

Legal protection links with criminal tax proceedings

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Santiago de Compostela

4-6 June 2009



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Part 1.- The new international context

- **Globalization** and the liberalization of economy
- Improve the **welfare and wealth**
- #
- **Globalization** and the liberalization of economy improve public revenue
- But also **tax evasions , avoidance and....**

TAX CRIMINALITY



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- One of the **main and successful form** of Ex.Inf. is that used in criminal tax judicial assistance.
- **All (almost)** countries are in possession of a net of criminal judicial assistance treaties
- **Not all (tax haven)** provide for the judicial assistance for criminal taxes.



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EATLP

Mutual assistance and information exchange

Legal protection

links with criminal tax proceedings

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Introduction

The exchange of tax information has many facets to it; one of the main form is that used in criminal tax proceedings.

From a systematic point of view, we can state that tax criminal rules are acknowledged to be an integral part of criminal law and not of tax law. Thus the tax criminal enforcement is assumed and probated with reference to the code of criminal procedure that doesn't accept arguing from analogy. The criminal tax code is in principle a closed system.

However in the area of criminal tax law, as well as in all the other areas of international law studies, globalization and the liberalization of economic activity have accelerated the process of globalization of tax rules. It often happens that infringements of tax rules - incorrect behaviour that may result in pecuniary administrative sanctions - are relevant for tax crime too when especially the amount evades is considerable. As a result, when both civil and penal rules are to apply the first step is to analyze the relationships between the two systems (criminal procedure and tax law) in order to point out, if necessary, the main mutual exchanges of concepts.

These relationships arise interesting and complex questions from the theoretical point of view, but also in practice, especially in procedural flaws of acts. With regard to this, we should also consider that, criminal proceedings, as well as the administrative ones, watch over different interests and therefore, infringements of these two systems of rules do have different effects.

Moreover, if information is obtained during one of these two proceedings, then, it may be transferred into the other - under particular circumstances - depending on whether it deals with crimes such as money-laundering, organized crime, drug traffic, currency regulations violations. In actual fact, such information can be employed for tax assessing as well as for criminal liability. For instance, a transaction or a delivery may become the object of a tax penalty and at the same time of a laundering crime, and so be considered as a legal offence. All that as it is easy to understand open also crucial aspect of safeguard of alleged individuals for crimes.

Finally, the exchange of tax information is expected getting more and more decisive in the prevention and in the fight against international economic organized crime when overall these are carry out with complaisance of low tax countries. As a result, the relation between such provisions of law and international rules within constitutional law is considered by scholars a relevant matter of study.

1.- A brief historical overview of the international co-operation in tax matters

According to scholars and to case law too, there are neither main principles nor general mandatory provisions in criminal law as those of international law (conventional or customary principles); at most, there are treaties of mutual assistance in enquiry and mutual recognition of enforcement of judgements.

State Power to Tax is actually strictly limited to the borders of the national territory in token of the sovereignty of the State. Similarly, it occurs with the power to apply sanctions, since each State has only the inland monopoly to enforce the law and to punish by the criminal, administrative or tax law that comes under its jurisdiction¹. When the tax offender is in an area under the jurisdiction of another country - not inland the territory of the State - tax penalties, as well as sanctions, can be applied only owing to the co-operation among States and indeed, such a collaboration is possible thanks to the adjustment of domestic law to the international treaties. There are a number of forms of international co-operation based on those treaties; however, one of the most relevant is the exchange of information (on criminal matter) between the competent authorities of States involved.²

Then, in order to be legitimate, each exchange of information and each form of co-operation among States, on an administrative as well as on a judicial scale, must be founded on a bilateral or multilateral agreement.

2. International sources of the judicial co-operation in criminal law

At present, besides the bilateral conventions, the main international conventions on judicial assistance in tax matters are those listed hereinafter:

- a. The European convention on international judicial assistance, April 20, 1959;
- b. The European convention of extradition, December 13, 1957;

¹ See the Italian criminal code, art.6: "*Reati commessi nel territorio dello Stato. Chiunque commette un reato nel territorio dello Stato è punito secondo la legge italiana. Il reato si considera commesso nel territorio dello Stato, quando l'azione o l'omissione, che lo costituisce, è ivi avvenuta in tutto o in parte, ovvero si è ivi verificato l'evento che è la conseguenza dell'azione od omissione*". (Crimes committed in the territory of the State. Whoever commits a crime in the territory of the State is punished by the Italian law. The crime is intended committed in the territory of the State when the act or the omission has therein completely or partially occurred, or rather the event, which is the effect of the act or of the omission, has therein occurred.)

