General report "Mutual assistance and information exchange"

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I. Introduction

We are facing a globalised business world that amongst others leads to an intensification of exports. But the principle of formal territoriality bans a state from carrying out field audits and other investigations on the one hand whereas on the other hand there is no principle of material territoriality that would forbid connecting legal consequences of the national law with foreign facts and circumstances. Most industrial countries follow a taxation of *world-wide income* in their tax systems[1]. These aspects lead to a miss-match with the principle of *formal territoriality* where the national instruments and means are limited by the borders. The executability of the national law's order to tax the worldwide income shows a deficit here. Therefore exists a need to broaden the former pure national instruments into an international context by the mutual assistance in tax matters. The "Proposal for a Council Directive on administrative cooperation in the field of taxation" (COM (2009) 29) also names the globalisation, the internationalisation of the financial instruments and the mobility of the taxpayers as reasons for developing a new approach in its explanatory memorandum under "context of the proposal". The recent discussions about tax havens at the G-20 summit in London in April 2009 even increase the relevance of this topic at the moment.

The need for academic comments and reflections is massive and urgent since we find neither national literature that works with the mutual assistance in tax matters as a whole and that does not just focus on single aspects nor does a Europe-wide observation of this extent exist. We received national reports of 13 Member States that all influenced our general report. Of course, these reports are based on there own and extensive law compilation. For the preparation of the general report we took the national reports of the following countries into account: Austria, Belgium, Finland, Germany, Hungary, Italy, Luxemburg, the Netherlands, Poland, Portugal, Spain, Sweden and the United Kingdom. The national reports have been developed on basis of a questionnaire with about 90 questions that has been divided into the five main topics "Implementation", "Use", "Efficiency", "Burden of Proof" and "Legal protection" of the mutual assistance in tax affairs. This way we think to have covered all relevant aspects of this topic. In the general report we will of course only be able to concentrate on the most interesting aspects/questions. Since the project started already in 2008

[1] An exception in Europe is for example France that follows a worldwide taxation only in the field of income taxes but has the principle of territoriality concerning corporation tax.

the answers concerning the mutual assistance for direct taxation base on Council Directive 77/799/EEC which is still the applicable law.

The aims of the general report are to reflect the single national reports and to give a survey of the similarities and differences in the five main topics every national report dealt with. Whenever there are differences it is interesting to see what are the reasons for them and how do they influence the mutual assistance. The general report shall be helpful for the tax authorities and governments in order to improve the future tax law. It will also in some parts be a basis for checking if the new Council Directive on administrative cooperation in the field of taxation, (COM 2009) 29, achieves its aims and will be an improvement compared to Directive 77/799/EEC. In some parts we can only provide an overview of the situation in the Member States. Details can then be taken from the single national reports.

II. Questions of implementations

Due to the recent "Proposal for a Council Directive on administrative cooperation in the field of taxation" (COM (2009) 29) the Council Directive 77/799/EEC gets into the focus of the mutual assistance again. But it is by far not the only legal basis the tax authorities can refer to when they want to exchange information in tax affairs with another country.

1. Legal basis

There is a variety of legal basis that are relevant for the mutual assistance in tax affairs among the Member States. These legal basis can be dived into four levels.

a) Levels

The first level is the European level with its Council Directives and Regulations. The relevant Council Directives here are "Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation", "Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures" (replacing former Directive 76/308/EEC), "Directive 2002/94/EC of 9 December 2002 laying down detailed ruled for

implementing certain provisions of Council Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures" and "Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments". These Council Directives have to be implemented into national law. As expected no problems arise here. Excluding the new 2008/55/EC, which has not yet been included in the reports all of the Directives have been implemented into national law. But there are, e. g. with Directive 77/779/EC, remarkable differences concerning the time when the implementation took place. Leaving out countries that joined the European Union later, the U.K. implemented the Directive almost immediately in 1978 whereas Germany implemented it in 1985 and the Netherlands in 1986.

No implementation is necessary for the Council Regulation EC No. 1798/200 of 7 October 2003 in the field of value added tax which is another legal source on the European level.

On a second level there are multilateral agreements. These are the European Convention on Mutual Assistance in Crime Matters of 1959, the joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters of 1988 and the European Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of May 2000.

A third level are bilateral agreements. Here we have the information clauses in double tax treaties and special treaties between two countries about the mutual assistance in tax affairs. Concerning the information clauses there is a distinction between minor and major information clauses which can both still be found in the double tax treaties between the Member States though the OECD Model Tax Convention is the important guideline and basis for the negotiations to conclude new double tax treaties since all of the reporting Member States adhere to the OECD Model Convention. Differences between the treaties concerning minor and major information clauses often have historical reasons and are due to old OECD Conventions when the wording of Art. 26 has been different. Other reasons for using minor and major information clauses and the importance of further bilateral agreements for the different Member States can be seen from the following list:

Country	policy/reasons for major and minor clauses	role of additional bilateral agreements
Austria	implementation of Art. 26 also with states that are not members of the OECD	only treaty with Germany
Belgium	not mentioned	with Italy, Netherlands, France, Lithunia and Latvia
Finland	not mentioned	Nordic Convention on Mutual Assistance
Germany	implementation of Art. 26 is common standard nowadays minor information clauses may derive from the long history of double tax treaties	several treaties; important role
Hungary	older, not revised treaties contain minor clauses	none
Italy	not mentioned	several concerning automatic exchange and simultanous assessment
Luxemburg	minor information clauses only exist in older treaties that have not been renegotiated	only Benelux Convention
Netherlands	reason that is often mentioned is: "lack of knowlegde from Dutch side on the tax legislation of the other country"	several
Poland	not mentioned	a few, minor role
Portugal	not mentioned	with Spain
Spain	minor clauses with countries with an ingrained tradition of bank secrecy	important one with Portugal some agreements are not public
Sweden	double tax treaties normally follow the current version of Art. 26	Nordic Convention on Mutual Assistance
U. K.	Art. 26 is the basis for all negations for new and renegotiated treaties, differences in the information clauses are largely historical and may derive from old OECD Conventions	none

The influence of the OECD model Convention for the treaty policy can be varified in a different area. In the field of mutual assistance in collection the 2002 version of the OECD model tax treaty has a new article for this topic. Since this version is quite recent the adoption of this article has not yet proceeded far as the following list shows. But anyway, since 2002 rules identical or similar to Art. 27 OECD Model Tax Convention have been included in new double tax treaties.

Country	**Adaption of Art. 27**
Germany	yes, identical with Poland, similar in some other treaties
Netherlands	yes, in a few treaties
Poland	in some recent ones, like Netherlands and Germany
Spain	yes, with Belgium and France
Sweden	yes, with Poland and Sweden
U. K.	with Faroe Islands

On a fourth level e. g. in Germany's General Tax Act (§ 117) there is a unilateral rule that regulates the administrative assistance in tax affairs.

b) Concurrences

It is quite complicated to get an overall view of these different sources of law concerning mutual assistance named above. Some members of our working group said it is a "jungle" at first glance. What makes things even more complicated is to think of the concurrences between these different sources. Of course, as general rule has to be taken into account that European law is *superior* to national rules. The Member States are bound to the in national law transferred principles of Council Directive 77/799/EEC[2]. Thus, double tax treaties' information clauses which are inferior in relation to European law, are been *overruled by in national law transformed Council Directive 77/799/EEC*. Just in cases where the duty to deliver information deriving from a specific double tax treaty goes further than the duty deriving from the Council Directive 77/799/EEC this specific double tax treaty comes first[3]. Another case of a priority double tax treaty clause is even thinkable if it's shelter of individual legal rights goes further than the standard of Council Directive 77/799/EEC and the transformed national law. In this case the double tax treaty clause can prevent the delivering of information that discover e.g. individual secrets. However, no national report mentions a similar case.

c) Role of the joint Council of Europe/OECD Convention on Mutual Assistance in Tax Matters in the different countries

Under II.1 we named the joint Council of Europe/OECD Convention on Mutual Assistance in Tax Matters as one of the multinational agreements. Though it is from the January, 25th, 1988 not all of the Member States have signed or ratified it yet. Amongst others the Convention has been ratified by Belgium, Finland, France, Italy, the Netherlands, Norway, Sweden, Poland and the U.K.. It has been signed by Germany. Austria, Greece, Hungary, Luxemburg, Portugal and Spain have not signed or ratified the Convention yet. Also non-member States of the Council of Europe signed and ratified the Convention like the United States (only signature) or Canada (signature and ratification). But Germany and the U.K. e. g. signed it just recently - about 20 years after this Convention was created. In Germany the reason for this late signing has been surely the massive criticism in the German literature. The critics miss suitable regulations to assure an effective protection of business secrets and secrecy in tax matters in general. Furthermore they see a lack of procedural requirements that would

[2] *Seer*, in: Tipke/Kruse, Cologne, Abgabenordnung/Finanzgerichtsordnung, § 117, para. 9 (Juli 2008).
[3] *Engelschalk*, in: Vogel/Lehner, DBA - Doppelbesteuerungsabkommen, Munich 2008, Art. 26, para. 16; *Carl/Klos*, in: Deutsches Steuerrecht 1992, p. 528 (531); *Hillenbrand/Brosig*, in: Betriebs-Berater 1997, p. 445 (447).

allow an effective legal protection[4]. By finally signing Germany wanted to indicate how serious its concern to improve the information exchange is. That some countries have neither ratified nor signed yet shows how difficult it is to bring multilateral agreements like this into force where unlike with European Council Directives there is no obligation to do so. Nevertheless, it is expected that in the long run (at least for German tax authorities and we see no reasons why this opinion should not be transferable to other Member States) collective administrative agreements like this Convention will get more practical relevance as well[5]. In the end, the Convention amends the scope of bilateral and multilateral treaties and regulations of the international information exchange and offers this way a chance to enlarge to an international cooperation.

