

EU AND INTERNATIONAL TAX COLLECTION NEWS

2014 – 3

This newsletter contains the public version of the reports that have been prepared within the EU Fiscalis project group 080 and that have been discussed at the Fiscalis conference on tax collection, held in Porto (Portugal) in October 2014.

This conference also dealt with the use of IT-systems for improving tax collection and recovery.

Participants represented the 28 EU-Member States, Norway, Turkey and international organisations (CIAT and IOTA).



Group of participants (Porto, 15-17 October 2014)

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Luk Vandenberghe
Hélène Michard
Mikael Berglund
Manuel Bessa Vieira
Patrick De Mets
Cynthia Lamur

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EU activities

EU FPG 080 Tax collection practices Report

Cost-efficient way of dealing with small claims

Report by: L. Vandenberghe, H. Michard

Contributors: P. De Mets, M. Roekaerts, L. Mulqueen, J. McCormack, R. Cabeza Chevron, T. Pallagi, S. Nagy, J. Gronski, A. van Eijsden, C. Lamur, K. Meško, J. Ščepková, L. Vandenberghe, H. Michard

This specific report is part of a series of reports summarizing the main findings of the tax collection procedures inquiry, made by Fiscalis project group 80 in 2013.

This survey is **limited to income taxes and VAT**. This report presents some ideas on best practices which could help Member States in developing a strategy of different measures which could, as a whole, improve tax collection and debt management.

This report is based on general contributions from 18 EU Member States (Belgium, Bulgaria, Germany, Ireland, Estonia, Spain, Greece, France, Italy, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden and the United Kingdom) and on specific reports from a more limited number of the following Member States: Belgium, Ireland, Spain, Hungary, Netherlands, Slovenia, Slovakia. The accuracy of this report depends on the accuracy of the national contributions.

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1. Introduction

1. This report focuses on the recovery of small claims, which is a real challenge for all tax enforcement authorities.

1.1. Definition of “small claims” ?

2. There is no common and clear definition of the concept “small claims”.¹ Member States have

¹ It can be noted that there is no clear concept of “minor claims” at EU level neither. E.g., directive 2010/24/EU on mutual assistance for the recovery of tax claims provides that a Member State is not obliged to grant assistance if the total amount of the claims, for which assistance is requested, is less than € 1,500 (Art. 18(3)). Another amount is taken into account within the framework of Regulation (EC) 861/2007 establishing a European Small Claims Procedure, dealing with litigation concerning small cases in cross-border situations. This regulation can be applied where the value of a claim does not exceed € 2,000, excluding all interest, expenses and disbursements. This regulation does not apply to revenue, customs or administrative matters (Art. 2(1) of the Regulation). However, the majority of the Member States apply national simplified procedures where the threshold varies greatly (from € 600 to € 25,000) (See Commission report on the application of Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a

different views on what is considered to be a “small claim”. This category also has different meanings or features within Member States. These differences depend on various factors, including the type of tax concerned, the periodicity of the tax concerned, and the segmentation of the tax payers generating most of the State revenue. Member States do not (necessarily) apply a legal definition of “small claims”. The classification takes into account the possibility to recover in a short period of time, in a cost-effective way.

3. In many Member States, “small claims” are characterised by a certain amount. The thresholds vary greatly, from a minimum of 10 euros (Sweden) to 18.000 (or 40.000) euros maximum (Spain).

4. The number of small claims appears to be relatively high.² However, there is little information about the total value or the volume of those cases compared to the total debt for collection or the total debt case numbers.³

1.2. Recovery of small claims: cost-efficiency concern

5. All tax administrations share the same concern: enforcement actions for small claims are time consuming and often more expensive than the amounts to be recovered.

6. Many tax authorities have put in place different measures which affect early phases in the collection of the tax revenue. They do not anymore consider the recovery process in isolation from the tax debt collection process. This important change of mind set calls for more cooperation between different departments of the tax authorities. This end to end approach also requires that some attention is paid to preventive measures, even before the tax is due, throughout the collection of the tax as well as the enforcement process.

European Small Claims Procedure (doc. COM/2013/0795 final, point 3.1.). This Commission report also indicates that the current threshold of € 2.000 severely limits the availability of the procedure for SMEs in particular. Accordingly, the Commission has presented a proposal to amend the existing rules (doc. COM(2013)794 of 19 November 2013). According to this proposal, the limit on claims amounts qualifying for the small claims procedure would be raised from € 2.000 to € 10.000.

² It was indicated that “small claims” for VAT represented 62% of all cases in Ireland; and that the number of small claims is about 72 % of the overall number of tax claims in Hungary. Spain reported that its minor debtors represent 60% of all debtors.

³ It appears that the sum of the small claims represents about 4,4 % of the total amount of all tax claims in Hungary; and about 4 % in Spain.

7. The following issues are analysed more in detail below:

- the need to stimulate the motivation of taxpayers to comply and to pay their taxes in time (part I);
- the need to ensure the cost-effectiveness balance of recovery measures (part II).

2. Influencing the tax payer behaviour to facilitate the tax collection: promoting voluntary compliance

8. The concept of “voluntary” tax compliance is linked to the motivation of taxpayers to comply with the tax rules and to pay their taxes in time. Member States may wish to proactively assist the taxpayers to fulfil their obligations in the early stage of the tax assessment and collection.

2.1. Facilitating the payment of taxes

9. For instance, some Member States preventively remind the tax payer about the time limit for filing their tax return or about the time limit for payment. It can be done through advertising campaigns, a set of actions taken for a particular group of tax payers or a more personalised way. In practice, for those who have an advanced automated tax collection system, e-mails can be sent to each tax payer before the due date, or posted in the dedicated space of the taxpayer on the web site of the Ministry of Finance (Spain). The success of these actions depends on an acute knowledge of the debtors (segmentation of the debt(or)s into groups⁴) and requires (highly) automated processes in the tax administration.

10. Further, for individual tax payers and SME’s in particular, being able to pay the taxes using electronic (online) means of payment could help them meeting their payment obligation and therefore could contribute to reduce the amount of late payment or outstanding small tax debt.

11. In order to reduce administrative costs for taxpayers making small claims and for the tax authorities, it can be considered to allow certain taxpayers to file their returns and payments on a reduced frequency basis.

⁴ See UK report of the National audit office (NAO) revised debt management strategy <http://www.nao.org.uk/report/managing-debt-owed-to-central-government/>; <http://www.nao.org.uk/report/hm-revenue-customs-management-of-tax-debt/>.

Example: Ireland applies the following reduced filing frequency schemes:

- *businesses making total annual VAT payments of less than € 3.000 are eligible to file VAT returns and make payments on a 6 monthly basis;*
- *business making total annual VAT payments of between € 3.000 and € 14.400 are eligible to file VAT returns and make payments on a 4 monthly basis;*
- *business making total annual PAYE/PRSI payments of up to € 28.800 are eligible to make payments on a 3 monthly basis;*
- *business making total annual RCT payments of up to € 28.800 are eligible to file RCT returns and make payments on a 3 monthly basis.*

2.2. Payment incentives

12. The use of positive (financial) incentives encouraging tax payers to pay their taxes before the end of the payment period, appears to be limited. Bulgaria and Greece reduce the amount of the personal income tax due if it is paid before the deadline. Sweden and Finland reported that if the tax is paid before the deadline and the tax account is positive, interest is granted on the surplus arising in the tax account (for income taxes as well as VAT).

13. The possibility to apply incentives of course depend on the nature of the tax concerned. E.g., incentives to promote advanced payments, meaning payments before the tax amount due is assessed, are excluded for several types of taxes, given the nature of the tax. For income taxes, taxpayers may be granted the possibility to make payments before the date of the tax assessment, as the taxable persons may be in a position where they know – or at least can presume – the total amount of their taxable income, and the tax due on that income. The Belgian tax law offers an incentive to individuals, self-employed (natural and legal) persons as well as companies to make voluntary payments of their income taxes at different specified moments. This advance payment allows those self-employed persons and companies to avoid an increase of the income tax on their income. (The rules are different for employees, as they are submitted to an “obligatory” advanced payment, through the withholding tax applied by their employers.)

14. It seems that promoting voluntary payment is mainly done through a negative stimulus, i.e. by applying penalties and charging interest in case of late payments. Of course, these may also influence

the taxpayers’ behaviour, although positively formulated incentives may be better perceived.

15. When it comes to positively influence the tax payment behaviour, it should not be forgotten that the payment behaviour of public authorities is also important. They should set the right example, avoiding unnecessary delays in the repayment of taxes, and the same should apply to other payments made by public authorities.

3. A cost-effective treatment of small claims

3.1. ‘De minimis (tantum) non curat fiscus’ ?

16. Tax recovery authorities should deal with small claims in a cost-effective way (which does not exclude that the same could be held with regard to the recovery of other claims...). It seems logic that less efforts and time will be spent on the recovery of (very) small claims.

17. However, some Member States reported that there is a growing expectation from the central office that tax collectors should effectively deal with small claims (Hungary). Many reporters feel that this requires legislative changes and appropriate IT solutions, facilitating recovery measures (such as direct debiting, garnishment, offsetting and, ultimately, write off). In this regard, an online connection with registers and databases managed by other authorities (for the registration of vehicles, real estate, etc.) is considered to be an important tool, especially if there is a direct access to these databases, allowing to execute large datamining queries in order to better target recovery actions and to make the enforcement procedure more effective.

18. With regard to the exchange of information and direct access to databases containing information that is useful for recovery purposes, it is interesting to note that the development of mutual direct access to national databases is also fostered at an intra-EU level.⁵ On this point, several initiatives are currently taken within the Recovery Committee and the Fiscalis program, in order to improve the cooperation between tax recovery authorities and tax assessment authorities, and the cooperation of recovery authorities with VAT refund authorities, vehicle registration authorities, and the authorities responsible for social security and agricultural

⁵ Communication from the Commission to the European Parliament and the Council, “An Action Plan to strengthen the fight against tax fraud and tax evasion”, (doc. COM(2012)722 of 6 December 2012, point 33.

payments. These evolutions should make it possible to facilitate the recovery in general (better access to information about assets; better chances to apply offsetting practices, etc.).

19. These IT developments also allow – at least to a certain extent – the automation of specific recovery measures.

Best Practices Experience:

Special IT application for attachment of assets (Spain)

1. If a claim remains unpaid after the second period of payment given to the debtor (i.e. after the first period for voluntary payment), the IT tools of the Spanish tax authorities have an automated action that pushes it into the attachment period having a connection with databases of assets related to the debtor.

2. The Spanish authorities have developed a specific IT application to issue attachments of some assets owned by minor debtors. The functioning of this IT tool is quite different from the IT procedure for other debtors, using more automated and mass actions for minor debtors.

Description

3. The specific IT application for minor debtors allows to issue 4 types of attachments: over bank accounts, commercial credits, wages and/or vehicles. The order of these attachments is compulsory: the attachments are first applied to bank accounts; secondly to commercial credits; then to wages; and finally to vehicles. The movement from one stage to another is automated: a qualifying process verifies whether the debtors fulfil all the requirements established to enter and leave each attachment stage. (e.g. if the debtor doesn't have any bank account, it is not possible to apply the first stage of attachments and the IT application will immediately check whether the next attachment stage (on commercial credits) is possible.)

4. Once inside each stage, another automated action checks whether the minor debtor fulfils all the requirements established to attach his/her assets. If those requirements are fulfilled, an automated action issues the attachment formality.

Evaluation

5. This automated use of attachments is useful to cope with the great number of debtors with small

claims. In so far as these claims are not complex, they are suitable for massive and automated actions.

This condition implies that these automated attachments are not applied to debtors having claims included in a request for instalment already submitted to the tax authorities.

6. The use of this automated IT application allows the authorities to concentrate more human (and other) resources on other debtors.

Best Practices Experience:

Special IT application for attachment of assets (Portugal)

In 2005, the Portuguese Tax Authority developed an IT tool, called SIPE, to dematerialize the seizure proceedings. It is based on data cross-checking, with information collected in the different tax authorities' databases and in third party databases, such as banks, notaries, social security, insurance companies, real estate registration offices etc. So, in an automated and fast way, all types of assets (bank accounts, saving certificates, salaries, pensions, rents, credits, houses, vehicles, ...) can be seized, regardless of the amount of the claim.

3.2. Writing off small tax claims?

20. If it appears that the (limited) recovery actions do not result in the (full) recovery of the small claims within a reasonable time, it can be considered to write off these amounts.

21. Even for larger amounts, the cost of recovery actions could still exceed the amount of the claim. However, a systematic and automatic writing off of these debts may not always be needed. Other measures can be envisaged, where the claim can be put "on hold" till the moment where the debtor (or his successors) act themselves to pay the outstanding claims. Several conditions should ideally be fulfilled to manage these claims:

- the use of a database that allows to retrieve easily the tax situation of each tax debtor (tax debts + interest due);
- the application of rules that prevent a rapid expiring of the limitation period, without a need to take additional actions to suspend or interrupt the limitation period;
- the introduction of measures that oblige the debtor (or his successors) to undertake action themselves to settle the outstanding claims, e.g., by linking the delivery of a new passport to the

payment of the outstanding taxes, or by blocking bank accounts of deceased persons in case their tax debts have not been paid (Belgium).

Best Practices Experience:
blocking the bank account of deceased persons (Belgium)

1. Belgium has a long tradition of bank secrecy rules, and the access of Belgian tax authorities to information about bank accounts is subject to several conditions and restrictions. However, this did not prevent the introduction of a specific recovery measure, facilitating the recovery of outstanding tax debts of deceased persons and their heirs, even for small debts.

Description

2. In Belgium, the amounts on a bank account belonging to a deceased person are blocked by the bank, as soon as it is informed about the decease. Under Belgian civil law, the bank could be held liable if it paid these amounts to persons who would afterwards appear not to be entitled to the inheritance.

The heirs first need to obtain a special inheritance certificate, before they can take possession of amounts on the bank accounts of the deceased person.⁶ This certificate is drawn up by the notary (or by the tax collector of the office where the inheritance is situated), in order to confirm who is entitled to the inheritance.

3. This inheritance certificate is now also used for tax recovery purposes.⁷ As soon as he is requested to draw up such a certificate, the notary has to inform the tax collector, who will check whether the deceased person – or the heir asking the inheritance certificate – have outstanding tax debts. If this is the case, the tax collector will inform the notary within 12 days. All this communication between the notary and the tax collection authorities is done electronically.

4. The notary mentions the outstanding tax debts in the inheritance certificate. The freezing of the bank account bank (i.e. of the part of it, belonging to the heir concerned) can only be stopped if this heir can prove to the bank that he has paid his own tax debts and/or his part of the tax debts of the deceased person.

Taking into account the person's specific situation

5. This measure implies that heirs have to wait longer before they can take possession of the bank accounts of the deceased. However, the measure itself only causes a limited extra delay, as the tax authorities have to inform the notary within 12 days. Once the heirs are informed about the existence of outstanding tax debts of the deceased, additional delays only depend on them: it is up to them to react quickly and to arrange the payment of the outstanding tax debts.

