR did even win the European Citizen's Prize, a prize, launched by the European Parliament which recognizes people who have contributed in a remarkable way to European cooperation and the promotion of common values.

Nevertheless, whistleblowers often commit infractions when revealing tax frauds and tax evasion (industrial espionage, data theft, violation of commercial and banking secrecy etc.) and they need to be protected. Hervé FALCIANI for example has been sentenced to five years in prison by a Swiss court in November 2015. He is currently living in France and was not present at the trial. He is subject to an international arrest warrant but Spain refused to extradite him in 2013 and France won't extradite him either since a State does not extradite its nationals. **In this case, the lack of cooperation between these countries permitted to protect a whistleblower and to fight against tax fraud.** The protection of whistleblowers in this case would be more problematic inside the European Union: if Switzerland had been in the European Union and had emitted an European Arrest Warrant, France or Spain could not have refused to cooperate (there is no protection of the nationals for the European Arrest Warrant and the condition of the double criminality would be met for data theft for example).

Thus, protecting whistleblowers at a European level is a necessity. This work of harmonization could be done by the European Union which already discussed the issue in march 2016³⁵, but these discussions did not lead to an agreement. The Council of Europe adopted on 30 April 2014 a recommendation CM/Rec (2014)7³⁶ on the protection of whistleblowers. It explains that we need a robust harmonized framework that protects whistleblowers and keeps their identity secret. Nevertheless, this recommendation is not compelling. It will be for the future to show whether European countries are able to voluntarily adopt harmonized legislations protecting whistleblowers, if they will wait for a European agreement on this topic to compel them to change their legislation, or if they will refuse to cooperate...

³⁵ <http://www.europarl.europa.eu/news/en/news-room/plenary/2016-03-07/8>

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