The actual status of the convention can be taken from the following website: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=127&CM=1&DF=&CL=ENG

2. Constitutional backgrounds

The national reporters tell that their countries' legislations do not provide a constitutional framework especially for the mutual assistance in tax matters. But the general constitutional principles of the Member States are also relevant for the mutual assistance. These principles are the following:

[4] ICC, in: Betriebs-Berater 1986, p. 1274 (1276).
[5] *Hendricks*, Internationale Informationshilfe in Steuerverfahren, Diss. Münster, Cologne 2004, p. 80.

Belgium	no constitutional frame
Finland	exchange has to follow the rule-of-law-principle and the general principles of adminstrative law, fair trial and right on privacy
Germany	duty of loyalty, assistance can affect informational self-determination
Hungary	general priniciples which are priniciples of legal certainty, protection of privacy and ability-to-pay
Italy	the same principles that rule the acquisition of information for domestic reasons, e. g. principle of equality, freedom of persons, freedom of domicile, freedom of letter; no specific claims against infringements of such constitutional garantees
Luxemburg	constitutional provisions seem not to go as far as legislative provisions
Netherlands	no specific provisions, general constitutional framwork regarding the legal position of treaties
Poland	deduced from the constitutional right to privacy and Art. 51 of the Constitution that deals with the handling of information generally
Portugal	Art. 103 and 104 of the Constitution deal with the tax system and with taxes and include taxpayer garantees. These provisions apply to mutual assistance.
Spain	deduced from general constituational rights, like right to intimacy, right to data protection and principle of legal certainty
U. K.	no constitutional framework, HMRC's exercise of its gathering powers may be challenged in context of Art. 8 ECHR, UK domestic human rights legislation should be compatible here too

3. Differences and similarities in the tax haven criteria

In the recent discussions e. g. at the latest G 20 summit in London in April 2009 the word “tax haven” has been often used because it is an major aim to fight against them. From the general reports it becomes clear that the handling of tax havens in the Member States *is not alike*. Some Member States have tax haven criteria codified in their tax code, other have not. Then there are Member States that have developed a *list of countries* they declare as *tax havens*. Other Member States have a *white list* that enumerates countries they do not declare as a tax haven. The differences can be seen in the following list (for details please see the single national reports):

Country	Criteria
Austria	no legal definition, the literature divides into real tax havens, quasi-tax havens, low-tax country and countries that promote certain sectors
Belgium	definition in the Belgium income tax code: a country with a tax system that is more favourable compared to the Belgian one, tax havens are listed by the Government
Germany	no legal definition, also different definitions in literature
Hungary	according to the Individual Income Tax Act a jurisdiction is a tax haven where no tax is introduced that is equivalent to Hungarian Corporate Tax or which would be levied at a 12 % flat rate at least, a country is no tax haven when Hungary has concluded a double tax treaty with this country
Italy	main criteria: lack of exchange of information and a low tax rate, Ministry of Finance enacts a white list with countries that exchange information
Luxemburg	no legal definition
Netherlands	no legal definition, no blacklist countries, criterion for low taxation is set at less than 10 % tax on a tax base as determined under Dutch tax law
Poland	Ministry of Finance provides a list of countries that are regarded as tax havens, no agreements with these countries on basis of the OECD Convention
Portugal	exhaustive list of countries that are declared as tax havens, but the criteria are not public or known
Spain	model of a closed list with tax haven counrties by Royal Decree, no tax haven when a country signs an agreement with Spain in order to avoid double taxation etc.
Sweden	no definition in domestic tax law
U. K.	no legal definition or criteria by which a jurisdiction is declared to be a tax haven

Having unique criteria for tax havens in the EU and a common list of countries all Member States declared as tax havens can make fighting tax havens easier because it would create a higher economic pressure on those countries. Looking at the criteria the OECD developed may be useful here. The OECD names *four key factors* that determine whether a jurisdiction is a tax haven. The first is that the jurisdiction imposes no or only nominal taxes. The three other factors to be considered are:

- Whether there is a lack of transparency
- Whether there are laws or administrative practices that prevent the effective exchange of information for the taxation purposes with other governments on taxpayers benefiting from the no or nominal taxation
- Whether there is an absence of a requirement that the activity has to be substantial[6].

The OECD also has a list of countries that are tax havens in its view which only contains three countries: Andorra, The Principality of Liechtenstein and the Principality of Monaco[7].

[6] http://www.oecd.org.document/23/0,3343,en_2649_33745_30575447_1_1_1_1,00.html.

However, in the in April 2009 published "Progress Report" the OECD pointed out that all three states have recently made clear statements that they intend to rapidly implement the standards[8].

4. Influence of the EU law on the design of the rules and practices to avoid tax fraud and tax circumvention in the Member States

Most national reporters are not aware of facts that an influence exists other than through the implementation of the EU Council Directives or through the EU Regulations. Here, first of all the *Saving Directive* is mentioned as an effective instrument in the fight against tax fraud and tax circumvention. Spain claims that the influence of the EU law has led to important steps for the Spanish legal system in the international and internal environment. Whereas Hungary says that the implementation of the respective European Law has not significantly influenced the national legal practices. More important seems to be the influence of the ECJ's case law in Hungary, which led to the introduction of an alternative minimum tax. The influence of the ECJ's case law is also mentioned by Italy and Poland.

III. Questions of use

All the legal basis named above under II.1 do not have a positive effect on the information exchange if the means this legal basis offer are not used by the tax authorities whenever there is the need to use them. So we like to find out how the information is exchanged and also how often. Together with the chapter on "Efficiency" this is surely the most practically related part of our researches.

1. Activities the tax authorities are allowed when assessing taxes

The main activities tax authorities are allowed to do when assessing taxes in each Member State and the consequences when the requested party fails to supply the information are listed below. For details please look at the single national reports.

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[7] http://www.oecd.org/document/57/0,3343,en_2649_33745_30578809_1_1_1_1,00.html.
[8] Progress report on the jurisdictions surveyed by the OECD Global Forum in implementing the internationally agreed tax standard, released April, 2nd, 2009.

- Austria: as a general principle every person is obligated to provide information on tax matters in accordance with the General Fiscal Code even if it does not concern his/her personal tax liability.
  Options of the tax authority: Legal inspection, questioning of witnesses (with the exception of the professional representatives of the party and banks), tax audit, search, bank information (just in cases when a financial criminal proceeding has been initiated due to tax fraud).
  If the requested party fails to supply this information: fines up to 5.000 €

- Belgium: there is no general law that regulates the various acts and activities of the tax administration. Generally audits and examinations are allowed.
  Income audit: examination of books and accounts; address questions that the taxpayer is obliged to answer within one month
  VAT audit: taxpayer is obliged to provide access to information,
  Taxpayer is obliged to present books and accounts.
  VAT officers are allowed to take books and documents with them or copies of them
  The Income Tax Code as well as the VAT code authorises the tax administration to request information from third parties. A restriction may be the bank secrecy.
  If the requested party fails to supply this information concerning Income Tax as well as VAT, fines are possible as well as criminal sanctions. Concerning the Income Tax it is also possible to deny the tax consultant the right to represent the taxpayer for a period of up to five years if he/she has been found guilty of an administrative or fiscal offence.

- Finland: most important are: tax audit, cooperation with the police such as home search and seize of documents

- Germany: Interview the taxpayer, require a sworn declaration, demand information from third persons, expert evidence, documentary evidence, access to electronic data file, which contains bank-customer data

If the requested party fails to supply this information: penalty payment, substitute performance, direct enforcement, calculation/estimation of the tax basis in case a real calculation cannot be carried out

- Italy: request information and documents from the taxpayer, ask the taxpayer to present himself before the office, make inspections in the taxpayer's residence and office, ask third persons, companies, public administrations to give information related to the taxpayer
  If the requested party fails to supply this information: administrative or criminal sanctions

- Hungary: tax audit, ask individuals (even if not being considered to be taxpayers) to give witness, bank secrecy is based purely on contract law -> tax authorities may have access to bank information for exchange of information purposes in all tax matters
  If the requested party fails to supply this information: administrative penalty

- Luxemburg: The relevant rules are contained in the general laws in taxes. Information from third parties may only be obtained if their collection from the taxpayer directly is not possible.

- Netherlands: ask questions, investigate books and documents, visit (not search) at the premises of the taxpayer or of his employer, his bank, associate or business partner or everyone who has the legal obligation to keep books and records
  If the requested party fails to supply this information: reversion of the burden of proof (tax inspector assesses the tax and the taxpayer has to prove that the assessment is too high), if a third party fails: fine

- Poland: any legal instrument available in the Polish legal system

- Portugal: freely access the premises or sites where there may be elements connected with the tax payer's activities, examine and accept his accounting books and records, access, consult and test his IT system, demand the collaboration of any public entity necessary for the assessment of his tax situation or the tax

situation of third parties, request information from notaries, registrars and other official entities, to use his premises when such use is necessary for the inspection to be carried out. (This is a non-exhaustive listing of the powers of the inspection of the tax administrations.) On a court decision the law allows the derogation of bank secrecy.
If the requested party fails to supply this information: administrative offence liability and/or criminal liability, penalties at different amounts

- Sweden: request additional information from the taxpayer and from another person or institution e. g. banks, insurance companies or business partners, audit with far-reaching rights to go through all the documentation and files of a taxpayer, but some types of documents are permitted to be concealed in the audit (attorney-client privilege)
  If the requested party fails to supply this information: fine

- Spain: address requirements of information to the taxpayer or third parties, requirements regarding movements of bank accounts
  If the requested party fails to supply this information: fine

- U.K.: issue a taxpayer notice, issue a third party notice (requires either the agreement of the taxpayer to whom it relates or the approval of a tax tribunal), enter business premises and to inspect them and the business documents (income tax, capital gains tax, corporation tax and VAT)
  If the requested party fails to supply this information: penalty; criminal offences are committed where a person conceals, destroys or disposes documents that the taxpayers knows are or will be subject of an information notice or where he obstructs an HMRC (Her Majesty Revenue and Customs) officer

Generally tax audits, examinations and investigation of different kinds and requesting information and documents from the taxpayer are the common activities here. Also requesting third persons is allowed in many Member States but the Austrian and Belgium reporters advice that in their country the bank secrecy can cause restrictions here. So the main

differences in the activities allowed arise from the *different handling of the bank secrecy* in the national law.