6. The blocking of the bank account is not absolute. It is still possible for the heirs to use the bank account for the payment of some specific other debts: costs relating to the funeral service, and some costs relating to the last residence of the deceased (payment of bills relating to water, electricity, gas, house rent, insurance). And if a bank account was jointly held by the deceased and his/her spouse or legal partner, the latter still has access to maximum 5000 € of this account.

Evaluation

7. This measure applies to all income taxes, VAT and several other taxes, in so far as they are not contested. (This does not exclude other precautionary measures in case of disputed tax debts). It also applies to social security debts. Moreover, the legislation concerned does not provide for a minimum threshold to apply this measure. This global approach is a considerable advantage of this recovery measure.

8. This measure is easy to apply for the tax collection offices. In fact, all the administrative and financial burden linked to its application is put on the heir(s) of the debtor, who have to take all the necessary actions to stop the blocking of the bank accounts. In this way, this measure can be easily applied for small claims.

9. However, if the decease does not come suddenly, debtors may arrange that there is (almost) no money left on the bank account at the moment of the decease.

⁶ Law of 06.05.2009.

⁷ Art. 157 and 158 of a law (Programmawet) of 29.03.2012.

3.3. Specific measures to facilitate or increase the collection of small tax claims

Direct debiting

22. In some Member States, tax authorities are allowed to apply a direct debiting of the financial account(s) of the debtor, in order to recover a claim. (The distinction between “direct debiting” practices and “normal” seizure and attachment procedures is not always clear, and Member States not applying direct debiting measures may still apply other seizure and attachment procedures.)

23. In most of these Member States, this measure is only allowed from the moment on which enforcement measures can be taken (Estonia, Ireland, Spain, France, Poland, Romania, Slovakia). In some Member States, it is possible as soon as the time period granted for the voluntary payment of the tax claim has come to its end (Hungary, Poland, Slovenia).

24. With regard to the communication of this direct debiting measure, national practices seem to be different. In most of these Member States, the debtor is only informed about this measure once the amount of the tax claim is taken from his bank account (Ireland, Spain, France, Poland, Slovenia).

Some other Member States have no obligation to inform the debtor about this measure (not before the amount is taken from the bank account nor afterwards) (Estonia, Hungary).

Some Member States reported that direct debiting or attachment of bank accounts is allowed but the debtor is informed before the amount of the tax claim is taken from his bank account (Romania, Slovenia, Slovakia).

25. In most of these Member States, direct debiting or attachment of bank accounts is not only applied for the amount of the tax claim itself, but also for the amount of outstanding tax penalties (Ireland, Estonia, Spain, France, Poland, Romania, Slovakia). One Member State reported that direct debiting is not allowed for the tax penalties (Hungary).

26. In some Member States, the tax authorities have to take into account that a minimum amount on the financial accounts should be left to cover the basic living expenses of the tax debtor (Estonia, France, Poland, Romania, Slovenia, Slovakia). In other Member States, direct debiting can be applied to all the amounts on the financial account(s) of the debtor

(Ireland, Spain, Hungary). In the Netherlands, the debtor concerned can request to reduce the amount collected by direct debiting (cf. *infra*, best practice experience: direct debiting in the Netherlands, point 8).

The possibility to apply direct debiting on the credit margin of the bank account appears to be exceptional (Netherlands).

27. In a majority of Member States applying direct debiting, tax authorities do not need to have the exact number of a bank account before they can contact the bank. The bank is required to check whether the debtor concerned has bank accounts in that bank (Ireland, Estonia, Spain, France, Poland, Romania, Slovakia). In other Member States, the authorities need to have the exact number of the bank account before they contact the bank concerned (Hungary).

Some Member States reported that they have a specific access to bank accounts information, through a special IT-system (France, Romania, Hungary) or through the information that banks and other financial entities are expected to provide each year (Spain).

28. Member States appear to apply different practices with regard to the possibility to contest the direct debiting or bank attachment actions. In Ireland, there is no avenue for appeal against an attachment; in Slovenia, an appeal can only be lodged within 8 days following the serving of the enforcement order.

29. Direct debiting and other bank attachment procedures seem to be a good, cost-effective instrument for the recovery of small claims. However, it appears that some Member States do not use such an instrument if the claim does not reach a minimum amount.

Best Practices Experience: Direct debiting (“government claim”) (Netherlands)

1. Some years ago, the “government claim” was introduced in the Dutch legislation.⁸ It is a special recovery measure for certain small tax debt amounts.

⁸ Art. 19(4) of the Dutch Enforcement Act (Invorderingswet) 1990. The provisions on the government claim were introduced by the Law of 27.07.2007 (wet houdende wijziging van de algemene wet inzake rijksbelastingen en van enige andere wetten, in het kader van het versterken van de fiscale rechtshandhaving en het verkorten van beslistermijnen).

Description

2. The government claim is a simple electronic and automatic third party seizure (or garnishment by attachment) on a bank account. It has been developed for mass use when collecting small amounts of tax debts.

3. After sending a summons and a distress warrant, the tax collector can decide to use this instrument. The tax collector then sends a notification to the bank informing it that the account of the person concerned is attached. This notification is made electronically.⁹ On the request by the tax collector, the bank is obliged to pay from the balance of the account owned by the tax debtor at the bank. In fact, the collector can attach the positive amount of the bank account but also the available credit space on the bank account of the tax debtor.

Special characteristics to guarantee the efficiency of this recovery measure

4. In order to guarantee the efficiency of this government claim, the debtor himself is only informed afterwards: the tax collector will inform the debtor within seven days following the attachment. And the bank will notify him by mentioning the attachment on the next bank statement.

5. The application of this government claim requires a smooth cooperation between the tax collection authorities and the banks. In this regard, it is noted that the tax authorities can ask the financial institutions to provide information about the holders of bank accounts in the Netherlands, without any communication of these information exchange to the debtor concerned.¹⁰

Taking into account the debtor's specific (financial) situation

6. The attachment relates to the bank account that the debtor normally uses for his payments. The fact that the government claim is applied without any specific warning (but not without having sent a summons and a distress warrant), and the fact that it is not only applied to the amounts actually available on the bank account but also to the credit margin on that bank account, may lead to unpleasant surprises

for the debtors concerned. These debtors may also have other debts and perhaps little income.

7. Therefore, the government claim attachment is limited as follows:

- it is only used for small tax debts (maximum 1000 €);
- the maximum amount attached at one occasion is 500 €;
- the government claim can not be applied more than two times each month;
- it can only be applied for maximum 3 consecutive months.¹¹

8. Despite these limitations, the national Ombudsman observed that this measure could still lead to serious problems for some debtors and he recommended that this government claim measure should better take into account that debtors also need a minimum amount for living. Accordingly, the tax authorities have introduced the possibility for the person concerned to ask for a (partial) reduction of the garnished amounts, taking into account the tax free amount.¹² In order to have this correction mechanism applied, the burden of proof is on the debtor concerned. He has to provide evidence of this personal or family situation and of all financial means at his disposal.

9. The notices informing the person concerned about the use of the government claim mention a telephone number where he can obtain further explanation or where he can introduce a complaint. According to the authorities' experiences, there is almost no complaint about this practice.

10. No government claim is applied in case of bankruptcy or debt restructuring of the tax debtor.

Evaluation

11. In a first phase (till 2012), the government claim was exclusively applied for recovery of the motor vehicle tax (with a success rate of about 37 %). Since 2012, it is also used in the field of income taxes (with a success rate of about 50 %). In the tax authorities' view, this measure is very efficient and effective. It has had a positive effect on the debts written off, which have been reduced. It has also contributed to a more efficient use of the tax bailiffs, who can now focus more on other cases and activities.

⁹ Art. 1cd Implementing rules of the Dutch Enforcement Act (Uitvoeringsregeling Invorderingswet 1990) and Annex on Art. 1cb, point 2.

¹⁰ Decision of the Dutch Secretary of State of 13.12.2012 (BLKB 2012/1937M).

¹¹ Art. 1ce Implementing rules of the Dutch Enforcement Act (Uitvoeringsregeling Invorderingswet 1990).

¹² Art. 19.4 Leidraad Invordering 2008 (applying from 01.11.2013).

**Best Practices Experience:
Direct debiting (Hungary)**

1. The Hungarian tax collectors also dispose of the possibility to use direct debiting. Generally, direct debiting is the first enforcement action in tax debt cases in Hungary.

Description

2. Since 2013, the tax authorities have an online connection with banks, enabling the tax collector to send his request electronically.¹³

3. Banks have to carry out the tax authority's official transfer order, without the enforcement order being attached.

4. In the case of companies, direct debiting can even be applied easier, as companies must submit their bank accounts to the tax office at the time of their establishment. And if such a bank account number is changed by decision of or for reasons attributable to the bank, it is the responsibility of that bank to notify the previous and the new account number to the state tax authority within fifteen days of the change taking effect.¹⁴

5. If a taxpayer made any payment of tax before the official transfer order was issued, but after the due date of the tax, the tax authority shall repay such sum collected without legal grounds within eight days, without any interest.¹⁵

Taking into account the debtor's specific (financial) situation

6. The deposits of debtor may be subject to attachment without limitations, except for natural persons. From the money deposited by natural persons, the part that is in excess of four times the amount of the minimum old age pension may be subject to attachment without limitation; from the rest of such deposits fifty per cent of the part that is between the minimum old age pension and four times the amount of the minimum old age pension may be subject to attachment. The part up to the amount of the minimum old age pension is exempt from attachment.¹⁶

7. If the funds on the payment account indicated in the transfer order are insufficient (in part or in full),

to cover the amount of the tax debt, the bank is obliged to check whether the amount can be taken from other accounts of the same debtor, that are administered by the same bank.¹⁷

8. If a bank account is held by the debtor and by one (or more) other person(s), the whole amount of that account can be attached. It is then up to the other person(s) to react and to demonstrate to which extent they are entitled to the money that was put on this joint account.¹⁸

**Best Practices Experience:
Tax enforcement on a debtor's financial assets in banks (Slovenia)**

Tax enforcement on bank accounts

1. An enforcement order on the monetary assets that a debtor has in banks or savings institutions can be served by the tax authority on the debtor and on the banks or savings institutions where the debtor's monetary assets are deposited.¹⁹

2. The tax enforcement on the monetary assets that a debtor keeps in accounts at banks or savings institutions is carried out by imposing upon the bank or savings institution, by way of the enforcement order, an obligation to seize the debtor's monetary assets on the day it receives the order up to the amount of tax stated in the enforcement order. The amount has to be transferred to the account specified in the enforcement order.

Responsibility of the "first mentioned" bank or savings institution (in case of account at several banks or savings institutions)

3. If the debtor has accounts at several banks or savings institutions, the tax authority may send an enforcement order to all of these banks or savings institutions, which shall be obliged to seize the debtor's monetary assets up to the amount of the liability stated in the enforcement order and transfer them immediately to the debtor's account with the bank listed as first in the enforcement order. When the bank or savings institution listed as first in the enforcement order discovers, after receiving the funds referred, that there are sufficient funds in the debtor's account to satisfy the enforcement order, it has to instruct

¹³ Act XCII of 2003 (on the Rules of Taxation), Section 52.

¹⁴ Act XCII of 2003 (on the Rules of Taxation), Section 23(7).

¹⁵ Act XCII of 2003 (on the Rules of Taxation), Section 152.

¹⁶ Act LIII of 1994 on Judicial Enforcement, Section 79/A.

¹⁷ Act LIII of 1994 on Judicial Enforcement, Section 79/B(1).

¹⁸ Act LIII of 1994 on Judicial Enforcement, Section 79/C.

¹⁹ Art. 166 and 171 Tax Administration Act.

the other banks or savings institutions to cease any further seizure of monetary assets. This bank or savings institution has to communicate this immediately to the tax authority and to carry out the transfer of the funds to the account specified in the enforcement order.

Taking into account the debtor's specific (financial) situation

4. The monetary assets which are considered cash receipts of the current month can only be seized to a limited extent: the amount of cash receipts which are regarded as employment income (in accordance with the act regulating income tax), seized by way of this tax enforcement, may not exceed 2/3, leaving the debtor with an amount of at least 70 % of the minimum wage pursuant to the act regulating the minimum wage. And these cash receipts may not be seized by way of this tax enforcement if they do not exceed the basic amount of the minimum income (in accordance with the act regulating social assistance).

Short period of time for contesting the seizure

5. The debtor has the right to appeal to an enforcement order. But this has to be done within 8 days following the serving of an enforcement order. The appeal does not automatically stay the commenced tax enforcement, but the tax authority shall stay the tax enforcement (until a decision on the appeal is taken) if it deems that the appeal might be successful. In that case, interest shall be charged for the period of deferred enforcement. An appeal against an enforcement order may not be used to challenge the instrument permitting enforcement.

Best Practices Experience:

Attachment of bank accounts (Slovakia)

Process of attachment of bank accounts: 3 steps

1. The process of the attachment of the bank account involves 3 steps: the decision to start this proceeding is sent to the bank in order to freeze the funds on the bank account(s) of the tax debtor. This is immediately followed by a tax recovery notice sent to the tax debtor, requesting him to settle his tax debts by the date prescribed by the tax administration. (This period may not be shorter than 8 days since the date of receipt of the notice). If there is no payment nor appeal

against the tax recovery notice, the tax office shall issue a tax recovery warrant, which obliges the bank to transfer the amount concerned to the tax administration. (If the funds are held in a term deposit account, this transfer transaction shall be carried out upon expiration of this term.)

2. If the amount on the bank concerned is not sufficient to cover the tax debts, the bank shall be obliged to keep deducting the funds from this bank account, till the whole amount is recovered. So the tax recovery order remains valid until the whole amount of the tax debt is covered.

Taking into account the debtor's specific (financial) situation

3. The following funds cannot be the subject of this attachment of a bank account:
 - a) for a private person: an amount of € 165. If this person has several accounts, even kept at several banks, the tax authority shall specify at which bank and from which account the amount of € 165 should not be debited;
 - b) funds in the account determined for payment of the wages tax relating to the debtor's employees (as well as funds to compensate occupational injuries and occupational illnesses pursuant to a special regulation), for the payment period closest to the date when the bank was delivered the decision on the tax recovery proceeding.²⁰

Setoff

30. Expensive and time-consuming recovery actions can be avoided if small claims can be set off against credits or payments to which the tax debtor is entitled. Most Member States indeed have civil law or tax law provisions allowing this setoff of tax claims against other payments or credits. In this way, income tax or VAT claims can be set off against tax credits relating to income taxes and/or VAT (Belgium, Bulgaria, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Hungary, Austria, Poland, Portugal, Romania, Finland, Sweden, United Kingdom). However, in some cases, setoff is only possible for tax claims and tax credits relating to the same type of tax (Slovenia).

31. In so far as these other payments or credits belong to the competence of other authorities, this offsetting process requires a coordinated approach of

²⁰ Art. 109, paragraph 1 Tax Code.

different authorities. Their databases must be linked or even integrated.