² Under the definition of judicial assistance, we may include the activities listed hereinafter:

- The acquisition of evidence that the fact amount to a crime.
- The notification and summoning of trial proceedings.
- The cross-examination and the collation abroad.
- The accomplishment abroad of personal or house searches, of inspection of places, of experts' reports and technical examinations, of superintendence's observations.
- The non-resident request to come before the court to bear witness. (artt.10, 12 CEAG)
- The enforcement of last judgements abroad.
- The public prosecution undertaking. (art. 21 CEAG)

- c. **The Second additional protocol to the European convention of judicial assistance, in Strasburg, March 17, 1978;**
- d. **The convention about money laundering crimes, in Strasburg, November 11, 1990 (art.1, paragraph 1);**
- e. **The convention on extradition among the European Union's States members;**
- f. **The Convention of Aja, 1970;**
- g. **The agreement of co-operation against Community fraud and other similar violations that may affect Community interests.**
- h. **The GAFI registration for money laundering crimes.**
- i. **Rules of Code of criminal procedure related to relationships among international jurisdictional authorities.**
- j. **The administrative agreements for simultaneous audits.**
- k. **The European convention of Human Rights (ECHR) for legal protection in the field of taxation.**
- l. **The Schengen Convention .**

3. Main principles

This branch of law is regulated by the principles unlighted hereinafter:

3.1. The principle of speciality

According to this principle, the “Requested or informing State”, in other words the State that must provide judicial assistance, may admit it only under the express circumstance that, the enquiry results and information exchanged are solely employed by the “Requesting State” as documentation of pre-trial investigation in the proceeding for which such assistance is provided.³ However, many States admit that information may be employed without restrictions. This procedure is normally effective only if the Requesting State presents a sufficiently detailed request and the Requested State can obtain the relevant information. If the Requesting State does not present a sufficiently detailed request, and if the Requested State does not have sufficient information, exchange of information upon request will not be productive.

³ See art.2 CEAG, 1959.

Generally, before applying for rogatory, States ask for a special statement in line with the principle of speciality. Furthermore, we can argue that, the Requesting State is not actually entitled to obtain an engagement from the Requested State, except for the observance of *bona fide* principle among States. For instance, Switzerland doesn't admit other States to use⁴ to use informations acquired by "rogatoria" with elements of a common crime on the ground of judicial tax agreement (where those informations may be relevant), in pursuance of the saving clause of speciality.

3.2. The principle of double criminality

The application of coercive measures, such as searches, sequestrations, injunctions to display papers, summoning a witness and the acquisition of summary information are allowed only if the infringement is a crime punishable by the law in the Requested State as well as in the Requesting one.

However, the enforcement of this principle, based on a substantive reciprocity, is in itself a hard limit to the exchange of tax information and to the co-operation among States. As a matter of fact, each State assumes a different notion of tax crime with a different extension and consequently, a different liability to punishment. For instance, the equivalent Italian terms for the expressions "tax fraud" and "tax evasion" are not considered as exactly alike by Swiss and Liechtenstein laws. Actually, these two States grant judicial assistance only when the tax fraud occurs, but they do not recognize the concept of "*frode fiscale*", as it is intended by the Italian tax law.

In actual fact, owing to this considerable discrepancy, the international co-operation in tax matter among Italy, Switzerland and Lichtenstein has always been problematic, above all about information concerning bank secrecy.

3.3. The irrelevance of the Requesting State's rules of procedure as regards the Requested State's obligation to co-operate

The prescription of rights is probably the explanatory example of this kind problem. Furthermore, the European convention of judicial assistance doesn't expressly deal with this argument, nevertheless, tax scholars argue that the judicial assistance may be denied to the Requesting State if the Requested one holds that the crime is statute barred.

⁴ See Comm. Trib. Prov. Milan, decision n. 175/18, May 30, 2000.

3.4. Principle of the “*ne bis in idem*”

Generally, the judicial assistance is not granted when the related proceeding is either a pending criminal procedure against the same offender in the Requested State or the Requested State has already delivered the last judgement on the same fact.

3.5. Principle of proportionality

According to this principle, the authority having jurisdiction may reject co-operation if the fact occurred doesn't deserve the requested measures. In actual fact, it must verify if the proportionality, between this application and the seriousness of facts, exists. For instance, one may consider a bank account with a little amount of money whose attachment is demanded.

3.6. Principle of the *locus regit actum*

With regard to this aspect, the competent authority of the Requested State, applying for a rogatory letter, must provide tax information according to its own domestic procedure law.

3.7. Principle of connection

This principle establishes the necessity of a direct or indirect relationship between the evidence and the person under investigation.

3.7.1. Principle of reciprocity

As for this principle, tax information is given only when the Requesting State and the Requested one, agree to exchange analogous information on a mutual basis. As far as the Italian system is concerned, we can state that the new code of criminal procedure doesn't provide any special provision with regard to tax offences. Furthermore, unlike other countries, the tax crime law (D.Lgs 74/2000) doesn't provide any *ad hoc* regulation for tax offences. As a result, they are submitted to general regulations.

4. Judicial deeds and exchange of information procedures in criminal tax law: the “rogatory letter”.

The mutual judicial assistance grounds on the International conventions and as for Italy, it is based on tax provisions included in the Italian Code of criminal procedure.⁵

In the international framework, the so-called “rogatory letter”⁶ is universally considered the most convenient instrument for co-operation among States on criminal matters. The “rogatory letter” consists in a magistracy special request addressed by a State to its foreign homologue in order to acquire, through a pre-trial investigation, evidence inland the territory of that State⁷. This instrument within the extradition is probably the most ancient, as well as the most relevant, deed used by States.