In contrast to a commercial, industrial or professional secret which is protected by Art. 8 of Council Directive 77/799/EEC[9] the *bank secret is not protected by the Council Directive*. The protection of the *commercial secrets* is also included in Art. 16 (4) COM (2009) 29. But the proposal goes even further when Art. 17 (2) COM (2009) 29 states that: "in no case shall Article 16 (2) and (4) be construed as permitting a requested authority of a Member State to decline to supply information concerning a person resident for tax purposes in the Member State of the requesting authority solely because this information is held by a bank, other financial institution…". This *distinction* between *bank secrets* and *business secrets* makes very much sense in our opinion because the idea of what should be protected is completely different. The business secrets help protecting a country's enterprises and their inventions and investments and in the consequence the desired economic competition is kept in progress. In contrast to that the bank secret can hinder the tax authorities to get to know about all relevant incomes of a taxpayer and to find the exact tax base. It can also support tax fraud and tax circumvention. A state could implement it to become more attractive for investors. In a union like the EU these are surely undesired effects. Even the OECD emphasises the importance that countries have the authority to be able to respond to a specific request for information held by banks and other financial institutions[10]. This approach seems to arrive in the countries that still have the bank secrecy. The Austrian reporters e. g. refer that in their country one could feel growing pressure from international organisations like the OECD to grant financial authorities greater access to banking information.

2. Specifics in the organisation of the exchange of information from one Member State's competent authority to another one and possibilities to shorten this way

a) Current situation

According to Art. 1 of the Council Directive 77/799/EEC the exchange of information takes place between the "competent authorities" of the Member States that are defined for each

[9] Art. 8 (2) of the Directive allows a Member State to refuse providing information where it would let to a disclosure of a commercial, industrial or professional secret.
[10] *OECD, Global Forum of Taxation,* Tax Co-operation – Towards a level playing field: , Paris 2008, p. 11 et seq.

country in Art. 1 paragraph 5. In Belgium the court decided that only the competent authority can request for international assistance and can answer requests. If the exchange of information is requested by *local tax administrations* the exchange of information is illegitimate and cannot be used for tax purposes. Naturally, the organisation of answering a request is different in every country but they all pass the request forward to subordinate agencies (for details see the single national reports). Some countries like the Netherlands have different administrative procedures for automatic and spontaneous information exchanges than for the information exchange on request. Either there are no specific rules that organise the way of answering a foreign request like in Belgium or Hungary or there is an internal guideline for the exchange developed for the staff of the competent authority that is also publically available like in Germany, Spain or the U. K. Possibilities to *shorten the often circumstantial administrative way via bilateral treaties* exist. Germany concluded such a treaty only with Austria and also Austria has only a treaty with Germany dated already back to the year 1954. Belgium has an administrative arrangement with France that says that local tax administrations can exchange directly without passing through the central tax authorities. Spain agreed upon a direct consultation with France, Sweden, the Netherlands and Portugal and has signed cross-border agreements with France and Portugal that allow a direct exchange among specialized units. At the moment a “pilot” group of countries is developing a standard form for the requests comparable to the ones used for VAT purposes.

b) Specifics in the organisation under COM (2009) 29

Art. 4 of COM (2009) 29 has the heading “Organisation”. According to Art. 4 (1) each Member State shall communicate a competent authority to the Commission for the purpose of this Directive. This is nothing new since there is a list of competent authorities in Art. 1 (5) of Directive 77/799/EEC, too. What is new is that each Member State should install a *single taxation liaison office* which shall have principal responsibility for contacts with other Member States in the field of administrative cooperation covered by this Directive. This is similar to the regulation for VAT purposes where according to Art. 3 (2) of Council Regulation No. 2073/2004 such a single central liaison office already had to been installed.

Furthermore the competent authority of each Member State may designate taxation liaison departments that shall be any office other than the taxation liaison office with a specific territorial competence or a specialised operational responsibility. This office shall be

authorised to exchange information directly on basis of this Directive. This will surely be a first step to short-cut the official channels that have often been described as too circumstantial. The same aim has certainly the introduction of the authorisation to designate competent officials who are entitled to directly engage in administrative cooperation on the basis of the Directive except where a specific authorisation is required under this Directive (Art. 4 (4) COM (2009) 29). This will definitely shorten the way. It is certainly also a possibility to fasten the process of administrative assistance when these competent officials use these means and are advised and motivated to do so.

3. Administrative procedures when the requested information is not in the hands of the requested authority

Due to the national specifications even the procedures are quite different. In Germany e. g. which has a federal structure the Federal Central Tax Office forwards the request to the state that itself forwards the request to the local state tax office that administrates taxes like income tax, corporate tax or VAT. If the local tax office is in possession of the requested information it passes it on to the state ministry department which passes it further to the Federal Central Tax Office. If the requested information is not in the hands of the local tax office, the taxpayer and other persons are obliged to cooperate. There is a preculiarity concerning VAT where sales tax audit visits are allowed.

Looking at a smaller country like Luxemburg the requested authority will do its own researches which means first research its internal files before addressing the taxpayer. When the information cannot be obtained from the taxpayer the authority will request the information from third parties.

In the Netherlands it is the tax inspector who decides if it is necessary to ask questions to the taxpayer concerned or to refer the question to another region to obtain more information or to investigate books or premises of the taxpayer.

In Italy the direct interventions of the taxpayer are one measure next to asking the municipalities, banks etc.

In Spain the competent authority will carry out the suitable enquiries to get the information from the taxpayer or third persons. If it is not necessary to get the requested information the Secretary General of Finance will inform the Minister so he can give explanations to the requesting authority.

4. Organisation of the exchange of information when the request is based on "Council Regulation No. 1798/2003 in the field of value added tax"

Concerning the VAT the procedure is in most countries the same as with requests for direct taxation. This is explicitly mentioned by the national reporters of Belgium, the Netherlands, Poland and Spain, where the Spanish national reporters emphasize that there is a greater decentralization. A big advantage compared to direct taxation is certainly the existence of the *database network CCN* here which allows the Member States to exchange information quickly. But according to Art. 21 of COM (2009) 29 it is desired that also for direct taxes the required information is provided via CCN. Germany has invented a special programme called "KUSS" on its Minister of Finance Conference that helps avoiding cases of fraud and reducing the weaknesses resulting from its system of federalism.

5. Differences in the precautions taken to avoid provision of commercial, industrial, business or professional secrets

Most Member States say that they only answer a request when the other Member State guarantees that it keeps the fiscal secret and that the data is supplied only to persons who are directly involved in the tax proceeding. If this is not the case, this is a reason for them to refuse the provision of information.

The necessity for further administrative precautions is e. g. seen by Belgium because of the Belgian State's liability to pay indemnities to Belgian companies. Whereas these indemnities result from a Brussel's court decision, compensation because of a breach of official duty is possible according to the German Civil Code. A violation of the fiscal secret can also be a subject to penalty because it is protected by the German Penal Code. Punishments are also intended in the Dutch law. Concerning Council Directive 76/308/EEC and 2002/94/EC most national reporters talk about the implementation into national law as a mean to ensure secrecy

and confidentiality here. Concerning Directive 76/308/EEC Poland admits that the Polish regulations do not guarantee entire security in this case because the scope of bodies permitted to have access to confidential fiscal information is larger than that stated in Art. 16 of the Directive. Whereas concerning the Directive 2002/94/EC Germany additionally mentions its Data Protection Act that regulates how to handle electronically stored personal data and determines the data secret. Italy points out that it uses its own computer system equipped with the most advanced security measures against intrusion and unauthorised access. Limited access of the data bases just for a special group of tax officials is a practice used in Luxemburg, the Netherlands and Spain here. The U. K. points out that the access to its data bases is password protected and that there are no facilities to copy data to disks without specific authorisation from an HMRC data guardian.

All in all it can be said that currently there will problably be no real guarantee for concealment. In the end the Member States have to put trust in the integrity of the tax administrations of the other countries.

6. Reasons for taking part in simultaneous tax examinations

The main reasons for taking part in simultaneous tax examinations are to control the appropriateness of *transfer prices* or for *VAT reasons*. Most countries state that they take very rarely part in simultaneous tax examinations, e. g. five audits per year. Luxemburg has not participated at all, Spain in 19 from 2003-2006. The Dutch reporters point out that their tax administration participates in simultaneous tax examinations in cases where investigating a specific taxpayer would be very interesting for the other country as well. Maybe because the HMRC sees very little overlap between the cases which the HMRC has the most interest in examining and the cases which might interest other countries, it is a reason why simultaneous tax examinations are very rarely used by the U. K.. In their eyes simultaneous controls in relations to indirect taxes, e. g. cross-boarder VAT matters, have been more productive.

7. Tendencies for the usage of a certain kind of instrument of mutual assistance

All of the national reporters point out that there is *no tendency or hierarchy to use a certain instrument over the other*, but that the use rather depends on the constellation of the case and the nature of the information needed. HMRC clarifies it as follows: exchanges on request are

made in current enquiry cases and the requesting officer will usually need a prompt response. Automatic information is used for risk analysis prior to enquiries. Automatic exchange is used for cross-border payments of interests, royalties and rental income from property. Anyway, the exchange on request seems at least in the eyes of the Spanish and Hungarian reporter the more usual method though we doubt that this thesis is reflected in the statistic material. Luxemburg will not apply the automatic exchange of information whereas the Netherlands try to improve the use of automatic exchange of information and to raise the awareness for the availability of this instrument. Austria views the use of the automatic and spontaneous exchange as preventive. In this context Italy points out that these instruments should according to Italian law only be used when the elements requested are not otherwise available nationally.