Differences in organisational structures and in legislations may explain the diversity of Member States' positions with regard to the possibility to set off tax claims (in the income tax and VAT field) against:

- 1^o) non-tax credits (amounts under civil law obligations; amounts due by other government agencies, ...)
 - which is possible in some countries (Belgium, Bulgaria, Greece, Poland, Portugal, Romania, Slovakia, Sweden (under civil law), UK (yes for VAT, not for income taxes))
 - but not (yet) in others (Germany, Estonia, Ireland, Spain, France, Italy, Hungary, Austria, Slovenia, Finland);
- 2^o) amounts paid by social security organisations
 - which is possible in some countries (Bulgaria, Poland, Portugal, Romania, Sweden, United Kingdom (allowed, but not applied in practice));
 - but not (yet) in others (Belgium, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Hungary, Austria, Slovakia, Slovenia, Finland).

A better cooperation and coordination between the different authorities appear to be useful.²¹

32. In general, setoff can take place without any need for a prior authorisation by an administrative or judicial authority, nor for a prior agreement of the person concerned (Belgium, Bulgaria, Germany, Estonia, Ireland, Greece, Spain, France, Hungary, Austria, Poland, Portugal, Romania, Slovenia²², Slovakia²³, Finland, Sweden, United Kingdom). However, an exception can be found in Italy, where the agreement of the person concerned appears to be required, both for income taxes and VAT.

A majority of Member States requires a prior notification of the setoff to the debtor (Belgium, Germany, Estonia, Hungary, Italy, Austria, Poland, Slovakia and Finland), but there is also a considerable number of Member States where such prior notice to the debtor is not required (Bulgaria,

Ireland, Greece, Spain, Portugal, Romania, Sweden, United Kingdom). In France, a prior notification is needed if the setoff is based on civil law, but not if it is done in accordance with tax law rules.

33. Is it possible to set off tax claims if the tax claim or the (tax) credit is contested? Member States appear to have different approaches to this question:

- in some countries, setoff is only possible if there is no contestation about the tax claim or the (tax) credit (Belgium, Germany, Estonia, Ireland, Greece, France, Italy, Hungary, Portugal, United Kingdom).
- this condition relating to the non-contestation of the tax claim or the (tax) credit is not applied in several other countries (Bulgaria, Spain, Austria, Poland, Romania, Slovenia, Slovakia, Sweden).

In any case, if the tax claim is contested, it should be possible for the debtor to contest the setoff, and an impartial judge should have the power to undo the setoff – or at least to suspend the final character of this measure – if that appears appropriate, taking into

account the sincere nature of the contestation.²⁴

34. Member States also appear to have a different approach with regard to the use of setoff in situations where the recovery actions are not yet possible or where they are postponed:

- in some Member States, setoff is already possible when the period given for the payment of the tax claim has not yet come to its end (Belgium, Bulgaria, Ireland (but only on request from the taxpayer), Greece, Spain, Italy, Finland, Sweden), while this is not possible in other Member States (Germany, Estonia, France, Hungary, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, United Kingdom);
- the setoff of tax claims against other (tax) credits, even though the debtor has obtained an instalment

²¹ The cooperation between tax recovery authorities and social security authorities is the subject of a Fiscalis workshop in Brussels on 18 September 2014.

²² No prior authorisation and no agreement of the debtor required is offsetting is made in accordance with tax law rules, but a prior authorisation by a judge and agreement of the person concerned is required for compensation made in accordance with civil law.

²³ But in case of offsetting the tax claim against non-tax credits, prior authorisation of the Financial Directorate is required in Slovakia.

²⁴ In line with the EUCJ judgment in case C-386/94, C-340/95, C-401/95 and C-47/96, Garage Molenheide and others, with regard to the need for a judicial control on measures of conservancy:

“56. Consequently, provisions of laws or regulations which would prevent the judge hearing attachment proceedings from lifting in whole or in part the retention of the refundable VAT balance, even though there is evidence before him which would prima facie justify the conclusion that the findings of the official reports drawn up by the administrative authority were incorrect, should be regarded as going further than is necessary in order to ensure effective recovery and would adversely affect to a disproportionate extent the right of deduction.

57. Similarly, provisions of laws or regulations which would make it impossible for the court adjudicating on the substance of the case to lift in whole or in part the retention of the refundable VAT balance before the decision on the substance of the case becomes definitive would be disproportionate.”

plan for his tax debt (which he respects), is possible in some Member States (Belgium, Bulgaria, Ireland, Greece, Spain, Portugal²⁵, Romania, Sweden) but not in other Member States (Germany, Estonia, France, Italy, Hungary, Austria, Poland, Slovenia, Slovakia, United Kingdom).

35. In general, Member States do not set any limit (maximum amount) to the amounts that can be set off (Belgium, Bulgaria, Estonia, Ireland, Greece, Spain, France, Hungary, Austria, Poland, Portugal, Romania, Slovakia, Sweden, United Kingdom) (exceptions: Germany and Italy²⁶). Some of them expressly mentioned that when applying this setoff measure, there is no need for the tax authorities to take account of the question whether this influences the minimum amount that the debtor needs to cover his basic living expenses (Belgium, Estonia, Spain, Austria, Poland, Portugal, Sweden). In this regard, it was observed that the mere setoff of claims and debts differs from garnishment or seizure measures.

The United Kingdom however observed that offsetting should not result in a situation where the person concerned no longer has a minimum amount available that is needed to cover his basic living expenses.

36. It may be surprising to note that when setting off tax claims against tax credits, not all Member States check whether the amount of the tax credit, based on a debtor's tax return, is correct. Most Member States do have at least some control. Such control is reported to be systematic in some Member States (Belgium, Bulgaria, Germany, Spain, Romania, Slovakia), while other only make these verifications in particular situations (Estonia, Ireland, Hungary, Poland, Portugal, Slovenia) or for a specific category of taxes (i.e. for VAT, not for income taxes: France and Austria). One Member State reported that these checks take place, but not before the offsetting takes place. Some Member States however indicated that such controls are not carried out.

37. Setoff practices are mostly limited to the tax claims, debts and credits of one and the same person. With regard to different persons living in the same household, only a few Member States report that it is possible to set off tax claims and credits of these different persons (Germany, Ireland (if there is a written authorisation from the third party), Spain, Portugal). Other Member States do not appear to

apply this measure to different persons (Belgium, Bulgaria, Estonia, Greece, France, Italy, Hungary, Austria, Poland, Romania, Finland, Slovenia, Slovakia, Sweden, United Kingdom).

The setoff between companies belonging to the same group only applies in a few countries (Ireland (but written authorisation is needed from the third party to do the offset) and Portugal; Slovakia: only for VAT) (not in Belgium, Bulgaria, Germany, Estonia, Greece, Spain, France, Italy, Hungary, Austria, Poland, Romania, Slovenia, Finland, Sweden, United Kingdom).

The setoff between a company and the director of that company can be applied in Ireland (with a written authorisation from the third party) and in Portugal, but not in other countries (Belgium, Bulgaria, Germany, Estonia, Greece, Spain, France, Italy, Hungary, Austria, Poland, Romania, Slovenia, Slovakia, Finland, Sweden, United Kingdom).

²⁵ If no collateral is provided.

²⁶ But without a clear indication of which limit is applied, and when and how.

EU FPG 080 Tax collection practices Report

Transfer of information between tax audit and tax recovery services

Report by: P. De Mets, M. Roekaerts, H. Steffens

Contributors: P. De Mets, M. Roekaerts, L. Mulqueen, J. McCormack, A. Bravo Diaz, J. P. Cordeiro, C. Coelho, A. P. Matos, J. Ščepková, A. Öbrink

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3. Conclusion

Introduction

1. During the work of the Fiscalis Project Group 80, an important topic was raised with regard to the tax auditor's obligation to transfer information about assets to the recovery/enforcement organisation.

2. This topic was already discussed during the Fiscalis seminar in Antwerp and the main impression at that time was that a number of Member States were not sufficiently efficient in this context. However, the examples given at that occasion by some Member States (United Kingdom, Portugal) where tax auditors are obliged to draw up a list of assets during a tax audit for assessment purposes when there exist previous tax debts for an individual or legal entity and to transfer this information to the recovery/enforcement organization have highlighted a potential of creating efficiency by making more use of information deriving from tax audits concerning assets belonging to the debtor, insofar as these assets are unknown to the recovery/enforcement organisation.

3. In order to analyse the current situation, a questionnaire has been sent to Member States, to which six Member States replied (Belgium, Ireland, Portugal, Slovakia, Spain and Sweden). Just prior to the workshop in Porto, additional replies were received from Finland and Poland.

4. From the analysis of the answers, it became clear that the questions were broadly interpreted and the answers provided touch upon a wide range of issues related to the sharing of information, broader than the initial question of providing

¹ Published in the Official Journal of the European Union L64/1, 11.3.2011

² Published in the Official Journal of the European Union L157/38, 26.6.2003

³ Published in the Official Journal of the European Union L44/23, 20.2.2008

⁴ Published in the Official Journal of the European Union L267/46, 15.10.2003

information by the taxation authority to the recovery/enforcement authority when previous tax debts exist.

5. During the discussion on the draft of this report during the Fiscalis workshop in Porto, participants stressed the need for communication and co-operation between the tax auditors and the tax collectors. Currently, in many cases the spontaneous flow of information is limited to those cases where precautionary measures are to be taken. Throughout the discussion it became clear that, even if the awareness on the importance of this topic is growing, there is still room for improvement.

6. This analysis will look into two aspects of the transfer and use of information.

The first part will analyse the practice in those Member States that replied to the questionnaire. This part will focus mainly on the access that the recovery/enforcement organisation has to data collected for taxation purposes.

A second part will look at the relevant provisions in EU law which provide legal basis for information exchanged between taxation authorities of different EU Member States to be passed on to the recovery/enforcement authority. Obviously, the information collected from abroad may be included in the national databases to which the recovery/enforcement organisation has access.

7. It is important to note that throughout the Member States answers, references are made to databases without specifying the content of these databases. It is clear that if the Member States answers that they can consult a database, they can only consult the information contained therein (which may be limited or extended in scope).

1. Transfer of information within Member states' Administrations

1.1. Legal obligations and obstacles for taxation services, when there exist previous tax debts, to provide information of assets to the internal or external recovery/enforcement services

8. Original questions asked:

What provisions exist in national legislation obliging the Tax Agency, when there exist previous tax debts, to provide information of assets to the internal or external recovery/enforcement organization?

Do there exist any legal obstacles for the Tax Agency, when there exist previous tax debts, to provide information of assets to the internal or external recovery/enforcement organization?

9. In three of the Member States that replied (Sweden, Belgium, Ireland) there is a legal basis for this exchange of information.

10. In Belgium, fiscal law obliges all entities of the Federal tax authorities (FPS Finance) to place all appropriate, relevant and non-excessive information at the disposal of all agents of these Federal tax authorities, insofar as these agents are charged with the assessment or recovery of taxes, and insofar as this information contributes to the fulfilment of the tasks of these agents. Furthermore, there is a legal basis⁵ for any data legitimately collected by the Federal tax authorities while performing a mission to be used later for the fulfilment of another mission. However, the recovery official will need to search for the information on a case-by-case basis in a wide range of databases. If assessment information is used in a systematic way (general, not related to personal debts) by the recovery services, prior approval of the internal "Information and Protection of Privacy Security Service" is sought.

11. In Sweden, if the applicant authority has information concerning the debtors' economic circumstances of importance for the recovery, the applicant shall inform the Swedish Enforcement Agency (SEA) of this when recovery is applied for or as soon as possible after that.⁶ However, in practice not all auditors are aware of their responsibility to provide the SEA with information (in case prior debts exist).

12. The Irish Collector-General's office will monitor a phased payment (instalment) arrangement or refer the debt to the various enforcement agencies for collection if necessary. There is a legal basis⁷ under which any information obtained by a Revenue officer can be shared with another Revenue officer when the information is needed to aid in the collection of tax debts. The auditor will use a template to outline all the

⁵ Law of 3 August 2012 "containing provisions relating to the treatment of personal data carried out by the Federal Public Service Finance as part of its mission", published in the "Moniteur Belge" on 24 August 2012. This law provides also for the creation of an "Information and Protection of Privacy Security Service", an internal body within the Federal tax authorities (FPS Finance), whose mission will be to decide what types of personal data are subject to exchange (internal and external) within the FPS Finance.

⁶ 7 § Swedish Recovery Ordinance, 1993:1229.

⁷ S851 (Confidentiality of taxpayer information) of the TCA 1997

information gathered that may help in collection of the debt once the audit has been completed and where the taxpayer cannot pay off the outstanding tax debt. This information may also be shared with the external enforcement agencies when it is used solely to aid in the collection of the tax debts referred to the agency for collection.

13. In some other Member States, there is no legal obligation but neither are there legal obstacles (Poland, Portugal and Slovakia). In Portugal, where the auditing and the recovery services form part of the same organization, the practice is considered to be a procedure adopted to improve collection. The same situation exists in Slovakia, where this approach is fully in accordance with the principles of cooperation as it is recommended that the audit officials provide recovery officials with information on the following: the commencement of the tax audit, a preliminary injunction (i.e. precautionary measure which may be applied in course of a tax audit), the need or requirement to establish the tax lien (a pledge) over the tax payers' property, an overview of the assets determined in framework of the tax audit, the amount of the tax claims assessed after the tax audit (no prescribed form to be used). In Poland the possibility, but not the obligation, to request information from audit services has a legal basis.⁸ This possibility is used in practice if it is justified by the need.

14. Finland mentioned a discussion on the definition of the word 'taxation' in the law and if taxation includes recovery. Independently from this semantic discussion, in practice increasing co-operation between recovery and audit exists for the simple reason that both the audit and enforcement/recovery services in general work with the same tax payers.

15. Examples of close co-operation were provided by four Member States (Slovakia, Sweden, Portugal, Belgium). In Slovakia, it is recommended that the recovery officials accompany their audit colleagues when carrying out the "local investigation process", which allows to investigate and to proof the existence of the assets of the tax payers, for instance

⁸ According to Article 36 §1 of the Act on Enforcement Proceedings in Administration "to the extent necessary to initiate or carry out enforcement proceedings and to provide assistance under the Act on Mutual Assistance enforcement authority (...) may request information and explanations from participants in the proceedings, and also seek information from public administration authorities and organizational entities subordinated or subsidiary thereto, as well as from other entities".

based upon the books of accounts, invoices, tangible assets, fix and fittings. In Sweden, the transmission of information on assets operates very well in particular nationwide coordinated control actions against organized crime. There are Task Teams with mixed competence (Audit and Collection) working together on specific cases, which has been key to progress. The Swedish Enforcement Agency is trying to implement this in other control actions as well. In Portugal, recently the audit teams were obliged, in their external work, to collect information requested in a standard form that they take with them to the external inspection. The information collected includes an identification of the person responsible, evidence on the actual management and assets that could ensure the collection of tax debts. The main objective of filling the previous mentioned working form is to identify managers and add the evidence of the exercise of management for accountability purposes, identify the company's auditor and accountant and the period that they have been working there. In Belgium, collection and recovery cells are integrated within the general administration responsible for the fight against fraud. This way, the needs of the tax collector are taken into account in the framework of anti-fraud tax audits as information on assets is gathered and if necessary, precautionary measures are immediately taken.