Furthermore, we can state that whereas extradition is rarely used when tax offences occur, rogatory letters are regularly employed. Generally, passive and active requests are evaluated either by the Ministry of Justice or by the public authority. The active request is referred to the foreign competent authority through the diplomatic corps. Today, perhaps, the international praxis accept a direct cooperation between public prosecutors or judge (depending from the law of every state).

Moreover, the active and passive rogatory letters, as well as the exchange of information on tax offences, require a specific jurisdictional control and consequently a special qualified Court. As for Italy, such control is exercised by the Court of Appeal which may provide assessments on taxpayers carried out by the competent revenue police (*Guardia di Finanza*).

All these results are finally deferred to the former Court, the Court of Appeal. In its turn, this Court finally sends them to the foreign judicial authority that formulated originally the request. The new praxis allows for the active rogatory they be sent directly by the public prosecutor office to the foreign competent judge This procedure, seen as a whole, is very strict and formal, and then its violation may give rise to the inadmissibility defect.

5. Limits to the judicial tax assistance

Considering the premises above, we can enlighten that, according to the European convention of judicial assistance signed in Strasburg on April 20, 1959, art. 2, letter b:

⁵ See art. 696 and fol. CPP

⁶ In the UK language also called active and passive “letter of request”.

⁷ The Italian discipline is regulated by art. 723 and fol. CPP; however, in pursuance of the principle of Subsidiarity, it is enforced for those aspects that the international agreement doesn't provide for.

“Assistance may be refused : a) if the request concerns an offence which the Requested Party considers as a political offence, an offence connected with a political or a fiscal offence; b) if the Requested Party considers that execution of the request is likely to prejudice the sovereignty, security, public order or other essential interests of its country.”

With regard to this, Switzerland neither signed nor ratified the 1978 protocol which establishes (Article 1) the Requested State impossibility to reject judicial assistance when the request concerns behaviour that it does not qualify a tax crime.

As the evaluation of the fiscal character of the violation is ascribed to the requested State, differences among tax regulations produce some zones of not correspondence among individual State disciplines. The judicial application for further survey of the Requested State is the only limit to its absolute discretionary evaluation.

6. The use of bank or financial information

According to main principles accepted by most of the countries, not only may tax authorities use tax information got through assessments, but also employ all information they got previously.⁸

Unlike other States, Switzerland and Liechtenstein have specific rules on bank secrecy and other confidentiality laws⁹. In particular, bank secrecy violation is punished like the client attorney privilege violation.

As far as Italy is concerned, we can state that in the tax field there isn't a specific rule that imposes the banking secrecy. Consequently, tax authorities have no restrictions to get information by banks, so they use it for tax audit purposes. However, they may acquire directly by banks the information they need only if the bank doesn't cooperate with revenue police entrusted; for instance, if the bank provides incomplete or rather incorrect information.

Generally, the regular access to bank information must be previously permitted by the local tax authority (*Direzione Regionale delle Entrate*) and in order to safeguard privacy, assessments must take place in the presence of the bank manager. Moreover, the bank is supposed to inform its client about the procedure carried out. Finally, because of the law silence over the matter, the client can't assist actively to the procedure.

⁸ See art. 37 Italian Dpr 600/73.

⁹ See Article 14 Swiss and Liechtenstein banking law.

7. The Italian, European and international approaches to the exchange of information on administrative and criminal matters.

The relationship between the pre-trial phase and the judicial one: a synthesis.

As far as the relationship between criminal and tax proceedings is concerned, Italian system establishes that the court may not stay a tax proceeding if a criminal action on the same fact is pending; this is defined “double track approach”. In other words, the final judgement, the *res judicata* of a tax administrative judgement, doesn’t have any mandatory effectiveness for the criminal judge, who, however, may take it into account as a clue.

With reference to how criminal final judgement may affect a tax trial, it’s important to point out the Italian rules (art. 654 CPP,) establishes the limits of effects in the civil and administrative judgement of a criminal decision. This judgement has a mandatory effectiveness in a tax judgement only if tax authority has sued for damages in a criminal proceeding and the criminal decision has been adopted on the same relevant fact as for tax litigation.

7.2. The relationship between the criminal and the tax investigation: the Italian view.

First of all, when the same fact has a double relevance, that is to say both criminal and administrative relevance, Italian system allows both procedures. Then, the fact is judged in the tax as well as in the criminal proceeding safe the speciality clause .

It is extremely relevant to consider the tax pre-trial outcomes; as a matter of fact, it may occur that evidence got during the pre-trial phase may enter into the criminal judgement. In actual fact, this may not often occurs as the defendant’s guarantees in the criminal proceeding are much higher. The Italian legislator doesn’t provide a general solution to this problem, then, a case by case evaluation must be done.