8. The relationship between criminal and tax proceedings and judgements

It is generally to be said that a distinction must be made between tax matters and criminal matters. Different sources of law are affected here. The Council Directive 77/799/EEC e. g. does not provide means for criminal matters. Consequently, the reports also show that there is a *separation between criminal and tax proceedings* in the different countries. This separation can be more or less strict.

The Belgium legislation e. g. forbids direct communications between tax inspectors and criminal prosecutors and the exchange of information between the tax administration and the department of justice is only possible under very strict conditions. In Germany criminal cases are subject to ordinary jurisdiction whereas tax matters are subject to the jurisdiction of the tax courts. Here, Proceedings and judgements are independent. This also influences the legal position of the taxpayer. Whereas the taxpayer has the right to refuse testimony after the German Code of Criminal Procedure he/she is legally obligated to cooperate in tax procedures. The complete separation of criminal and administrative proceedings is called “double rail-theory” in the Italian law. It is interesting here that this separation did not always exist but that in former times the criminal judge was bound by a tax sentence. Also in Hungary tax liability and liability for fiscal offences are determined independently from each other. But the tax authority competent in completing a tax audit may initiate a criminal procedure. In Spain on a first step infringement procedures will be carried out by the same person who dealt with the audit procedure. But when there is a suspicion for a criminal

offence this is reported to the criminal prosecutor and the audit procedure is called off. So there is also a separation when it comes to the criminal proceedings here. It is similar in the U.K. where first HMRC investigates the avoidance and evasion of tax using both civil and criminal proceedings and when it considers that a case may be dealt with through the institution of criminal proceedings forwards it to the Revenue and Customs Prosecution Office, which then determines whether or not to institute such proceedings. Due to the size of the country, criminal court proceedings in general and more especially in tax matters are in fact very rare in practice in Luxemburg.

9. Comparison of the quantities and figures

First of all it can be said that getting quantities and figures from the ministries has been a problem in many Member States and took time or have not been received at all because of the Ministries' unwillingness to cooperate. In most of the countries we are *missing a policy of transparency related to this topic*. Thus, it does not surprise that in some countries like Germany, Finland, Luxemburg, Portugal and Sweden *no up-to-date public statistics are available*. It can generally be said that the number of requests is quite low in some countries like Germany (averagely 400 requests made between 2002 and 2007 per year), Italy (with under 100 requests per year), the U.K. (with 150 requests made in 2001 and 325 in 2007) or Luxemburg (averagely 10 to 15 requests made). Belgium (with averagely 3.000 requests made per year) and the Netherland (with 1.553 requests made in 2007) seem to use this instrument more often. The low amount of requests is in Germany justified with the enlarged duties to cooperate that exist when facts and circumstances affect a foreign country. This instrument is used first and requests are therefore seldomly needed. The same can be said for Italy where international cooperation should be implemented only when the elements requested are not otherwise available nationally. But since not every Member State's legislation knows such kind of enlarged duties to cooperate (e. g. the U. K.) it may be questioned if this is a *systematical ignoring* of the Directive 77/799/EEC or if they use their national means first without having this procedure regulated in their laws with the consequence of no need for using the Directive anymore. The spontaneous and automatic exchange of information is used more often. Also the exchange concerning VAT is used more frequently which might be due to by the existence of standardised forms and also reflects the economic relevance of this type of tax for the Member States.

Most countries request more often *information from their neighbour countries* than from others, as reported e. g. by Finland, the Netherlands or Belgium and of course economic relations are relevant here, too. Concerning the Council Directive 2003/48/EC it is remarkable that Luxemburg sent in 2006 information on bank accounts in 2.300.000 cases. This refers to cases where Luxemburg bank clients accepted the communication of information to the revenue authorities of their home country in order to avoid the withholding tax on interest.

IV. Questions of efficiency

Not just businesses and enterprises but also administrations are nowadays meant to work efficiently. In the German literature the expression *"administration's efficiency"* is known which can be understood as the administration's instruction to *carefully balance out* between the *fiscal interests* of the involved states and the in that singular case *effected legally protected interests*[11]. In the information exchange there are at least always two tax administrations concerned that have to work efficiently together and that have apart from the legal basis named under II.1 also to pay attention to their constitutions and the national laws. The questions we pose under the chapter "efficiency" focus on the practical experience the Member States have with the means the mutual assistance offers.

1. Valuation of the efficiency of enlarged duties to cooperate

Enlarged duties to cooperate seem to be not a common instrument concerning the exchange of information because its existence is only mentioned by the national reporters of Germany, Luxemburg, Austria and Spain. Italy knows enlarged duties to cooperate just in relationship with tax havens and the Netherlands state that there are no additional duties to cooperate to the levying of taxes but there is a difference in the position of the taxpayer in the case where there is no cooperation. Regarding Luxemburg and Austria the enlarged duties to cooperate are not fixed by law. The situation in Luxemburg is derived from the legal situation in Germany but is not really affirmed by the Luxemburg Court. In Austria the enlarged duties to cooperate have been developed by the jurisdiction. In both countries the enlarged duties should be used first before sending requests to other Member States and consequently these countries see a kind of hierarchy that the enlarged duties to cooperate come first. So some *cases can already be solved without questioning another Member State*. This instrument

[11] *Seer*, Verständigungen in Steuerverfahren, Habilitationsschrift, Köln 1996, p. 302.

seems to be quite effective at least in the eyes of the ministry or tax authorities. But it should not be forgotten that there is always the danger that the taxpayer can just pretend to cooperate. The Austrian national reporter sees general positive effects for the avoidance of tax fraud and tax evasion because of the existence of the enlarged duties to cooperate. The capacities of the tax agencies could because of the enlarged duties are used more efficiently for international tax cases that have a higher potential for a risk.

Because of its concentration on tax havens the Italian situation is not comparable with the "normal" European information exchange. According to the Luxemburg national reporter the enlarged duties to cooperate have little practical importance there because they are not really affirmed by the Luxemburg Courts.

2. Valuation of the efficiency to reduce tax evasion among the different instruments of information exchange of the Council Directive 77/799/EEC

Concerning this topic the national reporters seem to agree generally in two points: Firstly, it is the combination of the different instruments that helps fighting tax evasion. That is why the Italian reporters point out that the whole network of the instrument is efficient because e. g. an automatic exchange could be used to start an exchange on request or an exchange on request can be used for a spontaneous information exchange. Secondly, it is hard to say that one instrument is more efficient than the other one because *every instrument serves a different purpose*. The efficiency of an instrument depends on the kind of information needed and exchanged, the purpose of the request and the way the request can be handled in both countries. The exchange on request is used e. g. when specific information in a certain and single case is needed. Automatically and spontaneously exchanged information can reveal information that would have otherwise perhaps never been discovered. Just the Luxemburg national reporter highlights one instrument as being more efficient than the others and this is the spontaneous exchange of information. In his eyes a taxpayer wishing to hide income of a certain type has always to count with the possibility that an exchange might occur. Comparing spontaneous and automatic exchange of information the Austrian national reporter also regards the spontaneous information exchange as more efficient than the automatic information exchange because the information that is exchanged is more tightly focused and will therefore with a high likeliness lead to relevant results for the state getting the information. Therefore the Austrian spontaneous exchanges of information are connected with

a request for acknowledgement. Some national reporters indicate that even taking all three instruments together has not reached efficiency high enough. The Italian reporters say that a higher level of implementation is necessary and that the Italian National Revenue Service is trying to intensify the spontaneous exchange. Also the Polish reporters point out that the cooperation is not advanced enough especially in the field of direct taxation whereas to a limited extent the VIES (Value Added Tax Information Exchange System) seems to be efficient for the VAT. They also indicate that there is a lack of understanding for the necessity for the information exchange in Poland.

3. Valuation of the efficiency to reduce tax evasion between double tax treaties and the relevant Council Directives

The answers to this question are not consistent. Some national reporters say that there are no differences in the efficiency of these instruments. This is e. g. what the Austrian, Luxemburg, British and Belgium national reporter say. But the Belgium national reporter names one exception which is involved in a non-European context. The double tax treaty with the US excludes the bank secrecy law if information is asked by the US authorities. It may be just a coincidence that Austria, Belgium and Luxemburg are on the so called “gray list” published at the G-20 summit in London in April 2009 naming countries that promised a better transparency but did not sign relevant international agreements yet. The other reporters who answered this question by a majority say that the relevant Council Directive is more efficient. One reason named is the existence of the network CCN (Custom Code Network) and the standardised electronic forms, though the electronic form used is according to the Portuguese national reporter also used for requests under the double tax treaty law with European countries. Another reason for the higher efficiency of the Council Directive is according to the Polish national reporters that the European law has precedence over domestic and international law. The Dutch national reporters also think that the *Council Directive gives more possibilities to exchange information than the existing double tax treaties* because the amount of taxes covered is mostly smaller since it often just covers taxes on income and capital. But the Directives *do not cover gift and inheritance taxes*. Thus, the difference will not be that big. A major point is seen in the fact that it is allowed to disclose the information in public court proceedings whereas this is only possible if the other state does not object under the Council Directive law. This may be an incentive for some countries to exchange more information under the Directive than under double tax treaty law. In contrast to the main

opinion that the Council Directives are more effective, stands the position of the representatives of the German finance ministry. They claimed that double tax treaty law is advantageous compared to the Directive because double tax treaties always allow reactions in the form that the treaty's advantages do not have to be provided in cases where the treaty's application has been abusive. However, they even see that concerning VAT the administrative assistance is the "one and only" instrument with a high efficiency. They also state that in the field of the income based taxes – where in their eyes real "defrauders" would go to tax havens – the administrative assistance has preventive character.