16. Another approach is taken by Member States (Spain, Belgium) where audit and tax recovery services share the same databases, therefore eliminating the need for a specific legal basis to transfer information. Indeed, officials working for the taxation or recovery/enforcement authority can both directly consult this information.

1.2. Internal instructions governing the transfer of information

17. Original questions asked:

What internal instructions from e.g. the Director General or other management levels obliging the transfer of such information exist in the Tax Agency in relation to the internal or external recovery/enforcement organization?

(if possible) In what percentage of all tax audits during 2012 was a list of assets drawn up by the tax auditor, when there existed previous tax debts for an individual or legal entity, and this information was transferred to the recovery/enforcement organization?

18. In some Member States (Portugal, Spain), both the audit and tax recovery services belong to the same office.

19. In Portugal, each of the regional offices has a tax audit and a tax recovery department that fall under the responsibility of to the same regional service's top manager. This Regional Director is accountable for the results of the regional tax audits and also for the amounts collected and recovered in his area. However, until a few years ago those departments worked independently of each other and it is only the recent investment to increase the recovery/collection which led to changes within the organization. Even though the project to harmonize the procedures concerning the transfer of information is still ongoing, several Regional Directors have issued instructions about the transfer of information as no national guidelines (formal or informal) were issued.

20. As in Spain the audit and tax recovery services share the same databases, there is no need to provide information of debtor's assets since this information is uploaded in the shared databases.

21. In other Member States that replied to the questionnaire, the recovery authority is separated from the audit authority. The transfer of information can be based on national guidelines which clearly state that information should be submitted to the Enforcement Authority (Sweden), but it is equally possible that no internal instructions are available (Belgium).

22. Even if the flow of information is organised, either legally or in practice, no information could be collected from the questionnaire concerning the percentage of all tax audits during which a list of assets was drawn up by the tax auditor (when there existed previous tax debts for an individual or legal entity) and where this information was transferred to the recovery/enforcement organization. Also no information was available concerning the percentage of all recovery/enforcement matters during which a list of assets drawn up by the tax auditor was received and used.

1.3. Methods used to communicate information between the tax auditor and the internal or external recovery/enforcement organization

23. Original questions asked:

By what means, electronically or paper, is the information communicated between the Tax

Agency (tax auditors) and the internal or external recovery/enforcement organization?

(if possible) In what percentage of all recovery/enforcement matters during 2012 was a list of assets drawn up by the tax auditor received and used by internal or external recovery/enforcement organization?

24. Four Member States (Sweden, Belgium, Poland, Portugal) answered this question.

25. In Sweden, the transfer may happen electronically, on paper or by phone depending on the type of information it may concern. In Poland, the transfer of information takes place electronically or on paper.

26. If in Portugal there are debts prior to the auditing procedure, or if there is a high probability that they can arise as a result of the auditing, the auditor must collect the information mentioned above on paper⁹, leaving it inside the inspection report and available for reference, but also to the IT tool responsible for managing seizable assets, if the auditor identifies new assets that are not yet known by the system (including bank accounts, financial instruments, customer credits and other financial holdings). The form should also mention if the tax auditor proposes precautionary seizure of assets in case there would be a proven risk of payment evasion.

27. In Belgium, most information is contained in databases, the transfer therefore takes places in an electronic way. If necessary, the tax collector can consult the paper file that exists for the debtor in the collection office.

28. Spain stated that in the last decade it was faced with an increasing number of payment evasion fraud, meaning that the patrimony of the debtor is emptied before the tax debts are enforceable. In order to combat this scheme, a "Programme for the Monitoring of Coordinated Actions (PSAC)¹⁰" was developed in order to increase the number and improve the efficiency of coordinated actions between the assessment and recovery bodies, in order to achieve an efficient collection of tax debts.

⁹ At the moment each regional service is using a different form (providing the same information). A new form is being centrally developed in order to harmonize and clarify all the procedures related to the cooperation between audit and recovery, including the information to be collected and evidence to be obtained.

¹⁰ Programa de Seguimiento de Actuaciones Coordinadas.

There are two ways in which a debtor can be included in this programme. In all cases, the collection risk posed by the taxpayer and the possibility to adopt precautionary measures are considered when deciding whether to include the taxpayer in PSAC or not.

- “Ordinary Inclusion” happens if the debtors, after analysis by taxation agency, are likely to present a collection risk or if the estimated debts are to exceed 100.000 €.

In the case of the ordinary inclusion, the collection risk is analysed first by the Tax Agency and secondly by Recovery/Enforcement Authority.

It can be concluded that the debtor presents a collection risk if some of the following signs appear: previous debts have been declared unrecoverable, the taxpayer is or has been declared bankrupt/insolvent, the current debts exceed 20.000 €, the taxpayer is no longer registered in the Social Security census (meaning no current economic activity).

However, other circumstances are also taken into account, including the way in which previous debts were collected, information on the assets¹¹, the evolution of the trading volume of the in the last years in order to determine if the foreseeable evolution of his economic activity will allow him to pay his tax debts.

- For “subsequent inclusion”, some of the circumstances that could determine the inclusion of the taxpayer in PSAC include the fulfilment of the legal requirements to adopt precautionary measures; that, in case there is a co-debtor or any other person liable for the debts, specific circumstances recommend to declare in advance the tax liability of this other person; that during the tax audit significant changes in the patrimony of the taxpayer or in the patrimony of other liable people are detected; evidence of a withdrawal of the economic activity.

Once a taxpayer is included in PSAC through any of the aforementioned channels, both the Tax Agency and the Recovery/Enforcement Authority try to ensure the collection of the taxpayer’s debts before they are enforceable. To ensure the collection of these debts, as already stated, precautionary measures can be adopted, but it is also possible to

declare in advance the tax liability of a co-debtor or another liable person and it is also possible to adopt precautionary measures regarding those other liable people.

1.4. Extension to Customs information

29. Original question asked:

Are there any other facts, information or experiences to be aware of regarding this topic?

30. Different Member States (Spain, Netherlands) have, over the past years, implemented a process in which the Customs checks whether the taxpayer has unpaid debts or not before releasing the goods that he is trying to import. Other Member States (Belgium) are starting up a similar procedure.

31. This procedure starts from matching the importers of goods with persons having fiscal debts. If there is a match, the importer has unpaid debts, the customs inform the Recovery/Enforcement Authority of this import. Depending on the national legislation, the Recovery/Enforcement Authority can decide whether precautionary measures should be taken if debts are not enforceable, but there is a collection risk (Spain) or whether the goods are to be seized. The latter will be done if the debts are enforceable and the value of the imported goods is higher than the costs of selling them in public auction (Spain, Belgium). As long as the debts are not paid, customs cannot release the imported goods.

32. In Spain, this practice has produced very positive results, as many debtors decide to pay their pending debts in order to obtain a quick release of the goods retained, so that they can deliver them to their customers in due time.

2. Transfer and use of information obtained from other EU Member States outside of Council Directive 2010/24/EU

33. In order to supplement the information provided by some Member States in the questionnaire, an analysis was made of the main EU-legislation creating a legal basis to exchange information between taxation services.

34. From this analysis, it follows that there is no limitation on the transfer of information exchanged between the taxation authorities of different Member States to the recovery/enforcement authority of the receiving Member State.

¹¹ This information is obtained from the databases and the Public Property Register. If the taxpayer is a legal entity, information about its managers’ assets is also analysed.

Furthermore, given the hierarchy of legal norms, national legal provisions limiting this exchange would not be in line with the primacy of EU law over national law.

2.1. Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/CE¹²

35. Article 16, 1, of Council Directive 2011/16/EU states that “*Information communicated between Member States in any form pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it. Such information may be used for the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2. Such information may also be used for the assessment and enforcement of other taxes and duties covered by Article 2 of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, or for the assessment and enforcement of compulsory social security contributions*”.

36. In a reply to a question in the European Parliament¹³, asking whether information communicated between Member States in any form pursuant to Council Directive 2011/16/EU may be used in all the various stages of the process of taxation, including assessment, examination, collection, recovery and enforcement of the taxes referred to in its Article 2, European Commissioner A. Šemeta confirmed that “*the Commission is of the opinion that information exchanged between Member States in any form pursuant to Council Directive 2011/16/EU of 15 February 2011 may be used in all stages of the taxation process, including assessment, examination, collection, recovery and enforcement of the taxes referred to in Article 2*”.

2.2. Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments¹⁴ (EU Savings Directive)

37. This Directive provides for a system of automated exchanges of information. The text of the Directive does not refer to sharing of information between the different fiscal bodies within one Member State. However, it does not explicitly prohibit such exchange.

38. In a question in the European Parliament¹⁵, it was noted that “*The negotiations on the EU Savings Directive are in an important phase. The exchange of information about income earned abroad between tax authorities is a key instrument in an effective approach to tax fraud. Does information received in the framework of the Savings Directive have to be used exclusively for the purpose of effective taxation of interest income or can it be used more broadly (such as information on the basis of the Mutual Assistance Directive)? If information may only be used for the purpose of effective taxation of interest income, would it not be appropriate to integrate the Savings Directive in the amended proposal for the Mutual Assistance Directive on which the Commission is currently working?*”

39. In his reply, European Commissioner A. Šemeta confirmed that “*Information exchanged under the Savings Directive can be used by tax administrations to the same extent as information exchanged under Council Directive 2011/16/EU on Administrative Cooperation in the field of taxation*”. Commissioner Šemeta referred to both the recitals and the wording of Article 9 of the EU Savings Directive.

2.3. Council Directive 2008/9/EG of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State¹⁶

40. This Directive provides for a system of VAT refunds, under certain conditions, to taxable persons not established in the Member State of Refund. The text of the Directive does not refer to sharing of information between the different fiscal bodies within one Member State. However, it does not explicitly prohibit such exchange.

¹² Published in the Official Journal of the European Union L64/1, 11.3.2011

¹³ Question P-006045/2013 of 27 June 2013

¹⁴ Published in the Official Journal of the European Union L157/38, 26.6.2003

¹⁵ Question E-006059/2013 of 25 July 2013.

¹⁶ Published in the Official Journal of the European Union L44/23, 20.2.2008

41. In practice a project matching VAT Refund information with debts was initiated by several Member States (Belgium, Netherlands, Luxembourg, Latvia¹⁷). Other Member States have expressed their interest in this recovery procedure (Czech Republic, United Kingdom). In order to work towards a common European recovery procedure.

2.4. Council Regulation (EC) No. 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) nr. 218/92¹⁸

42. Article 41, 1 of Council Regulation (EU) No. 1798/2003 states that *“information communicated in any form pursuant to this Regulation shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under both the national law of the Member State which received it and the corresponding provisions applicable to Community authorities. Such information may be used for the purpose of establishing the assessment base or the collection or administrative control of tax for the purpose of establishing the assessment base. The information may also be used for the assessment of other levies, duties, and taxes covered by Article 2 of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures.”*

43. Here again, it is clear that the information exchanged between Member States can be used for enforcement/recovery purposes. This position has been confirmed by the European Commission.

3. Conclusion

44. In the opinion of the Member States who answered the questionnaire, sharing information between the taxation and recovery authorities has indeed a great potential for recovery.

45. One of the crucial conditions for an effective and efficient recovery proceeding is to have full knowledge on the assets of a debtor. It is clear that there is potential for this area of cooperation to be

further developed. In the Member States that replied, recovery/enforcement authorities have access to the information in possession of the taxation authorities. Some Member States go further than allowing the recovery/enforcement authorities to pull the information out of the databases, and create legal and operational mechanisms actively pushing the information towards them.

46. Given the increased mobility within the EU, EU legislation provides for a set of legal instruments promoting exchange of information in the field of taxation. In order to counter cross-border payment evasion, it is important for recovery/enforcement authorities to have access to this information as well, and to make optimal use of this information.

¹⁷ Latvia requested clarification from Member States to which it had send requests for recovery based on the VAT Refund procedure at the SCAC Committee of 29.04.2014 and the Recovery Committee of 26.05.2014.

¹⁸ Published in the Official Journal of the European Union L267/46, 15.10.2003

EU FPG 080 Tax collection practices Report

The effect of horizontal monitoring and certification practice with regard to collection and recovery of taxes

Report by: A. Van Eijdsden, C. Lamur

Contributors: A. Van Eijdsden, C. Lamur, J. P. Cordeiro, C. Coelho, A. P. Matos, A. Öbrink, L. Wittberg

Introduction

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Introduction

1. Horizontal monitoring refers to mutual trust between the tax payer and the tax authorities, the more precise specification of each other's responsibilities and options available to enforce the law and the setting out and fulfillment of mutual agreements. In so doing, the mutual relationship and communication between citizens and the government shift towards a more equal position. Horizontal monitoring is also compatible with social developments in which the citizen's personal responsibility is accompanied by the feeling that the enforcement of the law is of great value. In addition,

the horizontal monitoring concept also implies that enforcement is feasible in today's complex and rapidly changing society when use is made of society's knowledge.

2. Member States may apply or examine the possibility of shifting their working method from vertical supervision (audits etc.) towards horizontal supervision with regard to certain business - tax payers under certain conditions. This does not mean that vertical monitoring is abandoned. The vertical type of supervision still remains an important working method. This horizontal monitoring could for instance be achieved by concluding horizontal agreements with several business - tax payers but also with certain tax service providers.

3. The reason for introducing horizontal monitoring is that tax authorities need new working methods. That has to do with the growing number of tax payers, the growing volume and intensification of the trade of goods, capital and services. But also the increasing number of laws and regulations and a heavier supervisory burden. The implementation burden on the tax authorities increases, as does the administrative burden imposed on tax payers.

4. With this new supervision method the tax authorities may be able to reduce the supervisory burden imposed on businesses when filing their tax assessment/return and will be able to pay more attention to high(er)-risk clients.

5. Member States that use a form of horizontal monitoring (HM) were asked to report whether this HM is only used for tax assessments and returns or also for tax collection and recovery purposes.

1. The current situation

6. Only 3 Member States entered into this topic: the Netherlands, Portugal and Sweden.

7. In the Netherlands, HM is mainly used as a tool for tax assessments and auditing purposes, although it includes tax collection and recovery. When the inspector concludes a Compliance Agreement there is a paragraph stating that all fiscal obligations (levying and collection) should still be complied with. However the tax collector does not use the format of a Compliance Agreement as a tool for or in the recovery process.

A detailed report of the Dutch practice is presented below.