Furthermore, it’s likely that evidence of a criminal proceeding is used in a tax proceeding, but not vice versa. This is because guarantees provided in the criminal proceeding are higher than in the tax one.¹⁰

¹⁰ With regard to this overview, see the decisions of the Italian Supreme Court as well as the Constitutional Court: Cass. Pen. n.45477; Cass Pen. n.2601 : “*In order to determine a turning of a mere administrative control activity into a criminal one, or vice versa, a simple clue of crime is not sufficient, whereas it is essential to identify the real indictee.*”

7.3. The Council Directive 77/799 EEC¹¹: the exchange of information and its use in criminal proceedings

As a general principle, if the taxpayer behaviour are important to a crime and the tax information, the Council Directive establishes that such information may be used in the criminal proceeding if the State, which provides it, doesn't raise any objection. In the same way see also Austrian report (par. V .- p. 12).

In actual fact, the Mutual Assistance Convention allows a contracting State which receives information from another State to forward such information to a third signatory country, provided that the State that first provided such information agrees. However, EC Directive 77/799 supersedes the Mutual Assistance Convention in income tax matters between EC Member States, which are expected only to apply the Mutual Assistance Convention's rules to matters not covered by EC Directive 77/799.

In accordance with the provisions of this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital, and any information relating to the establishment of taxes. In particular, Article 7 (1) ¹²states that such information: "All information made known to a Member State under this Directive shall be kept secret in that State in the same manner as information received under its national legislation. In any case, such information:

- may be made available only to the persons directly involved in the assessment of the tax or in the administrative control of this assessment,
- may be made known only in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or relating to, the making or reviewing the tax assessment and only to persons who are directly involved in such proceedings; such information may, however, be disclosed during public hearings or in judgements if the competent authority of the Member State supplying the information raises no objection,
- shall in no circumstances be used other than for taxation purposes or in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or in relation to, the making or reviewing of the tax assessment."

¹¹ Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation amended by the Council Directive 2003/93/EC of 7 October 2003.

¹² See article 7 (1) replaced by Council Directive 2003/93/EC of 7 October 2003.

We can argue that it is an application of the principle of speciality and similarly it occurs with Article 41 of Council Regulation (CE) n.1798/03 and Article 9 of Council Regulation (CE) n. 218/92: “the information may be disclosed in administrative and judicial proceedings concerning tax law violations”. This criterion is accordingly interpreted by scholars in these terms: the competent authority may expressly deny the use of tax information before its sending and any special request of authorization to use such information for criminal purposes is demanded.

Scholars, basically side with two theories. Accordingly with the first one, the information exchanged under the Council Directive 77/799/ECC and further amendment, may also be used, without reservation, in the field of criminal law. On the other side, the second theory distinguishes between those cases in which the criminal proceeding isn't pending yet and those ones in which it is actually outstanding. In this case, scholars argue that the “international letter rogatory” ought to be started up. So, tax information exchanged thanks to the mutual assistance between tax authorities may be used in a criminal proceeding only if it has been got before the opening of the pre-trial phase, otherwise its use may be declared as inadmissible evidence.

Accordingly, the Italian code of criminal procedure grants major guarantees to the person being prosecuted or under prosecution; for instance, declarations made by a taxpayer to foreign tax authorities may not be used if the defending counsel doesn't attend the audit.

By way of example, we can point out the recent affair occurred in Liechtenstein, a well-known tax haven. In this State and from a certain point of view in Switzerland too, there is strict bank secrecy. In particular, Liechtenstein doesn't cooperate in any way with other European States as it doesn't allow any form of exchange of information and any judicial assistance, above all in administrative as well as criminal tax matters. Even if this estoppel is destined to finish by 2998 1 November.

In 2008, the German Secret Service bought from an unfaithful Liechtenstein bank employee some information. Afterwards, it exchanged it with other Member States according to the Council Directive 77/799/EEC (and further amendment). On the grounds of the information collected, a number of Italian and of many other countries taxpayers were inquired for tax offences. However, as Liechtenstein doesn't grant any judicial assistance in tax matter, even in criminal cases as well as in money laundering ones, such information couldn't ever been used through official ways. Tax courts argue that information obtained by

an infringement (that is to say not through rogatory letters) may not be used during the tax proceeding¹³.

In order to fight tax havens privileges, European and US tax authorities are trying to overcome such refusal to cooperate in criminal tax matters.

8. Exchange of tax information and double taxation conventions

Many treaties against double taxation (es. signed by Italy with France and Germany) establish the possibility to use information exchanged in tax proceedings. However, as for the principle of speciality pointed out above, this event may occur only if the Requested State allows information, by restricting its use. Similarly, the France - Italy and German - Italy Conventions are in compliance with the Council Directive 77/799.

In the Italian system, there is an open and controversial question: it often occurs that a criminal proceeding begins during a tax audit. In that case, domestic rule (art. 200 CPP) provides for that if tax inspectors find out facts that can be important also to a crime, they may keep evidence and any other useful elements of crime.

This provision represents the frontier between the enforcement of tax law and the criminal one in judicial assistance matter a frontier which likewise other States (see Sweden report p.11-12 and Austrian report par. 22) is a little unclear So, the legislator, in these cases grant to the person under prosecution all legal guarantees and defences provided by the code of criminal procedure. The question arises when the fact is important to a crime in violation of tax and criminal law. The rogatory letter could be granted to sanction the criminal infringement, but not the tax one. Accordingly, information got outside the rogatory letter way are unusable.