4. Valuation of the efficiency of VIES and opportunities to improve the system

Given the *free circulation of goods* without border controls within the EU it is evident that a system like VIES is essential for the control of the Value Added Tax. It is also a well proven and tested system and most national reporters do not report any major problems. The British reporter puts it this way: "VIES provides HMRC with all information they require" but HMRC also complains about the *high level of error messages and redundant data*. The two issues named repeatedly are that there is sometimes a delay in the input of the national data so that it is not always accurate and that problems may relate to the way the information is filled in by the taxpayers. They may use wrong business IDs. To make VIES more effective it would in the eyes of the Italian reporters be necessary that the procedure becomes faster and that also *transactions related to services* are covered and not only those related to goods. The database should be extended so that also other information including bank data and not only those directly related to the application of VAT are implemented. This would be useful to start controls aimed at counteract frauds before they are carried out.

5. Valuation of the efficiency of Council Directive on savings income

As early as in the beginning of the EU there has been an initiative to cooperate in the field of savings income. The first proposal introduced in 1962 a Europe-wide standard allowing withholding tax on the one hand and an information service for an effective tax control on the other hand[12]. Nowadays, information concerning savings income is exchanged automatically according to Art. 9 of Council Directive 2003/48/EC. This Council Directive responds the

[12] *Anzinger*, in: Steuer und Wirtschaft 2002, p. 261 (264).

idea of *strengthening the automatic exchange of information* among the Member States. But it has to be pointed out that Belgium, Austria and Luxemburg do not cooperate in the same way as the other Member States. They are allowed to apply a withholding tax instead of providing information. Regardless they can obtain information from other States. This fact is seen as a problem by the Italian reporters who think that this rule distorts the freedom of the circulation of capital. Even in the German literature this exception is valuated critically since an internationally orientated investor still has considerable tolerances[13]. Anyway, most reporters rate the Council Directive as fairly efficient and proceeding smoothly without any major problems. As an example for the efficiency the Dutch reporters build a *correlation between the amount of data received from different countries and the amount of data that could not be used*. Since only 2,4 % of the data received in 2007 was unusable the Council Directive seems to work efficiently. The Polish reporters deduce its efficiency from the more frequently used application than the double tax treaties. The German ministry also claims that the Council Directive has a preventive effect since facts about transfers via black markets become evident. But the national reporters see the *following problems regarding the Council Directive*:

- The Directive does not provide any rule binding the State of residence of the paying agent to verify the information provided by the paying agent
- The identification of the information holders is a problem which is not solved for personal taxes
- The limited definition of interest payments allows the taxpayer quite easily to escape from the application of the Council Directive by investing in alternative financial products.

6. Language problems and the quality of the answers

The European Economic and Social Committee declares in its statement from March 2007 that language problems are often a *barrier in the fight against tax fraud between the Member States*[14]. There is an attempt to minimize problems occurring from different languages involved by developing standardised application forms for the requests concerning direct taxes. For the VAT a *standardised application form* already exists since 2001. Since September 2008 there is an *electronic application form*. But even with these standardised forms linguistic problems could occur in the description fields. In practice language problems

[13] *Winkler*, Aushöhlung der Individualrechte für fiskalische Zwecke, p. 127.
[14] COM(2006) 254, 2007/C 161/02, para. 2.6.1.1.

seem to be no major issue according to all national reporters. This is contributed to the widespread use of English in the communication between the Member States. Some countries like Germany or the Netherland also have there own *translation department* for some languages and all other countries use an *external translation service* for languages which their employees are not able to cope with. But is has to be considered that these translation services cause costs and delays. The Dutch reporters propose to declare *English as the common language for the exchange of information officially* but they also see that this may be a sensitive issue for some Member States. In contrast to that the Finnish reporters do not see the need to introduce a single common language since the general linguistic quality of received information and information on request is good in their eyes. But using just one common language is certainly the right way and better than going towards multi-language forms. Most countries seem to be able to cope very well with requests in English. Focusing on the three European community languages English, French and German will certainly be more than enough.

7. Valuation of the efficiency of the European Convention on Mutual Assistance in Crime Matters

Most national reporters cannot make any statements about the efficiency of the European Convention on Mutual Assistance in Crime Matters of April, 20th, 1959. This may indicate that it just plays an inferior role. In Germany the Finance Ministry cannot give information because crime matters are at the responsibility of the public prosecutor's office and therefore not in its sphere. In contrast to that the British HMRC observes that the Convention allows them to obtain the material they need to support their criminal cases where evidence and information is needed from other member States.

8. Valuation of the efficiency of common audits to inhibit tax avoidance

Common audits are allowed according to Art. 12 et seq. of the Council Regulation EC 2073/2004. *They are valued as being quite effective*. The Belgium national reporters even say that they are "indispensable for the tax examinations of multinational corporations". But they also point out that with just 4 audits organised by the Belgian tax administrations common audits are very rare. It is the same in the Netherlands participating at 28 common audits in

2007 and aims to have more since common audits are also here perceived as being effective. Even the U. K. uses this instrument very rarely. The effectiveness is considered as being especially high when it comes to VAT cases. E. g. the German Finance Ministry says that VAT common audits avoid tax fraud from the very beginning and have a preventive character. This effect is not seen for the taxes on income. The British and Luxemburg national reporters limit the effectiveness of common audits totally to VAT cases. Possibly COM (2009) 29 which also regulates common audits in Art. 11 is able to rise the importance of common audits for direct taxes.

9. Differences in the reasons why foreign tax administrations fail to supply information

"Failing" to supply information means in this case something different than officially refusing information according to one of the cases of Article 8 Council Directive 77/799/EEC. We wanted to find out which other reasons there may be that hinder the information exchange in the eyes of the Member States. The answers given here are of course no facts but just presumptions and probably experiences. The German Finance Ministry assumes that some states adhere to "a *policy of concealment" to become more attractive for investors*. This behaviour and way of thinking may for the "concealing" state under the recent discussions and developments become more and more unacceptable. Countries seem to be hesitant to deliver information on *companies that are important to and for the national economy*. In cases of insolvency a problem can be that the contact persons do not exist any more and that there is no more money available. Sometimes countries seem to fear starting a mutual agreement procedure. In this context of a kind of "*anti-mutual assistance mood*" can also be seen from the argument of the Luxemburg reporter who thinks that *distrust of the foreign tax authorities* could be an element as well and that a state surely sees that in a mutual assistance case its *scarce resource of tax authorities* that are used for this purpose *are precluded from collecting national taxes*. The Hungarian reporter sees a reason for the failure in the "rigid concept of sovereignty" that has been exercised for the time being even within the EU. By creating a better attitude towards the mutual assistance one may be able to solve some of these problems. The Commission realised this just recently. In the explanatory memorandum of the "Proposal for a directive on administrative cooperation in the field of taxation" under the "context of the proposal" the Commission stated that there is a need for instruments likely to create confidence between Member States by setting up the same rules, obligations and rights

for all Member States. The future will show if a new Directive for the mutual assistance is able to solve resentments against information exchange.

10. Proposals to make the exchange easier and quicker

a) Current situation

At least from the German sight the official channels for the administrative assistance are often declared as being too circumstantial and too long. These are the national reporters' proposals to make the exchange easier and quicker.

Using *one of the European community languages* is valued as one way to make the exchange easier and quicker. Therefore, in the eyes of the Italian national reporters, it would be necessary that the Member States do not use their own language and answered the request in the same language (of these three official languages) they got the request. However, using these languages is not possible without adequate language skills. That is why Germany and Austria see the *necessity for language training* as one measure to make the information exchange easier and quicker. But this is of course not the only suggestion for improvements since at least from a German point of view the administrative assistance's official channels are valued as circumstantial. The design of the Council Directive 77/779/EEC also leads to problems since there is no respite until a request has to be answered which can cause delays and makes the exchange ineffective from that perspective[15]. In this context the Dutch reporters point out that they have reduced the *time to answer* a request from 13.6 months in 1992 to 6.6 months in 1995. This time is estimated as being not too long for foreign tax authorities so that they would loose the right to assess the tax liability under domestic law. The Finnish tax administration even aims at handling incoming requests within 8 weeks. Actually 85% of the incoming requests are handled *within 3 months*. To remind a Member State where a request has been sent to after about *six months* of not getting an answer seems to be a common practice.

[15] See in advance *Möllenbeck*, Das Verhältnis der EG-Amtshilfe-Richtlinie zu den erweiterten Mitwirkungspflichten bei internationalen Steuerfällen, Diss. Bochum 2009, p. 65 et seq.

Comprehensive electronification and jointly developed standardised application forms that cover the common cases are estimated as useful means by the German finance ministry and the Italian national reporters. A related proposal comes from the British HMRC that thinks that the exchange of information by secured e-mail will make the exchange quicker. But we should not forget that we have already the electronic network CCN which is surely helpful for the communication between the Member States in many fields yet. Especially with third countries where requests are still send via paper the use of an electronic format would fasten things. Having standardised forms may also help solving language problems. Austria and Germany see the necessity for training and retraining in the field of the administrative assistance in tax affairs. Furthermore Austria wants to improve the internal process of information and thinks that having more employees in the relevant administrative offices would be helpful.

A new approach is made by the Belgian national reporters. They propose the *introduction of a European tax administration* that monitors and controls the information exchange. This administration could be a platform for an adequate information exchange by ensuring:

- that all the conditions for a legitimate request for information are available,
- that the requested information is delivered within a reasonable period of time,
- that the delivered information meets all the expected requirements,
- that the delivered information is used in respect with the Council Directives.