8. In Sweden, HM is only used for tax assessment purposes. An agreement with professional bodies of tax intermediaries and accountants, concluded in 2013, provides that their members will inform the tax administration about the tax returns they have prepared. This information will be used to monitor the quality of these tax returns. This evaluation may lead to a future adjustment of risk assessment criteria for the control of tax returns.

9. The Portuguese Tax Authorities do not have a model of monitoring and certification practice with regard to collection and recovery of taxes, covering all taxpayers, but merely a mitigated model of horizontal compliance monitoring which is still restricted to certain groups of taxpayers.

2. Models of mitigated “Compliance”

2.1. Strategic Debtors

10. Since the second half of 2010, the Portuguese Tax Authority implemented a strategy of debtors segmentation based on the total amount of debt. This included the determination of a specific category of large debtors, designated “Strategic Debtors”, using the following selection criteria:

- aggregated debt in a regional office’s area amount exceeding €500.000,00; or
- aggregated debt in more than a regional office’s area exceeding € 250.000,00; or
- not included in the above, whose debt represents 80% of the regional service’s debt portfolio;

This is the first example of the use of horizontal monitoring by the Portuguese tax authorities and for this purpose an IT application has been developed to allow an integrated management of these strategic debtors. That application named “SIGIDE” or “MSD” (System of Integrated Management of Strategic Debtors) is used to collect all information (past and present) of the debtor, which then serves as the basis for developing a strategy to recover the debt. In a single application view you can find all the data available on the debtor, such as customers, suppliers, assets, debts, auditing procedures, administrative and judicial litigation, as well as relationships with other taxpayers and the identification of managers when the debtor is a corporation.

11. The Portuguese authorities also created teams of experts constituted by the designated “Strategic Debtors Managers”. Each strategic debtor has a

strategic debtor manager assigned (at the regional office level) whose mission is to develop a plan of action to recover the debt, which implies a proactive spirit with a view to stimulate compliance.

12. Thus, based on information gathered by the application SIGIDE, a diagnosis of actions is made, in view of an implementation by all stakeholders in the hierarchical structure of the Tax Administration (from the central, regional and local services) in the area of debt recovery, and it is combined with a subsequent monitoring of the strategies outlined.

13. Additionally, monthly statistical newsletters are released to the local and regional offices, with quantitative data gathered from SIGIDE that illustrate in a graphical form and per regional office the performance of this strategy. This is also useful as a management support tool.

2.2. Unit of Large Taxpayers (*hereinafter UGC, in the Portuguese acronym*)

14. In line with developments in other countries, the Portuguese tax authorities created a department to deal exclusively with the monitoring of large taxpayers, given their relevance in economic terms and the increasing complexity of operations. One of the objectives was to promote assistance in voluntary compliance with tax obligations and reduce the number of tax disputes. In this particular issue Portugal intended to implement a model of “Compliance” in relation to designated “Large Taxpayers”.

15. Therefore, Executive Order no. 320-A/2011 of 30 December established the nuclear structure as well as the competences of the UGC. Moreover, the Decree-Law no. 6/2013, of 17 January was adopted to operationalize the UGC with effect from 1 January 2012.

The competence of the UGC is described in Article 34 of that Executive Order:

Executive Order no. 320-A/2011, of 30 December 2011:

«Article 34 Unit of Large Taxpayers

1 - The Unit of Large Taxpayers, abbreviated as UGC, ensures the area of tax management relations regarding the taxpayers, whose supervision is assigned to it, ensuring towards these the actions of tax inspection and tax justice.

2 – For those taxpayers referred to in the preceding paragraph, the UGC presents the following duties:

a) to provide personalized assistance to taxpayers by ensuring the monitoring of the overall relationship with the tax administration;

b) to ensure to the taxpayers who are deemed to have a high economic and fiscal dimension, based on criteria previously defined by executive order of the general directorate of the Tax and Customs Authority, the monitoring of the respective relationship with the tax administration through a single intermediate point designated by “taxpayer’s manager”;

c) to provide pre-declarative assistance, specifically through monitoring and joint analysis with taxpayers of the matters of increased technical complexity;

d) to review and monitor the tax and customs behaviour of taxpayers and the sectors of economic activity in which they operate, by checking formal analysis and the consistency of the elements declared, as well as the monitoring and analysis of information contained in databases and systematic collection of other types of information available;

e) to provide information on the situation of taxpayers, and to clarify the doubts raised by them, taking into account the administrative guidelines relating to the interpretation of tax laws;

f) to monitor the procedures regarding tax assessments and tax control;

g) to evaluate and propose the acceptance of previous agreements on transfer pricing;

h) to monitor procedures for allocating tax benefits that depend on recognition of the Minister of Finance or the General Directorate of Tax and Customs Authority;

i) to ensure and deepen the relationship between the tax administration and taxpayers, particularly in view of the establishment of codes of good business practices in the field of taxation and to identify and understand their needs and tax risks;

j) to perform inspection procedures to the accounts of taxpayers, using audit techniques, confirming the accuracy of statements made by substantive verification of supporting documents;

k) to develop models of risk management, with a view to identify, analyse and assess tax risks arising from the activities of the taxpayer;

l) to establish and undertake processes of inquiry, pursuant to Articles 40 and 41 of the General Taxation Infringements Law;

m) to undertake the implementation, investigation and assessment of tax procedures, ex officio or at the request of the taxpayer;

n) to undertake the implementation, investigation and assessment of the administrative appeal procedure;

o) to collaborate with the representation of the Treasury within the tax courts.»

16. Once created the organic structure to carry out the monitoring of large tax payers and defined their competences, the Executive Order no. 107/2013, of 15 March, established criteria for the selection of taxpayers whose tax situation should be followed up by this Unit.

Executive Order no. 107/2013, of 15th March:

«Article 1 Selection Criteria

The Taxpayers whose tax situation should be monitored and supervised by the Large Taxpayers Unit are those that meet at least one of the following criteria:

a) entities with a turnover of more than:

i) € 100 million, in case of activities carried out under the supervision of the Bank of Portugal or the Insurance Institute of Portugal;

ii) € 200 million, in the remaining cases;

b) holding companies formed under the Decree Law no 495/88, of 30 December, with a total value of income greater than EUR 200 million;

c) entities with a total value of taxes paid over EUR 20 million;

d) companies not covered by any of the preceding paragraphs that are considered significant, with

particular regard to their corporate relationship with the companies fulfilling the above conditions;

e) companies integrated in an economic group, included those under the special regime for the taxation of groups of companies, in accordance with article 69 of the Corporate Income Tax Code, where some members of the group, dominant or dominated societies are covered by the conditions defined in any of the preceding paragraphs. »

[...]

Article 3

Publicity

1. The entities referred to in subparagraphs a) to e) of Article 1 are defined and identified alphabetically under Executive Order approved by the General Directorate of the Tax and Customs Authority to be published in the Official Journal.

2. This relationship has the length of four years and may, by order of the General Directorate of Tax and Customs Authority, be increased on an annually basis according to those taxpayers that satisfy the corresponding requirements.

(...).»

17. Aware of the importance of its taxpayers, UGC has undertaken actions to establish close relationships and trust with its large taxpayers. However, this was done with respect for the legal rules applicable to these situations.

By encouraging this "compliance" relationship, UGC intends not only to increase voluntary compliance with tax obligations, but also to reduce substantially the context costs, the default risks and the number of disputes, as well as provide greater security to tax choices taken by the taxpayer under consideration.

18. In this line of approach, the following projects outline the good practices that the Unit of Large Taxpayers is nowadays implementing:

2.2.1 FORUM of Large Taxpayers

19. The creation of this "Forum" should allow a closer, better and mutual understanding between the Tax and Customs Authority and those taxpayers. In this line, it constitutes a privileged platform to discuss problems associated to that relationship, particularly on issues regarding ethics and, by doing so, to reduce compliance costs in the different perspectives of stakeholders in the tax procedures.

This unit is competent to develop the necessary activities of the Forum, in accordance with the superior approval, promoting the achievement of plenary sessions, to stimulate the deepening of the relationship at the tax context and to ensure the establishment and functioning of a permanent secretariat.

2.2.2 Customer Relationship Management (CRM)

20. The Customer Relationship Management (CRM) is a tool that automates the functions of contact with taxpayers, helping to maintain and improve the respective relationship by storing the information intelligently about their activities and interactions with the tax authorities.

This team is competent to develop the necessary activities, in particular, to promote their availability regarding the area of management and tax assistance and to ensure the training of the officials involved.

2.2.3 Contact Centre (CAT)

21. The UGC assurance of large taxpayer's relationships with the Tax and Customs Authority, as it was said before, tends to be performed by a single intermediate, called the taxpayer's manager, who is also responsible, among other functions, to provide information by telephone.

It is up to this team to develop the skills necessary to implement the service, particularly in conjunction with the Directorate of Communication Service and Tax Support (DSCAC). In order to carry out this project it is necessary to promote the acquisition of equipment, and the respective licenses, integrated with the CRM implementation process, and to provide specific training for employees who will operate the equipment used to contact the taxpayers.

2.2.4 Portuguese Tax Authority Website

22. The Portuguese Tax Authority website should provide information for this particular group of taxpayers as a way to ensure an effective relationship with them and, also, a continuous disclosure of updated information.

2.2.5 Newsletter

23. Sending periodic newsletters to Large Taxpayers is a privileged way to disclose tax knowledge, mainly legal innovations, and to publicize tax events and useful contacts. The newsletter should contain objective information, and shouldn't have a doctrinal character.

2.2.6 Tax Meetings

24. The Tax Meetings to be held periodically between the Portuguese Tax Authority and the Large Taxpayers consist in the presentation and discussion of legal innovations, allowing UGC to clarify any doubts and to know the impact and the operational problems that may occur.

This team is responsible for preparing, organizing and conducting regular tax meetings by sectors of activities or by specific tax issues.

2.3. Protocols with Professional Associations (Medical Association and Bar Association)

25. In 2013, the tax authorities concluded Cooperation Protocols with the Medical Association and the Bar Association, based on a strategy of engagement and collaboration with professional associations, in order to stimulate and facilitate tax compliance.

3. Country report: the Netherlands

3.1. Horizontal Monitoring (HM) in the Netherlands

1 Background to HM and introductory remarks

26. HM was introduced in the Netherlands in 2005 in reaction to several developments, such as the worldwide accounting scandals, regulatory pressure and the changed relationship between government and citizen's trend of more self-regulation.

Due to the prolonged economic down turn and financial crisis, the Tax and Customs Administration of the Netherlands has shifted its working method from vertical (audits etc.) towards more horizontal supervision with regard to certain tax payer-businesses. This does not mean that vertical monitoring has been abandoned. Vertical monitoring and supervision still remains an important working method.

A letter from the State Secretary of the Ministry of Finance to the Parliament explained HM as follows:

“Horizontal monitoring refers to mutual trust between the taxpayer and the Tax and Customs Administration, the more precise specification of each other's responsibilities and options available to enforce the law and the setting out

and fulfillment of mutual agreements. In so doing, the mutual relationship and communications between citizens and the government swift towards a more equal position. HM is also compatible with social developments in which the citizen's personal responsibility is accompanied by the feeling that the enforcement of the law is of great value. In addition, the horizontal monitoring concept also implies that enforcement is feasible in today's complex and rapidly changing society solely when use is made of society knowledge”.

27. The Tax and Customs Administration has implemented HM by concluding compliance agreements with certain tax payer businesses but also with certain tax service providers (intermediaries) and branch organisations.

28. Cooperative compliance strategies were introduced by the Dutch tax authorities in 2005 with focus on only taxpayers-businesses. The Tax and Customs Administration started a pilot for 20 very large businesses. Currently HM has been established for large businesses but has also been extended to small and medium-sized businesses (a relevant group of approx. 600.000 businesses in the Netherlands), for tax service providers and several branch organizations.

29. This essay will elaborate on HM in general but will focus on HM in particular in relation to tax collection and recovery.

2 Cooperative compliance-good relationship and the essence of HM

30. The objective of the Tax and Customs Administration is the maintenance and improvement of compliance. Compliance refers to the willingness of taxpayers and individuals entitled to benefits to adequately fulfill their statutory obligations. They fulfill their obligations when they:

1. (justifiably) register to pay tax,
2. file their returns (in time),
3. file correct and complete returns,
4. pay the tax stated in the return (in time).

The Tax and Customs Administration can choose from a variety of instruments for their responsive enforcement strategy. Preference is given to HM.

31. The tool of HM for the tax payer-business is based on a certain relationship between the business and the tax authorities. The HM makes an appeal on the own responsibility of the business and consists

of several principles. In this respect there are three key principles between the tax administration and the business. There should be a good relationship of:

- (i) *transparency*,
- (ii) *understanding*,
- (iii) *mutual trust*.

32. The taxpayer-businesses must show that their fiscal process and their fiscal risks are manageable and detectable, in the so called Tax Control Framework that allows for insight regarding the fiscal risks and the fiscal processes that should be managed by the business (this in fact describes the tax strategy of the business and the tax process among others).

33. The 'good relationship' is laid down in a compliance agreement between the tax administration and the taxpayer/intermediary or branch. In the compliance agreement the business and the tax administration agree upon the way to cooperate and the intensity of the auditing of the business by the tax administration (for instance initiating a random auditing or not). It stresses among others that the taxpayer-business has an information obligation: he must inform the tax administration at an early stage about his fiscal risks.

34. The tax administration will then give the taxpayer-business security about his fiscal position in advance. The Tax and Customs Administration thus aims at using corporate governance and compliance risk management of businesses in favor of its own compliance role.

35. The objective of HM is to improve the quality of the taxation process on the basis of cooperation and coordination. The ultimate goal of HM is to stimulate compliance, the voluntary willingness to comply with laws and regulations (i.e. fiscal obligations) in a correct way (cooperative compliance).

36. Policy rules have laid down that certain business sectors that are characterized as "havens" cannot participate in HM.¹

3 Evaluation in 2012

37. At the end of 2011, the Dutch State Secretary of the Ministry of Finance established an independent evaluation Committee. In this respect the State

Secretary asked a group of specialists to evaluate HM. The reasons for the installment of the Committee were to evaluate HM that was implemented at the Tax and Customs Administration as of 2005. The Committee was asked to give an opinion on this new policy and to (1) carry out an evaluation of the Tax and Customs Administration's HM, (2) detect bottlenecks, vulnerabilities of this new approach but also to (3) submit proposals for further development of HM and for a way to measure effects of HM.

The evaluation that was published in June 2012 and laid down in the report *Tax Supervision - Made to measure, Flexible when possible, strict where necessary*.²

38. This evaluation concluded mainly that the concept of HM is the appropriate approach in particular for (very) large business-taxpayers (and less for the Small and Medium-Sized businesses-segment). According to the Committee HM is a strategic and culture change within the tax administration that seems to lead to the impression that HM is the only way to go. Some years later this image was modified and brought back to the view that HM is part of the total compliance/audit control within the tax administration ranging from service to detection of taxpayers.