In the same way a problem could arises when a criminal offence appears during an ongoing assistance by another country based on an agreement on mutual administrative assistance but which does not provide for assistance in criminal tax matters. As agreements differ, it is normally necessary in these situations to stop the cooperation under administrative agreement and continue the cooperation under an agreement for mutual assistance in criminal matters.

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¹³ With regard to this, see Comm. Trib. Prov. Milano, sez. XVIII, April 4, 2000 n.178 and Trib. Bolzano June 15, 2006, n.31. This cases are still in progress and they may become cases-law too.

¹⁴ In this matter, cases laws are very rare: we can point out the Court of Bari decision n. 1261, March 9, 1999, which states that any element of crime acquired abroad without using the rogatory procedure can't be used.

Conclusion

To conclude, we can state that, the international framework still grounds on the observance of sovereignty of States and on the principle of national exclusive jurisdiction. Each State preserves rigorously its own system of criminal rules. Therefore, in the way Member States cooperate in judicial assistance matter, something is changing.

In actual fact, not only does globalization concern the organized crime and tax evasion and tax fraud, but also the mutual assistance among Member States, and consequently among tax authorities. As States can't contrast effectively this phenomenon, in order to preserve their economic systems, they are forced to cooperate. States have realized that fighting tax criminality cooperating with Member States means a greater margin of success.

Recently, Member States has signed multilateral agreements in tax matter and in judicial assistance. New political measures and a better coordination among States on tax matter could grant an effective contrast to the use of tax heaven for tax fraud and tax evasion.

Finally, to realize a European common market, it is absolutely essential to safeguard the fundamental human rights and to tackle criminal behaviours as well as tax crimes. From this point of view, the harmonization process ought to be effective in order to improve European co-operation. The creation of an international committee could be the answer and the way to get through this challenge.

Perspective and actual policy

- This form of judicial cooperation also in tax crime is destined to improve more and more according to the new anti evasion and anti tax havens policy
- See Obama , Merkel , Sarkozy policy
- See UBS and Lichtenstein cases



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MAIN PROBLEMS OF CRIMINAL TAX COOPERATION

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Overview of main problems in exchange of criminal tax information

- Each States has a their own POLITICAL tax crime law
- Coming from different culture economy etc
- So **different opposite interests** as being requested or informing State - not only **financial**
- but also of **value** about the infringement of revenue law and the infringement of law of another State.



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2 Problem of Relationships between penal and administrative proceedings.

And with **non tax criminal proceedings** (i.e money laundering, mafia , ecc.)

Use and changes of informations among them.

Political – tecnicl and theoretical problem.

Very complicated one

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The legal individual protection

- The legal individuals protection is **MORE SENSITIVE IN penal law and specially in the tax penal law.**



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THE MAIN PRINCIPLE

1.- Principle of Territoriality (strictly)

Enforcement of Taxation is strictly limited to the borders of the national territory in token of the sovereignty of the State.

Active tax power

Similarly, **each State has only the inland monopoly to enforce the law and to punish by the criminal, administrative or tax law that comes under its jurisdiction.**

Passive tax power

No international rule mandatory exists for criminal tax cooperation neither for prosecuting the tax crimes



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Legal base of tax criminal cooperation:Treaties

- **Collaboration is possible thanks to :**
- **Treaties of mutual assistance in enquiry and mutual recognition of enforcement of judgements.**
- **Together with the adjustment of domestic law to the international treaties.**



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the main international conventions on judicial assistance in tax matters

- The European convention on international judicial assistance, April 20, 1959;
- The European convention of extradition, December 13, 1957;
- The Second additional protocol to the European convention of judicial assistance, in Strasburg, March 17, 1978;
- The convention about money laundering crimes, in Strasburg, November 11, 1990 (art.1, paragraph 1);
- The convention on extradition among the European Union's States members;
- The Convention of Aja, 1970;
- The agreement of co-operation against Community fraud and other similar violations that may affect Community interests.
- The GAFI registration for money laundering crimes.
- Rules of Code of criminal procedure related to relationships among international jurisdictional authorities.
- The administrative agreements for simultaneous audits
- The European convention of Human Rights (ECHR) for legal protection in the field of taxation.
- Shengen Treaty

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What means Tax judicial assistance ?

- The acquisition of evidence that the fact is outstanding as a crime.
- The notification and summoning of trial proceedings.
- The cross-examination and the collation abroad.
- The accomplishment abroad of personal or house searches, of inspection of places, of experts' reports and technical examinations, of superintendence's observations.
- The non-resident request to come before the court to bear witness. (artt.10, 12 CEAG)
- The enforcement of last judgements abroad.
- The public prosecution undertaking. (art. 21 CEAG)



exchange of information procedures in criminal tax

- In the international framework, the legal instrument is **“rogatory letter”** (or in the UK technical language also called *active and passive “letter of request”*).
- The Rogatory is universally considered the most convenient instrument for co-operation among States on criminal matters and in the tax criminal cooperation too.
- The “rogatory letter” consists in a judicial special request (in Italy by the Court of Appeal) addressed by a State to its foreign homologue in order to acquire, through a pre-trial investigation, evidence inland the territory of that State .
- **Extradition** is further but rarely used mean v offences occur.