The German Finance Ministry sees the *need/right to a hearing* that is established in the German law as a reason for delays. Furthermore, apart from these hard factors it is also important that the need for information exchange is seen by the Member States and above all by the officers in the tax agencies and ministries.

b) Possible improvements due to COM (2009) 29

It is the proposal's aim to create a text with which the Member States have the power to efficiently cooperate at international level in order to overcome the negative effects of an steadily increasing globalisation on the internal market. The current Directive 77/799/EEC is estimated as being not able to achieve these goals anymore[16]. And there are surely regulations

[16] Cf. COM (2009) 29, Explanatory Memorandum, Context of the Proposal.

that are in our view able to raise the efficiency of the mutual assistance if the means offered here are implemented and used in the right way by the Member States. Some of the main changes are discussed below.

Art. 7 COM (2009) 29 statues *concrete time limits*. The requested authority shall provide the requested information as quickly as possible and *no later than six months* following the date of the receipt of the request. In cases where the requested authority is already in possession of that information, the information shall even be transmitted *within one month* after the date of the receipt of the request (Art. 7 (1)). Exceptions from that rule are possible but detailed reasons have to be named in cases where the other authority fails to meet these time limits (see Art. 7 (2-6)). This is definitely a change compared to the Council Directive 77/799/EEC where such concrete time limits are not established. In Art. 5 of this Directive they say the information shall be forwarded "as swiftly as possible". So COM (2009) 29 obligates the Member States more to make the exchange quicker. By naming specific obligations for the Member States to – amongst others – ensure the smooth operation of the administrative cooperation in Art. 21 that are missing in Directive 77/799/EEC the rule like all other rules gets an additional binding effect.

As mentioned already under III. 2. b) also the *establishment of the single taxation liaison* offices in the single Member State can be a mean to make the information exchange quicker and thereby more effective. This does however not go as far as the proposal of the Belgium reporters that wished the introduction of a European tax administration (see IV.10 a)).

The CCN network works efficiently for the VAT. A broadening also on the direct taxes is the approach of Art. 20 headed "practical arrangements". According to this article the information exchange should as far as possible be provided by electronic means using the CCN network (Art. 20 (1)). Turning away from paper form will also make the information exchange faster. Art. 20 (2) regulates that the CCN network is developed whenever this is necessary to enable the information exchange between the Member States. Both the Commission and the Member States are responsible here. So the system should be up-to date.

The national reporters often desired the usage of standard forms if possible even in an electronic form. The usage of these standard forms is now regulated in Art. 19 COM

(2009)29. It was the reporters' hope that this way language problems could be minimized and the mutual assistance would get faster.

The problems arising from the different languages used in the EU and the way and possibilities how to solve them have been described under IV.6. Some reporters have discussed quite lively if English should be the only language for the information exchange or if the whole variety of languages should be possible to use. Art. 20 (4) COM (2009) 29 also makes arrangements for the use of languages in the information exchange. According to this article requests for cooperation, including request for notification and attached documents may be made in any language agreed between the requested and requesting authority. A translation into the official language or one of the official languages of the Member States in which the requested authority is established is only accompanied to the requests in special cases when the requested authority states its reason for requesting a translation. The future will show if English becomes the lingua franca. But it is also possible and imaginable that neighbouring countries will agree upon one of their languages because one of the official languages is as widely spoken as English and this is even easier. E. g. in the Netherlands German is widely spoken. This may be true for other neighbouring countries like the Nordic States, too. The *agreement upon the language used should in our opinion made once between the states* for all possible request. Otherwise delays could be caused because of the agreements upon the language used.

Also the efficiency of the new Directive itself is taken into account by the evaluation as regulated in Art. 22 COM (2009) 29 through which amongst others the Member States and the Commission shall examine and evaluate the functioning of the administrative cooperation provided by this Directive and shall communicate any relevant information necessary for the evaluation of the administrative cooperation' s effectiveness. The Commission shall submit a report on the application of this Directive to the European Parliament and to the Council (Art. 25 COM (2009) 29).

V. Questions of burden of proof

1. Differences in the burden of proof

There are three different general models how the burden of proof is allocated.

1) Only one party bears the burden of proof. This is the case in the U.K. where the burden of proof lays with the taxpayer and in Belgium, Poland and Hungary where the tax authorities bear the burden of proof. In Hungary this burden of proof can be shifted to the taxpayer in exceptions. Also in Belgium the burden of proof is reversed through imposing an ex officio assessment e. g. when the taxpayer has not provided the information demanded or he/she has not responded to a notification of a correction in his/her tax return. In Italy when the exchange of information is suitable the burden of proof is borne by the tax authority (except for the cases where presumptions concerning tax benefits are admitted where the burden of proof is shifted to the taxpayer). When the exchange of information is not suitable the burden of proof for the requirements to obtain tax benefits is borne by the taxpayer.

2) The burden of proof lies on the party that can most easily get access to the information needed and has the best practical possibilities to give evidence. This can be called *"sphere-theory"*. This is the case in Germany, the Netherlands and Finland. This rule is concretised by the idea that tax-attracting facts and facts that will raise the tax (like proceeds) lay with the tax authorities and that tax reliefs and tax reductions have to be proved by the taxpayer. This is also the opinion of the Luxemburg courts.

3) The Portuguese and the Spanish national reporters say that the burden of proof lies on the party that *claims a fact respectively wants to make effective a right.* This may in most cases lead to the same results as under 2) where tax-attracting facts lay with the tax authorities and tax reductions have to be proved by the taxpayer because it is hard to imagine that the taxpayer claims a fact that will in the end not lead to a tax reduction or that the tax authority will not claim facts that raise the tax.

2. Overlook of the enlarged duties to cooperate and the relationship to the mutual assistance

Establishing enlarged duties to cooperate for the taxpayer for transactions concerning a foreign country can be a mean to get tax-relevant information on a national basis first without using mutual assistance. Germany has *codified enlarged duties* to cooperate in its General Tax Act. In Austria they are deduced from the jurisdiction. Enlarged duties to cooperate are also

known in Italy but just in the relationship to tax havens and Luxemburg where the enlarged duties are deduced from German law but are not affirmed by the Luxemburg Courts. Enlarged duties to cooperate are also known in the Spanish law. Both Germany and Austria see a kind of hierarchy where the enlarged duties to cooperate are used first before using mutual assistance. What is solved by using these enlarged duties does not have to be a matter of the information exchange.

Getting the information needed in relation to foreign countries can also be solved through the *burden of proof*. The Finnish reporters point out that if the taxpayer has had transactions with non-residents and the tax authorities cannot get the necessary information on the transaction through a double tax treaty the burden of proof lies primarily with the taxpayer. The Hungarian reporter says that tax reductions if connected with tax havens must be substantiated by the taxpayer and the burden of proof moves to the taxpayer in these cases.

In the Dutch tax law a kind of enlarged duties to cooperate are known in tax matters with *subsidiaries and their relationship* to a *foreign parent or sister company*. The General Tax Act e. g. imposes a legal obligation to provide information on a company of which the capital is divided into shares and on any other body, in case this company is more than 50% owned by a non-resident (parent) company or non-resident individual or in case of any other body the decision power in that body is held by the non-resident company or individual here. This obligation relates to information carriers which are in the possession of that non-resident company or non-resident individual. Like in the German rule this idea is surely to think in *spheres*. In the aforementioned cases the taxpayer is *closer to the evidence* and should therefore deliver it to the authorities. The Dutch law also has a possibility for a longer assessment in cases where information is needed for Dutch tax purposes that is held abroad or which relates to income that is derived from abroad.

VI. Questions of legal protection

To find out which rights the taxpayers have in the single legislations during the process of the information exchange we have divided the questionnaire into aspects of “Legal protection against incoming requests”, “Legal protection about making a request” and “Legal protection in general”.

1. Legal protection against incoming requests

Under this chapter we want to discuss which rights the taxpayer has in cases where another Member State sends a request concerning him/her to his/her country of residence.

a) Notification rights

The legal protection for the taxpayer about incoming requests seems to depend on a country's *notification liability*. In countries its laws stipulate no obligation for the national tax authorities to inform the taxpayer about the incoming request it is *practically impossible* for the taxpayer to prevent the tax authority from providing information to the requesting state. In the following countries there is generally no obligation to inform the taxpayer about incoming requests: Belgium, Finland, Italy, Poland (except in relation to assistance in administrative execution where a resident taxpayer is informed about the request), Spain and the U.K. However, this does not in every case mean that the taxpayer does not find out about the request e. g. by certain proceeding of the tax administrations to accomplish the transferral. In Italy e. g. the taxable person has the right to know why he/she has been assessed and this right can in special constellations lead to information about the request.

In the countries where the taxpayer gets informed about the request like in Germany, Luxemburg, Portugal, Sweden and Hungary there are in most cases also ways for the taxpayer to legally protect himself/herself. This can be *an action for an injunction* or for a declaratory judgement like in Germany with which the taxpayer can stop the tax administration from passing the information to a foreign country. In Luxemburg the taxpayer will be asked to take position and is therefore able to specify his/her arguments. According to the Luxemburg reporter this may lead the tax authorities not to exchange the information. The situation is similar in Portugal where the taxpayer has *30 days to present reasons* why the information exchange should not happen. In Sweden the taxpayer normally gets *informed after the information is sent*. Legal protection is here just possible in the cases where the information is not in the hands of the tax authority and the authority therefore turns to the taxpayer. In this case he/she can *file for an appeal* of the authority's decision to supply information.