39. Furthermore the Committee concluded in its report that:

- (1) HM should be better embedded in the Compliance Risk Management Strategy of the tax administration,
- (2) management and staff should be better aligned,
- (3) the tax administration should start to measure the efficiency and effectiveness of HM (the influence on tax revenue has not been measured yet³).

40. The Committee also concluded and advised to review and reassess the concept, especially with regard to the Small and Medium-Sized businesses segment (See below paragraph 6. 'Final remarks' where an impression of the findings of the Committee is given).

¹ It concerns businesses as "coffee-shops", mobile-home-sites (camp-sites), prostitution sector. These businesses cannot be brought under a compliance agreement with a tax service provider.

² Committee Horizontal Monitoring Tax and Customs Administration, 'Tax supervision-Made to measure, Flexible when possible, strict where necessary' (2012).

³ The OECD FTA started a project on *Measures of Tax Compliance Outcomes* in 2013 of which a report will be ready in July 2014.

4 *International evaluation in 2013*

41. On an international level several other tax authorities have implemented cooperative compliance strategies to be able to deal with several challenges. In 2012 and 2013 the OECD Forum on Tax Administration (FTA) undertook an international evaluation of these new approaches in the current changing economic and business environment and addressed past and current experiences. The OECD published her report in 2013.⁴

In the 2013 OECD report the term “co-operative compliance” was adopted.⁵ The report points out that the original term “enhanced relationship” is not an accurate description of the approach.

The term co-operative compliance, according to the OECD, better illustrates that the approach is based on cooperation with the purposes of assuring compliance, which in taxation terms means: payment of the correct amount of tax at the time due.

The OECD pointed out that the five main principles referred to in the 2008 Report⁶ remain valid. These principles are:

- 1) demonstrating commercial awareness,
- 2) impartiality,
- 3) proportionality,
- 4) openness through disclosure and transparency,
- 5) responsiveness.

The OECD recommended that there is scope to further developing and strengthening the co-operative compliance concept.

5 *Current state of HM*

42. Currently HM is offered by the Tax and Customs Administration not only to large business taxpayers but also to the Small and Medium-sized businesses-segment, to intermediaries of taxpayers and to medium-sized branches. The new HM policy rules have been laid down in published internal guidelines. Currently the following guidelines have been published by the Tax and Customs Administration: (1) the Guide on Supervision of Large Businesses and (2) the Guide on Supervision within the SME segment, (3) the Guide on Supervision within the SME segment for tax service

providers, (4) the Guide on Supervision within the Medium-Sized segment branches and (5) the Guide Horizontal Monitoring within the Individual Customer Handling’.

3.2. **Horizontal monitoring and collection (recovery) of tax**

1 *HM and collection in general*

43. Recovery measures taken by the Dutch tax collector are usually preceded by several considerations such as the basic principles of equality before the law, effectiveness of measures, the efficiency of collective measures, justice before law and goal-orientedness. Between some of these principles there exists a tension which makes it necessary for the tax collector to make a choice when taking coercive measures. A reminder or summons have been sent when the assessment has not been paid on the last due date. If the tax debt still remains unpaid, more severe measures are taken such as issuing a distress warrant and seizure of assets. The process of monitoring payments, sending reminders, summons and issuing distress warrants is fully automated.

Thus in general the tax collector will consider and measure the standpoint of the taxpayer.

In case of an existing compliance agreement for HM, this does not imply that tax collection and recovery does change. Thus this will not change the relationship between the taxpayer and the tax administration.

2 *Written policy rules for HM and collection*

44. It is remarkable to note that neither in legislation nor in the existing policy rules for HM, hardly anything is written down about HM and tax collection. The OECD 2012 survey about cooperative compliance does not mention collection or recovery at all. The published Dutch guidelines for HM refer mainly to the tax levying process. There are however (just) two Guides of the Dutch Tax and Customs authorities that pay some attention to tax collection.

45. The first guideline to be mentioned is the ‘*Guide Horizontal Monitoring within the Individual Customer Handling*’, where p. 49 mentions the following about tax collection:

“A-typical notifications.

These notifications can contain the signal that the organization is liable for the tax debt of a third party (for instance contractors liability).

⁴ OECD FTA, *Co-operative Compliance: A Framework from enhanced Relationship to Co-operative Compliance*, 2013.

⁵ OECD FTA, *Co-operative Compliance: A Framework from Enhanced Relationship to Co-operative compliance*, 2013.

⁶ OECD FTA, *Study into the Role of Tax Intermediaries*, 2008.

Starting point is that the local (tax administration) region that is considering to hold the third party liable, or wishes to start a liability audit, should in advance contact the specialist team of the organization. Together they will decide if and how the organization will be contacted. In that situation the basic points of Horizontal Monitoring are also applicable.”

46. The second Guide paying attention to the collection of tax is the ‘Guide Supervision Large Business in the Netherlands’, where p. 45, 46, writes the following about tax collection:

“10.2 Tax collection as an element of the horizontal monitoring process

Tax collection and its issues are addressed in all phases of the horizontal monitoring programme, in the horizontal monitoring meeting, in the implementation and discussions of the tax control framework and in the audits of the tax returns. Within this context the tax control framework provides assurances for the timely and correct payment of the tax specified in the tax return or assessment and for the prevention of liabilities. The transparency expected from the organisation also results in the organization’s reporting of relevant collection risks. The organisation may then in turn expect the NTCA⁷ to act on this information in an adequate and proportionate manner within the existing legislation and regulations.

Preliminary consultations may also be held on tax collection. Issues for discussion in these consultations can include, for example, the liability risk (liability of subcontractors and hirer’s liability and how these risks can be reduced by means of the selection of third parties to be contracted.

10.3 Tailor-made approach

Individual account management also provides opportunities for a constructive tailor/made approach of tax collection. The NTCA, depending on the organisation’s attitude and behaviour and within the opportunities offered by the legislation and regulations, gives consideration to and cooperates in the development of solutions that promote both the settlement of the debts and the continuity of the business. Large Business and Customs hold discussions with the organisation, the tax consultant, shareholder and/or financier to review which approach does

justice to the interests of the parties involved. The organisation can take the initiative for contacts, for example by means of a report of a (foreseen) payment problem. The account management team can also take the initiative when there are clear indications that a timely and complete payment may be put in jeopardy, for example due to changed market conditions, a fall in operating results, the bankruptcy of important debtors or a significant change in the tax position. These changes may be caused by the account management team’s supervision or by the organization, for example in the event of a merger, demerger or transfer of shares whereby deferred tax liabilities will be formalized in business entities with virtually no means of recovery. For this reason it will be necessary to be alert to potential collection consequences in as early as the tax assessment process and to call in the necessary (collection) expertise in good time in the decision-making process. This is also the case when (temporary) liquidity problems are or could be an issue, where relevant followed by potential insolvency. Timely intervention and a response to the situation can result in a substantial reduction of financial losses.”

As mentioned before the other Guidelines do not mention tax collection at all!

3 Pay at the right time

47. The majority of taxpayers comply with their payment obligations. In view of the HM approach a tax debt should be paid at the right time. Every concluded compliance agreement mentions that the agreement also includes the collection and recovery of tax. However collection and recovery of tax is not further specified. In short this means that all fiscal obligations must be met and satisfied by the taxpayer (with or without a compliance agreement). There are just slight differences, which are discussed later on.

48. It is also relevant to bear in mind that taxpayers who comply and take part in HM want to see tax authorities pay sufficient attention to those who do not comply.

4 Relationship

49. Business taxpayers need to show socially responsible entrepreneurship and be willingly tax-transparent, whereas tax authorities should demonstrate understanding in their dealings with taxpayers, based on the key pillars of cooperative compliance, i.e. commercial awareness, impartiality, proportionality, openness and responsiveness.

⁷ Netherlands Tax and Customs Administration.

50. The rights and obligations pursuant to relevant legislation and regulations however remain in full force after concluding a compliance agreement. This entails for instance that the legal obligation to notify the tax collector of real payment problems regarding tax debts at an early stage after which a director can be held personal liable for the tax debts of the company, remains intact. The taxpayer is still responsible for complying with his fiscal obligations such as payment of tax within the legally prescribed time periods. Taxpayers are also obliged to share relevant information with the tax collector. Taxpayers should on the basis of HM be transparent and open about their compliance with tax payment obligations. This entails that taxpayers should inform (give full disclosure to) the tax collector at an early stage about all payment risks and coming payment problems.

51. On the other hand the tax collector must be able and willing to discuss the payment problems with the taxpayer and make agreements about these issues. The sooner the taxpayer opens itself about fiscal risks (nonpayment, third party liabilities) to the tax collector, the tax collector is more willing to discuss problems and cooperate with the taxpayer business to think and work towards solutions (cooperative compliance). The Collection Policy Guide 2008 of the Netherlands offers space enough to a tailored approach and solution thinking i.e. restructuring solutions, payment arrangements, and remission possibilities.

5 Current experience tax collector

52. Recent interviews of some local tax collection staff reveal that in practice both taxpayers and the Tax and Customs Administration staff need more guidance in HM. Tax collectors of the local offices currently have little experience with HM. Their experience shows that in some cases there is no difference between the non compliant behavior of a customer with or without a compliance agreement. At the other hand some customers with a compliance agreement do inform the tax collector at an earlier stage about their payment problems than those without such an agreement. However currently there is no experience of cases where the compliance agreement has been ended because of non-compliance other than in insolvency situations. The tax collectors sometimes notice a different approach of the account management team towards customers with or without a compliance agreement if they show non-compliant behavior.

53. In short, the fact that a taxpayer that has agreed to a compliance agreement with the tax administration does not prevent non-compliance.

3.3. Are HM and recovery irreconcilable issues?

1 Advocates and opponents

54. Above a more general survey about HM was displayed. It seems that HM focuses more on the levying process than on the recovery of tax. Either way the 'hard core' advocates of HM usually deny this and are of the opinion that a taxpayer that has concluded a HM compliance agreement for all his tax issues, is bound by the basic concepts and starting points of HM. After all, these 'hard core' advocates of HM seem to be right. Because HM is based on the three following principles:

- 1) Mutual trust,
- 2) Understanding and
- 3) Transparency.

And – that is the logic of optimists regarding HM – when you trust one another in the levying process, have understanding for each other's situation and are transparent, you must also be as such regarding the collection of tax!

55. But in taxation matters it is often a fact that doctrine and practice differ from one another. This, next to the fact that it is deeply involved in human nature, there is a probable reflex to:

- a) pay as little as possible tax;
- b) pay what should be paid as late as possible, in the most possible beneficial way and at a the most late momentum;
- c) pay the creditors you depend on first (usually banks) in case of financial problems.

56. Should the conclusion then be that HM is not appropriate for tax collection and recovery? This conclusion seems premature but in essence there is a point of truth in it.

57. The advocates of HM see their opportunities and hope for instance to be informed in time by the business of the fact that it cannot, not completely or not in time comply with its financial obligations.

The opponents of HM aiming at collection will suggest that HM and collection have nothing in common. Their argument is that when after all a tax debt is collectable this "just" has to be paid, and you do not need HM for this.

58. Many other opinions can be added to the two before described different viewpoints about HM in

relation to collection. But it should be clear that there are arguments in favor of for both approaches. On the one hand you cannot be a “good guy” in the tax levying process and a “bad guy” for the collection process. That cannot be the right way.

59. The final conclusion is that when talking about HM, it mainly concerns the *levying* process, but it does not end with this levying process. “Noblesse oblige”, and that is also applicable to taxpayers with whom a HM compliance agreement has been concluded. Therefore it can be reasoned that HM in relation to collection is not self-evident but it cannot implicate that all agreements made with regard to HM and the obligations that result from that will end with subjects that only concern the levying of tax. For that matter the critical attitude of opponents of HM in relation to collection could be comprehended. Taxes anyway must be paid correctly and on time.

The three before mentioned basics of HM, trust, understanding and transparency, do not devalue these starting points. From their perception, HM aims at reaching optimal honesty in the field of HM.

If the tax administration knows that she can trust the taxpayer (the Netherlands calls them wrongly a “customer”) and if this taxpayer promises that tax risks will be notified in advance to the tax administration, then it is indeed sufficient that a “light” audit exists.

2 Lessons to learn

60. In the Netherlands the opinion in use is that when HM is applicable, it also includes collection. The different insights that exist about the span of control are largely different. A clear opinion about this subject is therefore not available. Formulated in a different way: the question if the meaning of HM for tax collection is similar to that in relation to the levying process, is answered differently.

Yet there are lessons to learn from the application of HM in the tax levying process for collection.

The three basic concepts of mutual trust, understanding and transparency, force the taxpayer to be completely open towards the tax collector when collection difficulties threaten to occur.

3.4. Situations where HM is relevant for collection

61. What situations could be mentioned where HM is relevant for the collection and recovery process?

1 Information obligations/early intervention by taxpayer

62. From the first moment that the taxpayer-business receives information about facts and circumstances that may have the effect that taxes are not at all, not timely or not completely paid, he should inform the collector. This is part of the “transparency” requirement. Depending on the nature and content of the information received by the collector, the collector will make up his mind. The collector will then be open and transparent towards the taxpayer and make it clear to the taxpayer of what he is planning to do in order to secure the position of the collector as a creditor as much as possible. Because of the “transparency” the collector probably receives more information than without HM.

2 Notification obligation of payment difficulties

63. In case of financial difficulties, legislation forces the corporate taxpayer-business to notify the tax collector in writing about the (cause of the) payment problems. This has to be done within fourteen days after the due date of the tax assessment. This notification should be made timely and should also give full disclosure of the financial situation of the corporate business. If no timely nor a complete and correct written notification is provided by the corporate business, this leads to the third party liability of the director of the corporate business. HM in this respect will mean that the corporate business will be obliged to be alert at financial difficulties at an early or earlier moment and intervene at an early stage in order to reduce unpaid tax debts and therefore prevent financial losses. Also non-HM customers should be alert!

3 Deferral of payment

64. The same applies to the deferral of payment of tax debts. The taxpayer must on the basis of the basic concepts of HM, much more than before, be completely transparent about the reason of his request for a deferral of payment of tax debts, the need, consequences and the possibility for providing a guarantee. He should therefore not ask for a payment arrangement to try to challenge the collector in how far he will and can go. On the contrary, he must be open to the collector and then the collector will not play games and will be completely open to the taxpayer.

3.5. HM and third party liability

65. When a business-taxpayer falls within the regime of HM in a normal situation, it follows that

all obligations resulting from the concluded compliance agreement must be fulfilled. This concerns the above issues as: mutual trust, understanding and transparency. The collection legislation of the Netherlands contains a relatively large portion of third party liability provisions. These third party liability provisions should be understood as legal rules that provide for a liability for unpaid tax debts of the principal taxpayer. In the Netherlands there are roughly two main categories of third party liability provisions, namely the so-called:

- 1°) risk liability
- 2°) culpable liability

Ad 1°): in case of a risk liability on the side of the third party, there is no requirement of any form of guilt whatsoever in relation to the liability.

Ad 2°): in case of a culpable liability, the third party held liable usually can be blamed (culpability) for the fact that the tax is not unpaid.