Main principles in cooperation tax criminal matter

1.The principle of speciality as a general rule

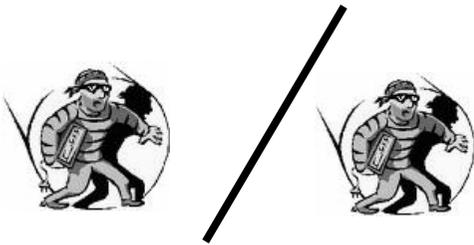
- Supplying State”,,, may admit criminal cooperation only under the **express** circumstance that, the enquiry results and information exchanged are solely employed by the “Requesting State” .
- See art.2 CEAG, 1959.
- **Switzerland, Liechtenstein** ecc. doesn't admit other States to use tax information acquired on the ground of judicial tax agreement, in pursuance of the saving clause of speciality.

Use of tax information ex art. 26 DTC in criminal proceedings

- Many treaties against double taxation signed by Italy (for instance the tax treaty signed with France and Germany) establish the **possibility to use information exchanged in tax proceedings**.
- However, as for the principle of speciality pointed out above, this event may occur **only if the Requested State allows information**, by restricting its use. Similarly, the France - Italy and German - Italy Conventions are in compliance with the Council Directive 77/799.

2.The principle of double criminality

- The assistance is allowed only if the infringement is a crime punishable by the law in the supplying State as well as in the Requesting one.
- **!!Hard limit** to the exchange of tax information and to the co-operation among States . As **rarely the notions of tax crimes correspond** .



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- **3. The non relevance of the Requesting State’s rules of procedure as regards the Requested State’s obligation to co-operate.**

- **4. Principle of the “ne bis in idem”**

Generally, the judicial assistance is not granted when the related proceeding is either a pending criminal procedure against the same offender in the Requested State or the Requested State has already delivered the last judgement on the same fact.

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5.Principle of proportionality

- According to this principle, the authority having jurisdiction may reject co-operation where the fact **occurred doesn’t deserve the requested measures**.
- In actual fact, it must verify if the proportionality, between this application and the seriousness of facts, exists. For instance, one may consider a bank account with a little amount of money whose attachment is demanded.

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6.Principle of the *locus regit actum*-

- With regard to this aspect, the competent authority of the Requested State, applying for a rogatory letter, must provide tax information according to its own domestic procedure law.

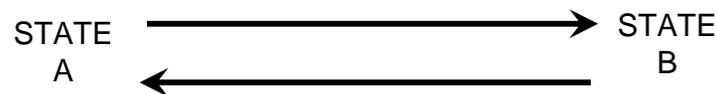
7.Principle of connection

- This principle establishes the necessity of a **direct or indirect relationship between the evidence and the person under investigation**

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8.- Principle of reciprocity-

- **tax information is given only when the Requesting State and the Requested one agree to exchange analogous information on a mutual basis**



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Limits to the judicial tax assistance

- According to art. 2, letter b) of the European convention of judicial assistance signed in Strasbourg on April 20, 1959, : **“Assistance may be refused** : a) if the request concerns an offence which the Requested Party **considers as a political offence**, an offence connected with a political or a fiscal offence;
Heritage of the old time
- b) if the Requested Party considers that execution of the request is likely to prejudice the **sovereignty, security**, public order or other essential interests of its country.” SEE Switzerland and Liechtenstein countries

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Evaluation of the fiscal character

- The evaluation of the fiscal character of the violation is ascribed to the **requested State**, so differences among tax regulations produce some zones of not correspondence among individual State disciplines.
- The judicial application for further survey of the Requested State is the **only limit to its absolute discretionary evaluation**. And with the **limit of bona fide principle** .

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2 Limit
Special economic interest involved

The use of bank or financial information

- Many States allow without no limits the use of bank or financial information. Es .Italy, US etc.
- Unlike other States, Switzerland and Liechtenstein have specific rules on bank secrecy and other confidentiality laws[1].
- **In particular, bank secrecy violation is punished as a crime like the client attorney privilege violation.**
[1] See Article 14 Swiss and Liechtenstein banking law.

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Limits – Differences in Legal protection

During the **judicial inquiry** in the supplying state, no defense attorney is provided for to treat the taxpayer of requesting state !

- Never in the case of bank secrecy!



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Relationship between administrative and criminal procedures

1.- With The Council Directive 77/799

EEC[1]: the exchange of information and its use in criminal proceedings

- As a general principle, if the taxpayer behaviour is taken as a crime and the tax information is also relevant for criminal purposes, the Council Directive establishes that such information **may** be used in the criminal proceeding **if the State, which provides it, doesn't raise any objection.**

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See article 7 (1) replaced by Council Directive 2003/93/EC of 7 October 2003.