The Spanish reporters criticise the legal situation in their country and propose that an obligation to inform the taxpayer about the request should be legally introduced. Generally it

is a useful proposal to introduce information rights and it can be asked why not all European countries grant them since the commentary to Art. 26 of the OECD Model Tax Convention explains that notification rules in the national law can help to prevent mistakes and facilitate the exchange of information[17]. This idea is not new since already the joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters of 1988 states in Art. 4 (3) that authorities of any contracting state, in accordance with its law, may inform its resident or national before transmitting information concerning him.

b) Need for a hearing before information is transferred to another Member State

Closely connected to the above mentioned notification rights are the consultation rights of a taxpayer. A hearing will only take place in cases where the taxpayer has also the right to be informed about the incoming request because it would not make any sense otherwise.

aa) Legal situation in the Member States

Concerning the need for a hearing before information is transferred to another Member State the single Member States have different regulations. There is one group of states which see no need for a hearing like Austria, Belgium or Finland. Some national reporters reason this missing need to hear the taxpayer before transferring information to another Member State with the fact that *the taxpayer has no right to be told* that a request for information has been made like in the U.K. or in Poland. A good example for this thinking is also Italy. Concerning information that is already in the hands of the tax authority the tax authority has the power to transfer the information to another Member State without asking the taxpayer's consent. In cases where the tax authority needs to do a fiscal assessment to look for the information requested and e. g. send as a consequence a questionnaire to the taxable person in order to obtain information the taxable person does not have the right to know that this activities are made on an information request base. The taxable person has in this phase of the tax assessment procedure not the right to contest the request before a Tax Court either because acts deriving from this phase of the tax assessment procedure are not contestable before such Court.

[17] OECD, Sec. 14.1 of the Commentary to Art. 26 OECD Model Tax Convention.

The other group of states like Germany (at least for some kinds of taxes), Luxemburg, the Netherlands or Portugal have a *right for a hearing* in favour of the taxpayer before information concerning him/her are transferred to another state. In Germany this duty to hear the taxpayer in most cases arises from sec. 117 (4) 3 German General Fiscal Code. Also in the Netherlands the taxpayer is entitled to a hearing if he/she wishes to. This hearing has to take place before the decision to actually supply the information is taken.

In Spain the situation seems to be not clear. There is a right to hear in general administrative procedures. But one opinion points out that this rule is not applicable in connection to the international exchange of information mechanism. Another opinion claims that the right to hear should be granted in whatever type of administrative procedure, thus also in the tax cases that are relevant here.

bb) Possible consequences for the tax cooperation

As pictured above we find *different treatments* in the several Member States. This situation is legally not problematic since Council Directive 77/799/EEC does not say how or if the Member States have to regulate a hearing in these cases. The Member States can act self-sufficiently here or their normal procedural tax laws become relevant. But it may anyway be interesting to reflect upon if these different ways of treating the taxpayer *influence the system of the information exchange in the EU*. One can say that the position of the taxpayer in a country where there is no right or need to hear him/her is inferior to those countries where there is such a need. The superior situation of the taxpayers in the countries where there is a need to hear becomes even stronger when you consider that additionally provisional legal protection exists which will depend on the existence of a right to hear. This is e. g. the case in Germany where the legal instruments of a preventive action for an injunction or for an interim order exist. Also in Portugal where the taxpayer has got 30 days to present his/her reasons for a disclosure not to be carried out the position of the taxpayer gets stronger. Taxpayer's rights like these may in contrast to a state where these rights not exist hinder a Member State from sending information to another state or they slow the information exchange down. But this retardation of the information exchange has to be accepted for reasons of preservation the effected Member States' legal principles that guarantee their taxpayer's effective legal protection.

c) Right to bar the requested state from giving fiscal information to another Member State

The right to bar the requested state from giving fiscal information to another Member State depends on a country's notification rights. In countries where taxpayer have no notification rights they do generally not have a right to bar the requested state from giving fiscal information to another Member State. Just in cases where the taxpayer gets "exceptionally" to know about the request some of these countries know some kind of legal protection for the taxpayer. E. g. in Belgium in these cases the taxpayer can start summary proceedings in court in order to prevent the information exchange. In Italy where the taxable person just may get informed about the request because it can lead to a disclosure of a business secret he/she has the right to object the information exchange before the Civil Court but there are no cases like this at the moment. In Spain the taxpayer can just claim in order to revise the legality of the administrative procedure. This is to be understood as a *posterior control*.

Though there are notification rights in Sweden the taxpayer has no right to bar. The taxpayer gets informed *after* the information has been sent to the requesting state. Just in cases where the requested information is not in the hands of the tax authority and the taxpayer has to obtain information he/she can file an appeal of the tax authority's decision to supply the requesting state with information. In the other states with notification rights where the notification takes place before the information is sent to the requesting state the taxpayers have at least a right to object in one way or the other. If this always causes a failure of the information supply it will also depend on court decisions like in Germany or on the competent authorities' decision like in the Netherlands or Portugal.

d) Conclusions

In the legal protection of the taxpayer concerning incoming requests there is a strict relationship between the *notification rights*, *consultation rights* and *intervention rights*. Countries without a notification right do not have consultation rights either. Consequently if the taxpayer does not know about the request he/she can not intervene. In countries without notification rights the taxpayer can just intervene when he/she get to know about the request "exceptionally" e. g. when the tax administration is not in the possession of the requested information and has to ask information. Just in these cases he/she can intervene. But his/her

right to intervene more or less depends on a random event. All in all it can be said that the amount of *the taxpayer's rights* at this stage of the information exchange clearly *depends on the notification rights*. But they are just effective for the taxpayer's legal protection if he/she gets informed about the request before the information is transmitted to the other Member State. Otherwise he/she has no possibility to appeal either.

In the eyes of the OECD notification rules in the national law can help to prevent mistakes and to facilitate the information exchange[18]. But of course the notification rights *should not cause delays in the information exchange* or make it ineffective. It is the job of the national law to protect his/her taxpayer on the one hand but to create rules on the other hands that still allow an effective and fast information exchange between the Member States.

Concerning the consulting rights there are opinions in the German literature which state that hearings may not in all cases have a positive effect on the results of the investigations because the taxpayer may if he/she is warned in advance *defeat the aim of the request with counteractive measures*. This will regularly be the case with investigations by the tax fraud investigation so that it is advocated that in cases of emergency a hearing must not take place since it is a danger for the purpose of the information exchange.

2. Legal protection against making a request

In contrast to VI.1. we aim here on the legal protection of the taxpayer in cases where his/her country of residence intends to request another Member State about his/her fiscal situation in this Member State.

a) Notification rights

Compared to the notification rights with incoming requests even less states know a notification right in the cases they intend to make a request. The Polish reporters state that the Polish tax authorities' decision to request has been to notify to the taxpayer. In Hungary the taxpayer must only be informed of a tax audit. But even if the other states do not know notification rights it does not mean that the taxpayer does not get to know about the intension

[18] OECD, Sec. 14.1 of the Commentary to Art. 26 OECD Model Tax Convention.

to request another Member State. In Belgium there is generally no obligation to inform the taxpayer. Only if the 4th or 5th year after the tax return year is concerned the taxpayer has to be notified. In Luxemburg there are no notification rights either but in practise the request is only sent when the information needed could not been answered by the taxpayer in a satisfactory way before. This is the same in Sweden where the taxpayer is informed when the tax authorities want the taxpayer to cooperate. In Austria the taxpayer can only learn about the existence of the request *in context with bank account information*, the opening of a new bank account or the monitoring of a bank account due to the possibility of damage claims otherwise. But it is interesting to see that this data is not banned from being used as evidence. In German literature there are opinions which state that because of the massive interference into the constitutional *right of the informational self-determination* a hearing should take place too.

b) Right to bar the country of residence from requesting a Member State

The taxpayers have nearly no rights to bar their country of residence from requesting a Member State. In Belgium the taxpayer can start summary proceedings in court but only if he/she is aware of the request which will not always be the case. In Germany the literature states that the request for administrative assistance can't be objected only the illegal use of the administrative assistance can[19]. A way to get *temporary legal protection* is the interim degree. But the fiscal courts do not often grant applications for interim orders[20]. In general the position of the taxpayer is quite weak here which is also shown by the situation in Italy where this phase of the tax assessment is kept completely secret.

c) Conclusions

Regarding the EU-wide situation of the taxpayer it is weaker when it comes to legal protection against making a request. Fewer countries have notification rights compared to the situation with incoming requests so that there are nearly no countries left that have to inform the taxpayer. As a consequence the taxpayer has nearly no rights to bar their country of residence from requesting a Member State. The reporters did not give any reasons for this situation. But it is positive that some countries first cooperate with the taxpayer and try to

[19] *Söhn*, in: Hübschmann/Hepp/Spitaler, Abgabenordnung/Finanzgerichtsordnung, Cologne, § 117 AO, para. 82.
[20] *Herlinghaus,* Anmerkung in: Entscheidungen der Finanzgerichte 2008, p. 1766 (1766).

receive the information needed from him/her before they send a request to another Member State. This may lead in many cases to an effective and satisfying solution of a question.

3. Influence of the Council Directives 77/799/EEC on the legal protection of the taxpayer

Since before the existence and the implementation of Council Directive 77/799/EEC there should not have been such an interest for the protection of the taxpayer. In cross-border cases we posed the question if this kind of legal protection described above existed already before the implementation of the Directive or if it has been developed as a consequence of the Directive. From those reporters who answered this question only the Spanish and the Luxemburg reporters said that this kind of legal protection did not exist before and has been developed as a consequence of the implementation of the Directive into national law. In the other countries this kind of legal protection existed before or since it derives from general domestic regulation like in Finland the implementation of the Directive did not influence the legal protection of the taxpayer.

Most national reporters also said that the Council Directive 2004/56/EC did not bring any major amendments of the domestic law concerning this topic.