66. The question is: can or should you hold a taxpayer-business liable with whom a compliance agreement has been concluded?

In other words: do mutual trust and the understanding that exist between the tax administration and the taxpayer oppose to invoking the third party liability? Especially regarding risk liability this is a question that could be asked.

In the Netherlands the opinions differ about this issue. On the one hand there are tax administration staff members that find it difficult to hold businesses liable that have concluded a compliance agreement. On the other hand many other employees of the tax administration consider that the law should be applicable to everyone in an equal way. In other words when a taxpayer-business can be held liable on the basis of the legal third party liability provisions, HM cannot change this.

3.6. A difficult issue

67. In the Netherlands there are financial institutions such as banks that fall within the scope of HM, that are normally very compliant, trustworthy and correct as far as it concerns their own taxation.⁸ However, over the past few years it has repeatedly been experienced that when the customers of a bank arrive in a state of financial difficulties, the bank often just prior to a bankruptcy

of their customer (the tax debtor) took action being (exclusively or not) advantageous to the bank and being (almost) always disadvantageous to the tax administration.

Because banks in general are better informed about the financial situation of their customers these banks have an information advantage that enables them to take measures in favor of themselves and at the detriment of the tax administration. When the banks were confronted with this fact, they usually argued that HM only concerns their own taxation and not that of others (taxpayers). They are of the opinion that their HM obligations towards the tax administration are not as far reaching that they also should meet the aimed “mutual trust, understanding and transparency” regarding the fiscal position of their customers in relation to the tax administration. The confusing point of this approach is that the bank (in this case) does exercise “mutual trust, understanding and transparency” with regard to the tax authorities for their own tax filing and payment obligations, but as soon as it concerns third parties, they feel free to play tricks with and fool the tax administration. Such a distinction is hardly a serious one.

68. It can be argued that the consequences of HM (mutual trust, understanding and transparency) should extend to all fiscal contacts of the party that signed a compliance agreement.

For that matter it is not relevant if the taxation exclusively concerns the compliance agreement party or (in)directly influences the taxation of third parties. One should not be partially transparent and partly understanding towards the tax administration for the own payment obligations and at the same time be sneaky and acting at the detriment of the tax administration whereby financial interests of the State are made subordinate to that of taxpayers that concluded a compliance agreement within HM.

3.7. Final remarks

69. As mentioned above an evaluation was performed by the Committee regarding HM and laid down in the report called: *‘Tax supervision - Made to measure, Flexible when possible, strict were necessary’*. The evaluation report falls out of the scope of this overview. That is the reason why this overview only describes some highlights that are presented in the evaluation report.

The findings of the evaluation of the Committee are presented below in catchwords.

⁸ Their own taxation meaning the fiscal position of the bank in relation to the tax administration.

1 The offered opportunities by HM:

According to businesses:

- An increase of mutual understanding (between taxpayers/financial service providers and the Tax and Customs Administration);
- The intention is good;
- Good resolution of pending issues;
- Rapid certainty about assessments.

According to (a wide majority) of the Tax and Customs Administration's staff:

- An improved information position for the Tax and Customs Administration;
- Improved preliminary consultations;
- HM realizes an acceleration of return processing;
- HM leads to an increase in the Tax and Customs Administration's information about the business;
- HM often leads to an adjustment of the supervision due to the fact that the business has control of its tax matters;
- 60% of the Tax and Customs Administration's staff is of the opinion that their own cases with HM lead to higher compliance (very large businesses are highly rated), which results in a better behavior of businesses and better internal controlled businesses;
- 50% of the Tax and Customs Administration's staff is of the opinion that their own workload of HM leads to:
 - (1) a decrease in the number of estimated assessments;
 - (2) an increase in the number of returns filed in time;
 - (3) a decrease in the number of objections lodged by taxpayers.

About 33% of the staff stated that they experienced a reduction in payment arrears.

More of the staff assigned to the Small and Medium-Sized Businesses segment have a favorable perception of the efficiency of HM (62%) than the staff assigned to the Very Large Businesses segment (43%) and Medium-Sized Businesses segment (37%).

2 Threats/risks

- The resistance exhibited by staff due to the change in culture;

- The absence of guidelines for the design on the tax control framework (experienced, in particular, by the Medium-Sized Businesses segment) and for the assessment of the tax control framework (experienced, in particular, by Tax and Customs Administration staff);
- The roll-out of HM in the Small and Medium-Sized Businesses segment, which raises questions including the design of the meta-monitoring, the role of the financial service provider, the restrictions in the selection of a financial service provider and the benefits for businesses in the Small and Medium-Sized Businesses segment;
- The risk of 'attachment' on entering a relationship of trust between businesses and the Tax and Customs Administration;
- The lack of transparency in the settlement of past tax issues;
- The lack of clarity about the contents of (compliance) agreements;
- The lack of effect measurement and efficiency measurement regarding the implementation of HM (no business-case and no benchmark measurement; it is not clear what costs are involved in the new approach and the results of it (cost-benefit analysis); in the Medium-Sized Businesses segment a start has been made with effect measurement of HM);
- It is not clear how reality checks are carried out;
- The overall impression is that the traditional, output-oriented performance indicators have been adjusted downwards over the course of time and, in some instances, even disappeared from the budget whilst virtually no indicators have been introduced to replace them;
- The findings give cause to the conclusion that the Tax and Customs Administration would appear to be navigating without a clear compass.
- The effect of HM on compliance is not easy /or impossible to see: compliance is determined by a combination of
 - (i) intrinsic motives (tax moral)
 - (ii) extrinsic incentives (risk of being caught; punishment scale) and
 - (iii) the possibilities for compliance (complexity of rules; the costs to comply with rules); the effects of the involvement of instruments on the behavior of taxpayers and as a result

thereof on tax revenues are not automatically determined;

- The Committee cannot determine the causal relationship between the deployment of HM and the measured compliance (no benchmark measurement and no business case);
- The Committee is worried about the level of expertise of the Tax and Customs Administration staff;
- The Committee endorses the worries about the future quality level of HM following from the combination of exit of experienced staff and the further decrease following the further setting of tasks;
- The Tax and Customs Administration could not give account to what capacity can be released as a result of reduced supervision of businesses that can be deployed in other forms of supervision;
- A lack of quantitative information of the effect on tax revenues; the Tax and Customs Administration does not gather information about the effects of HM; there is no insight in the results of preliminary consultation or improvement of tax return or payment behavior;
- A lack of a comparison between businesses within the regime of HM and other businesses;
- Some staff members are skeptical;
- The Committee is of the opinion that the administrative information about horizontal monitoring is totally inadequate. Horizontal monitoring is provided insufficient support from information systems that can assist in decision-making on the appropriate form of supervision and the measurement of the effects and efficiency of the selected form. It is not clear how the Tax and Customs Administration manages the organization and its staff.

3 International developments

70. On an international level HM is only applied to the Very Large Businesses-segment. The term used internationally used until 2013 is that of: *Enhanced Relationship* (ER)⁹. It is interesting to note that the Netherlands and the United Kingdom have started a pilot working together on treatment of

multinationals active in both countries (they are developing a cross border enhanced relationship).

4 Vulnerabilities and points of attention internationally (foreign tax administrations)

71. The following points are mentioned:

- How can the increasing number of businesses be managed by tax administrations with significantly decreasing staffing levels?
- The reallocation of the necessary capacity to provide both the promised level of service and address the high-risk items outside enhanced relationships (an adequate risk management system);
- The determination of adequate action to be taken in the event of the abuse of enhanced relationships;
- The reconsideration of the service provided to taxpayers who do not participate;
- The achievement of consistency in the implementation of enhanced relationships (by individual members of staff);
- The voluntary nature of the program in relation to the number of voluntary disclosures;
- The determination of the consequences of enhanced relationships for compliance and for the attitude and behavior of businesses participating in the concept;
- The closing of the gap between the tax administration and taxpayers caused by the traditional approach (establishing an improved relationship);
- The retention of alertness to the application of the principle of equality before the law;
- The contribution to the improved allocation of the tax administration's staff and resources;
- The improvement of the compliance costs and supervisory costs;
- The retention of the integrity of the tax system;
- The allocation of the capacity required for the dialogue with taxpayers may not be to the detriment of efficiency;
- The avoidance of the perception that an enhanced relationship will result in preferential treatment (taxpayers who do not have an enhanced relationship need to perceive their treatment as being fair and reasonable).

⁹ OECD in 2013 advised to change the term Enhanced relationship into that of Co-operative compliance, considering it a better description of the recommended approach.

5 *Short summary of threats noticed by the Committee:*

- Lack of strategy, policy view, no business case, no benchmark measurement, no performance indicators, critical success factors, no steering mechanisms; benefits on revenues are not clear, that tax revenues leak out with HM;
- Lack of rational foundation; insufficiently well considered and unbalanced;
- The question is if the need of segmentation (Very large sized Businesses, Medium-Sized Businesses and Small and Medium-Sized Businesses) is sufficiently recognized;
- How to react to risks as: legitimacy (the legal implementation of HM, the position of the taxpayer with and without a compliance agreement, the possibility to protest), legal certainty, legal equality and legal protection;
- With regard to the measurement of effectiveness, efficiency administrative information is insufficient;
- Point of attention is the capacity of the tax and customs administration: is sufficient qualified and expert staff available? Also there is the danger of knowledge drainage (account management).

6 *Final conclusion of the evaluation*

72. "Trust if possible, repression if needed." According to the Committee, HM is endorsed but in the implementation improvements are desirable and necessary.

EU FPG 080
Tax collection practices Report

Deterrent measures – general report

Report by: J. Cordeiro, H. Michard, L. Vandenberghe

Contributors: D. Kirova, P. Simon, L. Mulqueen, J. McCormack, J. P. Cordeiro, C. Coelho, A. P. Matos, A.Bravo Diaz, J. Ščepková, A. Öbrink.

This report reviews the contributions of EU Member States on the tax collection enquiry, held by Fiscalis project group 080 in 2013 and in 2014, regarding the issue "Deterrent Measures".

This analysis was based on the following questions:

1. Provide a detailed description of the application of dissuasive measures or explain your ideas about possible measures in this field.
2. Do you have information about the effects (costs and benefits)?
3. Did you encounter any legal problems with these measures? (e.g. privacy aspects).
4. Are there any measures that have not been introduced because of specific problems ?
5. Do you have any ideas for smart solutions (without legislative changes in parliament)?
6. Do these measures have a preventive effect?
7. Are there any other facts, information or experiences to be aware of regarding this topic?

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 - 1.3. Subsidiary liability or other penalisations to defaulter managing board members, third party liabilities
 - 1.4. Deterrent measures affecting fundamental freedoms and rights
2. Legal implementation issues
3. Cost-benefits approach

Introduction

1. The aim of deterrent measures is to dissuade people from not paying their tax debts and/or to prevent defaulters from relapsing. This section gathers the experiences of Member States with regard to dissuasive measures which fall outside the common deterrent measures. Usually, administrative penalties or even criminal sanctions are applied as deterrent as well as punitive (repressive) measures. However, other dissuasive measures may also be successful to address the non-complying tax debtors and the deliberate fraudsters, e.g. on-the-road car seizures applied with the use of number plate recognition tools, publication of names of tax debtors, passport marking, imprisonment, non-entitlement to specific public services, disqualification orders, etc.).

2. In the list of reported measures¹, one can see four categories:

-
- ¹ Publication of tax defaulters / debtors;
 - Denial of licenses or permits to access certain activities, benefits or public contracts, disqualification orders
 - Tax morality certificates;
 - Subsidiary liability or other penalizations to defaulter managing board members;
 - Suspension or cancellation of tax identification numbers;

- measures affecting the reputation of the tax debtor;
- measures imposing restrictions and conditions to exercise certain economic activities;
- measures relating to liability rules;
- measures restricting the free movement rights.

3. Some tax administrations stressed that these measures are essentially preventive, rather than assuming a punitive or coercive function. For instance, Sweden considers that the threat of being deprived from the F-tax scheme, or to enter into the enforcement process, many times leads to payment or at least contacts with the taxpayer to conduct a dialogue on how payment is due. As it appears from Member States' contributions, these dissuasive measures can serve different purposes at the same time, and most of them are not taken in isolation but are part of a global "carrot and stick" approach.

4. The main goals are not only to combat tax evasion and to promote voluntary payment, but also to achieve a greater equity and tax fairness. These measures indeed also have an educational role towards tax compliance by increasing the social disapproval towards taxpayers with tax debts. In this regard, the Swedish Enforcement Authority (SEA) underlined that the most vital target groups to work with in the preventive area are young people and new, starting companies.

1. Description of dissuasive measures

1.1. Measures affecting the reputation of the tax defaulter

Publication of lists of tax defaulters

5. The publication of lists of tax defaulters or debtors is one of the most common measures adopted². It consists in the disclosure of the details of the tax debtors failing to fulfil their tax obligations. In this case, the dissuasive effect is linked to the negative impact on the reputation/brand of the legal entities or of the

individuals concerned vis-a-vis their environment and the public in general.

6. Although the objectives are common to all tax administrations, the categories of tax debtors, the conditions for publication, the medium and the consequences of disclosure vary greatly from one country to another, depending on their legal framework. The reasons for publication may range from a "simple" failure to submit a (correct) tax return to established fraud (such as illegal selling of tobacco, cigarette smuggling, excise and licensing offences).³ In some cases publication also depends on the amount of the debt.

7. In some Member States⁴, the publication of names and tax numbers of tax debtors is an immediate consequence of the adoption of enforcement measures. In Sweden, for instance, the registration of the claim by the Swedish enforcement agency makes it public. In this regard, the Swedish enforcement authority stresses that the simple threat of entering into the enforcement procedure is a strong deterrent for tax payers considering the severe direct or indirect consequences incurred⁵. The private credit information agencies will record the payment default. Such a record is able to hamper the debtor to have new credits, make business and sometimes even to rent a flat or a car.

8. In some Member states, non-compliant tax debtors can escape the publication under certain conditions. In particular a tax payer who completes a qualifying disclosure⁶ can escape the publication. In such cases, publication measures combined with a disclosure scheme, are considered to be a strong incentive to pay the evaded tax.

Publication of lists of suspended or cancelled tax identification numbers

9. The Hungarian Tax administration published a list of suspensions and/or cancellations of tax identification numbers (TIN). This measure did not only affect the reputation of the entity or person concerned; it also had other effects including the impossibility to request subsidies.

- Suspension of tax refunds or withholding payments made by public entities to tax defaulters;

- Mandatory provision of securities to access certain activities;

- Withholding of imported goods.

- Passport withdrawal

- Refusal of scholarship

² Bulgaria, Ireland, Estonia, Greece, Finland, Hungary, Portugal, Romania, Slovenia, Slovakia, United Kingdom (This list is also based on answers from the previous questionnaire).

³ These are the examples provided by Ireland.

⁴ Sweden, Hungary.

⁵ For instance eviction of the tax debtor from his house sold at an auction.