- **“May be disclosed during public hearings or in judgements if the competent authority of the Member State supplying the information raises no objection”**
- **Speciality principle**

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Similarly it occurs with Article 41 of Council Regulation (CE) n.1798/03 and Article 9 of Council Regulation (CE) n. 218/92

- “the information **may be** disclosed in administrative and judicial proceedings concerning tax law violations”.
- **MAY BE**
- This criterion is accordingly interpreted by scholars in these terms: the competent requested authority **may expressly** deny the use of tax information before its sending and any special request of authorization to use such information for criminal purposes is demanded.

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Scholars, basically side with two theories

- 1.- Accordingly with the first one, the information exchanged under the Council Directive 77/799/ECC and further amendment, **may also be used, without reservation, in the field of criminal law.**
- 2.- On the other side, the second theory distinguishes between those cases
- 2.1.- in which the criminal proceeding isn't **pending** yet and those ones in which **it is actually outstanding.**
In this last case, scholars argue that the "international letter rogatory" ought to be started up. So, tax information exchanged thanks to the mutual assistance between tax authorities may be used in a criminal proceeding only if it has been got before the opening of the pre-trial phase, otherwise its use may be declared as inadmissible evidence.

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Ratio

- **As a general rule the States codes of criminal procedure , grant major guarantees to the person being prosecuted or under prosecution;**
- **For instance, declarations made by a taxpayer to foreign tax authorities may not be used if the defending counsel doesn't attend the audit.**

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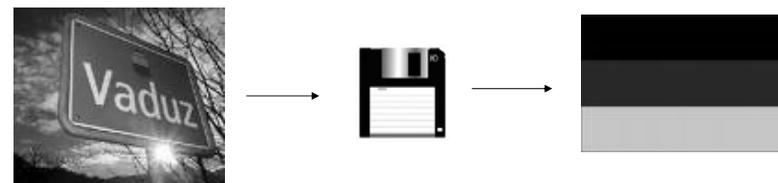
PART II - APPLICATION

- **The case in point : Liechtenstein,**

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Exchange of information

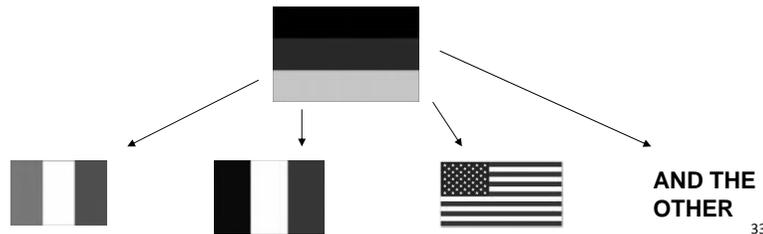
- In 2008, the German Secret Service (Bundesnachrichtendienst) purchased from an former unfaithful Liechtenstein bank employee ,some information by **microchip**.
- Afterwards, The tax german authority exchanged it with other Member States according to the Council Directive 77/799/EEC **"spontaneous(?) informations .**



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“Spontaneous” Exchange

- On the grounds of the information collected, a number of Italian, German and British taxpayers were inquired for tax offences. However, as Liechtenstein doesn't grant any judicial assistance in tax matter, even in criminal cases as well as in money laundering ones, such information couldn't ever be used through official ways. **Tax courts (italian) argue that information obtained by an infringement (that is to say not through rogatory letters) may not be used during the tax proceeding.**



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Liechtenstein Vaduz affair

- Manies Problems are involved with legal individual protection
- Reasoning in the light of past case law es. Kredit BANK Lux 1996.

The original sin!

- EVEN WHEN THE INFORMATION FORMALLY COME FROM an official body and in the distance from Germany to Italy according to legal EU correct procedures.

- PROBLEM**
The flaw in proceeding between Liechtenstein to Germany – **flaw OF ORIGIN** falls also in the information received by Italy?



1.- The original sin !

1. THE WAY OF OBTAINING THE EVIDENCE was lawful ?

2.-This evidence (*unlawful*) can be used by third parties, i.e. other States ?

- 3.- The status of States involved :**
- EU Member States**
- and Non member States (Lichtenstein)**

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EU PERSPECTIVE

- . In this case Are legal base ?
- 1. art. 4 Directive 77/ 799/EEC spontaneous exchange of *information* : without prior request forward the information ?
- 2.- EU Savings Directive'n 2003/48/EC ?

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Liecht. and SAVING DIRECTIVE

- Liechtenstein is **not** a member of the EU,
therefore
- neither the Exchange of Information Directive
 - nor the EU Savings Directive may be applied to Liechtenstein .

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3.-

3.- Wich relationship between Directives and bilateral or multilateral treaties ?

- Liechtenstein concluded agreement with the EU on 7 December 2004 applicable to the exchange of information
- to prevent tax fraud.

Art. 1 'The competent authorities of Liechtenstein and any Member State shall exchange information on conduct constituting tax fraud under the laws of the requested State, or the like for income covered by this Agreement

only competent authorities of Liechtenstein'
are obligated to provide information, and
not banking institutions.