4. Usage of the information exchange under Council Directive 77/799/EEC in a criminal trial

The general relationship between criminal and tax proceedings has been outlined under chapter III.8. It is also interesting to see how the information exchanged under Council Directive 77/799/EEC can be used in a criminal trial. The general possibility to use this information is given. According to Art. 7 (1) of Council Directive 77/799/EEC it is allowed to use the information exchanged under the Directive in criminal proceedings relating to tax. In the consequence most Member States allow the usage of this information in a criminal trial even without a specific authorization of a national judge like e. g. in Belgium, Austria, Spain, U. K. or Finland. Some countries like Germany and Poland state that the criminal proceeding in which the information is used has to concern fiscal offences only. But whereas under German law there will be no specific authorization needed is in Poland a consent of the EU country from which the information had been obtained required. The British report tells us

according to the HMRC that though no obligation exists for that the requested state will usually be informed by the U. K. as a matter of courtesy. In Luxemburg the usage is possible only for the purpose of establishing the correct amount of tax and for the prosecution of the fiscal offences concerning these taxes. But the usage for fiscal offences is not excluded. In the Netherlands such an usage is only possible when it concerns a fiscal crime and under the condition of the previous consent of the other Member State. If the supplying state has agreed the information can also be used for other purposes. In Italy two opinions are existing. The first is saying that the information exchanged under the Directive can also be used in criminal cases. The second demands that the information can only be used if it has been obtained before the "notice of a crime" because otherwise rules concerning juridical protection could be violated. Since there are no relevant court cases this controversy has not been solved yet.

The usage of the information provided under the Directive in a criminal trial is in none of the countries that answered that question forbidden but national specifics have to be taken into account here.

5. Claim for damages

As already mentioned above Art. 8 (2) of Directive 77/799/EEC allows to refuse the provision of information where this would lead to the *disclosure of a commercial, industrial or professional secret or of a commercial process*. The importance of protecting the business secrets is described in III.1. It is therefore interesting to see how and if the Member States' legislations know a claim for damages if the state discloses a taxpayer's business secret by giving information to another Member State.

Indeed *most countries know a claim for damages in these cases*. In Belgium such a claim for damages arises from a Court decision of the year 1980 where the court advised the Belgian tax administrations to pay attention to the economic consequences of the exchanges of information. In the other countries this claim for damages is found directly in the legislation. In Austria the claim for damages derive from the "Amtshilfegesetz" that transformed the Directive 77/799/EEC into national law. In Luxemburg the claim for damage is bound on general provisions of civil liability according to which the state is liable for the harms it acts have caused to any other person. In Germany tax administrations could be liable for damages provided that 1) there was no authority for administrative assistance, 2) the requesting

member state used the provided information for purposes other than intended and 3) the taxpayer did sustain damage[21]. If these qualifications are fulfilled the taxpayer can claim on official liability according to sec. 839 German Civil Code and Art. 34 of the German Constitution or on the encroachment of property by an unlawful sovereign encroachment[22]. It is not against the Finnish law to provide information that includes a commercial, industrial or professional secret though the limitations to exchange of information defined in the Directive are implemented in the Finnish legislation as such. Although a claim for damages can also arise here from the fact that public officials are responsible for that their actions comply with the Finnish law. If this is not the case the taxpayer may claim for damage. But as the Finnish and the Luxemburg reporters point out the taxpayer has to be able to prove that he/she has suffered an economic loss and that the loss is a direct consequence of the violation of the secret. The Luxemburg and Spanish reporter say that the payments for damages are limited to the actual damages suffered which is of course an economical useful regulation. Exemplary effects seem to be not intended here. But generally having a claim for damages is needed to effectively protect the taxpayers' business secrets. Without sanctions the protections might be less effective. But also without a claim for damages the Member States could have an interest to protect their enterprises by not giving their data out to another country.

But it is also pointed out that it will be very difficult for the taxpayer to obtain any substantial payments on this basis. This is what the Luxemburg and the Polish reporters allude to.

According to the British reporter HMRC is not precluded by any obligation of secrecy from disclosing information to another Member State in furtherance of the Directive provided that is 1) it is satisfied that the other Member State's rules relating to confidentiality are at least as strict as those in the U.K., and 2) the information is to be used for tax purposes only.

It this context it is interesting that the Portuguese rule concerning the claim for damages have become that strict that the Ministry of Finance announced to that officers would be covered by an *insurance to protect them of claims* under the new law (for details see the Portuguese report).

[21] Söhn, in: Hübschmann/Hepp/Spitaler, Abgabenordnung/Finanzgerichtsordnung, Cologne, §117, para. 380.
[22] Söhn, in: Hübschmann/Hepp/Spitaler, Abgabenordnung/Finanzgerichtsordnung, Cologne, § 117, para. 380.

VII. General Conclusion

Als final results of the survey we can remark the following perceptions:

1. Several legal basis hamper the overview for the tax administrators as well as for the taxpayers. The Council Directives (77/799/EEC, 76/308/EEC, 03/48/EC) are already implemented in every EU member state. The joint Council of Europe/OECD Convention on Mutual Assistance in Tax Matters is less relevant in the EU sphere, but more in the relationship to third countries. The national laws which are implemented on the basis of the Council Directives are overriding the bilateral tax treaty provisions which are based on Art. 26, 27 OECD. Just in cases where the duty to deliver information deriving from a specific double tax treaty goes further than the duty from the Council Directives this specific double tax treaty comes first. The same relationship exists if the legal protection of individual rights of taxpayers in bilateral tax treaty goes further than in the Council Directive. The Council Directives define a minimum standard of mutual assistance among the member states even for the legal protection of the individual rights of the taxpayer.

2. Three kinds of mutual assistance instruments are existing: exchanges on request, spontaneous information exchanges and automatic information exchanges. We find no tendency or hierarchy to use a certain instrument over the other. The means have a different scope of application which depends on the constellation of the case and the nature of information needed. A request for information is an appropriate instrument in certain single cases when after a national examination uncertainty remains about facts rooted in the territorial sphere of another state. Therefore the numbers of requests are not very large and vary from country to country. Remarkable is that smaller countries like Belgium and Netherlands are using the instrument of single information requests far more often (about 1.500/3.000 requests) than larger countries like Germany (only about 400 requests). In contrast, automatic information exchanges are getting an increasing importance at least by numbers. They have a more preventive function whereas spontaneous information transfers are grounded on specific tax risks of single cases. Very rare are still simultaneous tax examinations. Their scope is limited to the control of transfer prices in international groups of companies and VAT business to business commerce.

3. To comply a request of another member state it is not always sufficient to answer only by reporting some information from the office kept data files. Thus, it is required to examine the facts by tax audits, requesting information and documents from the taxpayer or third persons or other different investigations. The main difference in the activities of the tax administrators are arising from the different handling of the bank secrecy in the national laws. The Council Directive 77/799/EEC differs between bank secrets and commercial secrets. The business secrets help protecting a country's enterprises and their inventions or investments in order to keep the desired economic competition in progress. In contrast the bank secret can hinder the tax authorities to get to know about all relevant incomes of a taxpayer and can support tax fraud and tax circumvention. Therefore sustained national bank secrets are still obstacles for a functional mutual assistance among the tax authorities.

4. Natural the intense of mutual assistance depends on the practical cooperation between the tax administrations of the states. Most countries request more often information from their neighbour countries than from other countries. The willingness of member states to conclude mutual agreements in the sense of Art 9 II Council Directive 77/799/EEC are much stronger in the area of neighbour countries. Important preconditions for an effective mutual assistance are language skills, standardised electronic forms, clear office competences, a short way to the competent administration offices, fast responses and the real practice of reciprocity. These preconditions are still not always fulfilled. We have to state deficiencies in language and knowledge, a distrust of tax authorities and an "anti-mutual assistance mood" which is caused by limited resources of the tax authorities. The tax authorities have to invest in language training and education of the man power as well as in electronic data systems to overcome the pure domestic national fiscal attitude in support of an international and european view. Furthermore the time to answer on requests have to be shortened in a medial time period less than 6 months.

5. Some countries know enlarged taxpayer duties laid on cross-border activities to cooperate with the national tax authority. In these countries it is one reason for the small number of information requests because the tax authorities can use the enlarged duties as a tool to get the information directly from the taxpayer. In this content enlarged duties can influence even the burden of proof to the disadvantage of the taxpayer. We found three different general models how the burden of proof is allocated:

- The burden of proof is borne by the tax authorities, but can be shifted on the shoulders of the taxpayer if he/she does not provide the tax authority with the available information the tax authority has demanded.
- The burden of proof is allocated by a sphere-theory: It has to been borne by the party that can most easily get access to the information needed and has the best practical possibilities to give evidences.
- The burden of proof is lying on the party that claims a fact respectively wants to make effective a right.

6. The legal protection of the taxpayer shall distinguish in the legal protection against incoming requests and legal protection against making a request. Regarding the first mentioned question we find a strict relationship between notification duties of the tax authorities, consultation rights and intervention rights. The notification right is the precaution of a further going legal protection against the information delivery which can violate business, commercial or professional secrets of the taxpayer. The range of legal protection means is broad among the member states. A far developed legal protection instrument is a title of preliminary injunction issued by a fiscal court before a final judgement prohibits the delivery of information cross-border. However, in most of the countries we find only less effective legal protections which provide at least claims for damages which taxpayer sustains by violations of commercial, business, professionals or other types of secrets. Compared to the legal protection against incoming request the legal protection against making requests is weaker. Most of the countries don’t know any notification rights in this case. Therefore the legal protection remains on the level of claims for damages.

7. The entitled taxpayer’s interests of legal protection have to be balanced out with the valid public interests of the states in providing mutual assistance among each other and in exchanging tax relevant information. Legal protection shall not be misled as a tool to hamper the information exchange and requests. Therefore the taxpayer has to bring convincing evidences to verify the jeopardy of violating individual secrets by the requesting tax authority. If there is no hint that a tax authority can use the secrets for other purpose than for the lawful taxation the information shall be exchanged without a further delay.