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DIFFERENTLY
from the structure set out in the EU Savings Directive, which mandates that
Banking institutions,

•

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Does a Member State act in accordance with the general principle of international treaty law of pacta sunt servanda (and good faith) ?

- when accepting through 'criminal' channels, bank account information of a banking institution of another State ?
- that maintains a banking secrecy policy ?
- And that has an agreement with the EU essentially respecting this banking secrecy?

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Differently

- Countries addressees (Italy , UK , France etc) of data stored have to refrain of investigate respect the **international rule of non-inquiry' (the `Non-Inquiry Rule)**
- **The existence of a treaty relationship between countries and bona fide principle implies an a priori and in-depth investigation by the competent authorities into the legal and social situation of informing states ? Save serious derogation of Hrights ex art. 6.**
- **So Dutch District Court of Alkmaar 19 Feb. 2004 .**

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In my opinion

- In the case in point is not in dispute the bona fide compliance of the other state (German) but the fact that ,
- Being in dispute is a case of **crime matter** .
- And at present the international exchange of information in crime matter is **formally exclusive**
- Both for to respect the States sovereignty
- And the fundamental rights , fair Trial proceeding, privacy etc. of individuals over all in crime matter.

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the right to privacy

- **Being the information inadmissible because the**
- **behaviour of the (EU Member) States infringed a international conventional agreement**
- **invades ALSO the right to privacy**
- **of its citizens and also treads on the right to a fair trial?**

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The Rights Under the ECHR ?

- The right to a fair trial ('equality of arms') is the most important safeguard of the ECHR the alleged tax evaders can invoke, **also in case Member States exchange information on the basis of mutual assistance.**
- **ART. 6** In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to **a fair and public hearing**
- The same standard as developed in the case law under Article 6 is (is not) (yet) available in tax matter ?
 - BUT
 - In criminal matters the applicable standard is EFFECTIVE 'to avoid citizens suffer or risk to suffer a flagrant denial of a fair trial in the requesting country'.
 - Further
 - Article 8 additional (or alternative) rights the alleged tax evaders can invoke, such as **'the right to privacy' ?**

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- As the information received by public prosecutors, these are only de facto information only **simple circumstantial evidence** not sufficient to incriminate the taxpayer . the microfiche could not be qualified. **as official bank documentation** for a tax assessment such qualification is necessary .Neither the court had the means to conduct such investigations with rogatory procedures as Liechtenstein does not allows assistance in tax matter . Neither for money laundering neither (maybe) mafia.
- **So italian penal court have dismissed the**

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conclusion

the courts could (?) agree that **the manner to obtain data suered are unlfawful and the origin of the data** is completely unclear,

- thus rendering the evidence
- **unreliable . ?**

At present in my opinion it is likely the charges for tax evasion were dismissed.

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The principle of *poisonous tree*

- **EVEN WHEN THE INFORMATION FORMALLY COME FROM** an official body and in the distance from Germany to Italy according legal eu correct procedures.

-

The flaw in proceeding between the leg from Liechtenstein to Germany – flaw OF ORIGIN- falls also in the information received by Italy . *Vitiatur et vitiat* .

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Conclusion SOMETHING IS CHANGING

- Each State preserves rigorously its own system of criminal rules.
- Therefore, Member States must to cooperate in judicial assistance .
- **BUT SOMETHING IS CHANGING.**
- States can't contrast effectively this phenomenon, in order to preserve their economic systems, without international cooperation

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Switzerland Stop press

news 22 may 09

- Bill in Parliament of ratification CEAG 1959 and money laundering 1990 between USA and Swis. Rogatories more "agile" in the judicial inquiries of banking and financial secret .
- This agreement more efficient the procedures of cooperation against **ONLY Vat , consumption tax, Excises** , evasion (over 25.000 and 100.000 €).
- No Bank secret for money Laund. (With penalty no over 6 months)

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Idem

- Virgin Islands . Bilateral Convention with Nordic Countris (iceland- Gorenlandia, Finland- Norway-Sweden- Faeroer islands
- The agreements fall into line with the OECD standards for exchanging sensitives information to fight evasion
- They provide for cooperation in civil and criminal law too.

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MULTILATERALISM

OVERCOME THE BILATERALISM

- Recently, Member States has signed multilateral agreements in tax matter and in judicial assistance. New political measures and a better coordination among States on tax matter could grant an effective contrast to the use of tax heaven for tax fraud and tax evasion.

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Europea Union

- At present the **harmonisation of tax crime rules in Europe is matter of futurology.**
- More chances exist for the harmonisation of tax crime procedural rules .
- But
- to realize a real European common market, it is absolutely essential
- 1.- both to safeguard the fundamental human rights
- 2.- and to tackle criminal behaviours as well as tax crimes.

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Proposals

- 1.- The creation of **an international and or european committee** could be the answer and the way to get through this challenge –
- With the main aim of harmonising the domestic proceeding rules
- **More attention** by the States to theyr citizens protection.
- **Great opportunity** :the ratification of Charter of Fundamental Rights a Protocol of the Treaty of Lisbon

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Thanks

**Contact me for further
...spontaneous information**

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