⁶ A qualifying disclosure is completed when a tax-payer has, in advance of any revenue enquiry, voluntarily furnished complete information relating to the undisclosed tax liabilities and paid the tax and interest due.

1.2. Imposing conditions and restrictions on business activities

Denial of licenses or permits to access certain activities

10. Tax authorities also frequently take measures which restrict or prohibit the professional activity of tax defaulters. The restrictions or prohibitions intervene at various moments and have different scopes: access to a professional activity, licences, permits, specific requirements in the course of the activity (e.g. special schemes denied⁷), termination of the activity, prohibition to enter into a similar business following a bankruptcy, disqualification orders...

11. There is a wide spectrum of this kind of measures, affecting the possibility to exercise activities in many different economic sectors (e.g. insurance, public transportation of passengers and cargo, taxi services, signing public procurement contracts, registering a travel agency), or the access to public subsidies and contracts. The level of efficiency of such measures is considered to be very high to the benefit of the legitimate business and customers in the sectors where they apply.

12. Concerning the denial of licenses or permits related to professional activities, some tax administrations may take the initiative to notify the state authorities that are statutory allowed to issue the licenses or permits that are required to carry out a certain activity.

Mandatory provision of securities to access certain activities

13. Some actions are undertaken with the perspective to assure the collection or recovery before the tax is due. The provision of securities within custom or excise duties and the obligation of payment before registration proceedings of passenger cars and motorcycles were the examples advanced in the survey that reflect these cautionary measures⁸.

Attestation, certification of 'tax morality'

14. In some Members States, the interested parties in public procurement procedures or the applicants of specific public aids and subsidies are required to present a certificate from the tax authorities stating that they met in full their

tax/social obligations. This tax clearance or tax morality certificates may be issued at the request of the taxpayer to whom the certificate refers, or at the request of an administrative body or any other interested person or organisation that requires the certificate. In certain sectors of activity⁹, these provisions are considered effective by tax authorities, especially for non-established companies, and fair by legitimate business.

*Disqualification orders*¹⁰

15. In certain Member States, tax authorities can request that disqualification orders be imposed on managers or directors of a business in case of insolvency of the company. They can be published in the national insolvency register. Currently, in the EU wide e-insolvency register¹¹, the provision of information about directors' disqualification is optional.

1.3. Subsidiary liability or other penalisations to defaulter managing board members, third party liabilities

16. In addition to the initial tax debtors, other persons may be held liable for the same tax debt, e.g. managing and supervision board members, shareholders of corporate business, accountants or others¹². One Member State has identified more than 40 third party liability schemes. However, only few of those liability rules are used in practice, but this battery in itself is deemed to have a strong preventive effect on taxpayers¹³. This dissuasive measure may occur whenever the assets of the original tax debtors are insufficient (or non-existent) to pay the debt¹⁴, or they may apply under specific circumstances and for particular activities. The certification for contractors and subcontractors¹⁵

⁹ Fiscalis workshop on "Risk Management Applied to the Construction Sector" 14-16 June 2011, Helsinki, Finland.

¹⁰ A Court order banning an individual for a stated period from becoming the director of a firm.

¹¹ The e-register of insolvency will be compulsory in 5 years' time for all EU Member States, now it runs on a voluntary basis.

https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-en.do

¹² Notaries for instance in can be help personally liable for the payment of the due taxes of the defaulting tax payer (Belgium).

¹³ Only one third according to the Dutch Tax Authorities.

¹⁴ Portugal.

¹⁵ The Spanish General Tax Act establishes that persons that procure or subcontract the execution of works corresponding to their main economic activity shall be subsidiary liable for debts arising from the relating tax obligations.

⁷ For instance the F-Tax in Sweden.

⁸ Examples presented by Hungary.

was the example given of a second liability measure restrained to a certain line of activity.

17. In Bulgaria, a proposal was submitted to introduce penal responsibility for employers that do not comply with the payment of mandatory social security contributions¹⁶.

Public entities suspending tax refunds, withholding payments or withholding goods on importation

18. The suspension of tax refunds (e.g. VAT) may occur whenever a taxpayer is considered to be in default by the tax administration. Alongside this action, the payments arising from services provided to public entities may be withheld and used to pay the tax debt, being such public entities responsible to confirm the taxpayers' situation before they make the payment.

19. Customs checking whether the taxpayer does or does not have unpaid debts before releasing the goods that an operator is importing was considered an efficient measure. Many debtors decide to pay their pending debts in order to obtain a quick release of the withheld goods so that they can deliver them to their customers in due time.

1.4. Deterrent measures affecting fundamental freedoms and rights

20. In some countries, the enforcement services or agency have been given – and effectively use – powers with far reaching consequences, for instance, allowing the eviction of the tax debtor and his family from his house sold in an auction. Two recent judgments of the ECHR and the Swedish supreme court dealt with such enforcement measures for the recovery of a tax debt. Whilst acknowledging that measures of that kind, taken in order to facilitate the enforcement of tax debts and secure tax revenue to the State, are in the general interest, the courts recalled that it is expected that the authorities strike a fair balance between the demands of the general interest of the community and the requirement of protection of the individual's fundamental rights¹⁷.

¹⁶ The proposal submitted in 2013 to the Bulgarian parliament was not yet in to force at the time the answers were given to this survey

¹⁷ See ECHR *Rousk v Sweden* (n°27183/04) 25.01.2013, EUITCN 2014/1, 10 (The proportionality of the measures taken in this particular case has been assessed in the context of article 1 of protocol 1 of the Convention, (right to the peaceful enjoyment of a property) and Article 8 of the Convention, (respect for family life and home);

21. Another example of such measures concerned a measure affecting the granting of scholarships to the members of the family of a tax debtor.

22. A few Member States are able, in certain circumstances, to apply measures affecting the free movement of their citizens which did not comply with their tax obligations. These measures include: denial of leaving the country, withdrawal of the passport, refusal to renew the expired passport before the tax debts are paid in full.

In a judgment of 23 May 2006¹⁸, the European Court of Human Rights made the following analysis of national restrictions to free movement, for reasons relating to tax debts:

(a) “Civil law” countries

72. In the law of several member states a possibility for imposing a ban on leaving one's country due to tax obligations is expressly provided for: Croatia, Moldova, the Netherlands, Georgia, Poland, Russia, Ukraine and Norway. In Greece and Hungary the legal provisions allowing restrictions on the right to leave one's country due to tax debts have now been abolished.

73. In most states the possibility to resort to a travel ban for unpaid taxes is not unconditional. In particular, in Croatia, a passport application can be denied if there is a justified suspicion that the applicant was going to evade a tax obligation. In the Netherlands, the law states that a travel document can be refused or invalidated if there is good reason to believe that the person is neglecting his obligation to pay taxes. In Poland “unfulfilled obligations established by a court” can serve as grounds for a travel ban only if there is a serious risk that the person's travel abroad will render the fulfilment of the obligation impossible. In Norway, under the Enforcement of Civil Claims Act 1992, a debtor may be barred from leaving the country if that is essential for the enforcement of a court decision and seizure of property does not provide sufficient security (a prohibition order cannot be issued if, in view of the nature of the case and all of the circumstances involved, it would be a disproportionately severe measure and the order automatically ceases to have effect after 3 months).

Supreme Court Sweden, 27.12.2013 D.W. and A.W., EUITCN 2014/1, 16.

¹⁸ See the ECHR *Riener v. Bulgaria* (no. 46343/99) 23.05.2006 about the proportionality of the travel ban imposed on the applicant (automatic measure of indefinite duration) violation of Article 2 of Protocol No. 4 of the Charter of Human rights.

74. A further area in which countries resort to travel bans, is bankruptcy proceedings. The laws of several countries stipulate that a court may impose a prohibition against a debtor leaving the country in order to secure his presence before the court (e.g. Estonia, Denmark, Finland, Italy, Norway). Most member States' legal systems provide for prohibitions against leaving the country in respect of defendants in criminal proceedings.

(b) Common-law jurisdictions

75. In common-law jurisdictions, travel bans may be imposed by way of injunction.

(i) United Kingdom

76. In the United Kingdom, the tax authorities may seek from the courts a *Mareva* injunction (an order preventing the other party from disposing of assets outside the country), an injunction under section 37(1) of the Supreme Court Act 1981 to restrain the other party from leaving the jurisdiction ("*Bayer* injunction") or the writ of "*ne exeat regno*", an ancient writ which has much the same effect.

77. The simple fact that the person concerned has failed to pay would not be enough to satisfy the criteria for an injunction. In order to obtain an injunction under s. 37(1) restraining someone from leaving the country, the claimant must persuade the court that it is "necessary and convenient" to grant the order, for example, that the other party has information which he is refusing to disclose and which, if he is allowed to leave the United Kingdom, he will never disclose. A writ of "*ne exeat regno*" may be issued if several conditions are satisfied, such as, *inter alia*, cause to believe that the other party's absence from the jurisdiction would materially prejudice the claimant in pursuing the action.

78. Because the orders above are interferences with the liberty of the subject, they should last no longer than necessary – e.g. until the other party has disclosed all the information that they were refusing to disclose. The orders can be discharged on grounds that one of the requisite conditions was not in fact fulfilled but also on 'equitable' grounds.

(ii) Ireland

79. While the right to travel abroad is recognised as an implicit constitutional right in national case law, the courts have also recognised restrictions, in

particular where there are "undischarged obligations".

80. In civil contexts, Irish courts, like English courts, may make use of *Mareva* injunctions or *Bayer* injunctions, as described above. The High Court has held that such orders could be granted only in exceptional and compelling circumstances. Probable cause for believing that the defendant is about to absent himself from the jurisdiction with the intention of frustrating the administration of justice and/or an order of the court is a condition for granting an injunction. The injunction should not be imposed for punitive reasons. The injunction ought not to be granted where a lesser remedy would suffice and it should be interim in nature and limited to the shortest possible period of time. The defendant's right to travel should be out-balanced by those of the plaintiff and the proper and effective administration of justice.

2. Legal implementation issues

23. Some countries indicated that they were not able to take some specific dissuasive measures, as the legal framework in their State does not allow them (e.g. publication of tax debtors' names¹⁹). With regard to the dissuasive measures currently implemented, only few respondents evoked legal problems or constraints. However, some recent important judgements of the European Court of human rights (ECHR) or from the EU Court of justice (EUCJ) could be of interest, as the use of such measures may affect certain fundamental rights.²⁰ This assessment should be made not only when new tax legislation is designed, but also when these measures are applied in an individual case.

24. The possible legal impediments mentioned were about data protection/privacy issues. Seemingly, the Member States that have set up a publication scheme for debtors managed to deal with those issues according to their national legislation²¹ either in the tax area or in a more general framework about transparency of personal data. For instance, Sweden clarified that the information about the tax debt is public information.

¹⁹ E.g. pursuant to Article 95 of the Spanish General Tax Act, it would be illegal to implement such action in Spain, given the official secrecy of all data with tax significance

²⁰ For instance protection of property; right to a fair trial; respect for the private and family life, freedom of thought, conscience and occupation, freedom to conduct a business protection of personal data.

²¹ For instance the details of the tax defaulters are only published only in case of criminal acts (UK) or bankruptcy (NL).

Therefore everyone can visit the Swedish revenue for information about a specific person or a company tax debt. Other countries which do not have such publication of tax defaulters acknowledged that such procedure would not be in conformity with their national provisions on privacy and protection of personal data.

3. Cost-benefits approach

25. Very few respondents were able to make a cost-benefit analysis or to measure, with hard figures, the economic impact of the measures they implement. However, empirically, all respondents consider that the actions undertaken were having a positive impact on taxpayers' compliance. Moreover such measures are considered – not only by the tax authorities but also by the public – to support fair competition, which is a major issue for businesses. Currently, OECD and many national tax authorities are struggling with measuring the outcomes²². This is linked to the real challenge for tax administrations to be allocated sufficient resources, also taking into account the considerable efforts made so far to adjust their working methods.

26. For some measures, it seems clear that the cost does not outweigh the benefits. E.g., the possibility of seizure and apprehension of goods at their importation was presented as a smart measure²³. With regard to the use of number plate recognition tools, one could also expect that the costs are (more than) compensated by the revenue generated by the on-the-road seizures of vehicles of tax debtors. However, one respondent indicated that the costs of such equipment made their authorities refrain from using this tool.

27. One Member State (Portugal) succeeded in providing an assessment of the benefits resulting from the publication of tax debtors lists. According to their analysis, as a result of the inclusion of 58.208 debtors on the tax debtors list, the Portuguese tax authority was able to raise a total value of € 2.163.186.786 (since 2006 until September 2013).

²² For instance : OECD Forum on Tax administration-SMEs Compliance sub-group, Berlin 5-7 May 2014; Fiscalis working visit "debt management" Helsinki, 10-14 March 2014. Doran Michael, "Tax Penalties and Tax Compliance" (2009). *Georgetown Law Faculty Publications and Other Works*. Paper 915. <http://scholarship.law.georgetown.edu/facpub/915>.

²³ Portugal mentioned the control of the import procedures in this field whilst Spain already had made reference to this measure as a best practice.

EU FPG 080 Tax collection practices Report

Deterrent measures – legal issues

Report by: L. Vandenberghe and H. Michard

This report analyses some legal questions concerning deterrent measures used against tax debtors.

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2. Basic principles
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1. Introduction

1. Tax authorities can use a variety of measures to enforce tax claims, including deterrent (dissuasive) measures. The aim of deterrent measures is to dissuade people from not paying their tax debts and/or to prevent defaulters from relapsing.¹ One of the working sessions at the Porto

Conference will deal with specific dissuasive measures against tax debtors, e.g. on-the-road car seizures applied with the use of number plate recognition tools, publication of names of tax defaulters or debtors, passport marking, imprisonment, non-entitlement to specific public services, disqualification orders, etc.).

2. In their reports on dissuasive measures currently implemented in the Member States, only a few respondents evoked legal problems or constraints. However, some important judgements of the European Court of human rights (ECHR) and the EU Court of justice (EUCJ) indicate that it is important to pay attention to the balance between the tax debtor's rights and the measures undertaken by the tax authorities. The use of such measures may indeed affect certain fundamental rights.

Therefore, this note provides some examples of deterrent measures challenged on the basis of the European Convention on Human Rights as well as the Charter of fundamental rights of the European Union. Although the judgements are based on specific circumstances and facts, the approach followed in these decisions could also be relevant for the development and the daily implementation of certain deterrent measures.

2. Basic principles

3. Deterrent measures can be considered as an instrument to enforce the "social contract" between the society (the State representing the public interest) and the citizens (individual tax debtors). The theory of the social contract was developed since the 17th century (Thomas Hobbes (°1588), John Locke (°1632), Jean-Jaques Rousseau (°1712), Immanuel Kant (° 1724) and John Rawls (°1921)). According to this theory, the State is entitled to levy taxes, in order to finance the fulfilment of its obligations under the social contract with its citizens, namely to govern and to administer the national economy, so that the citizen can fully and freely exercise his personal rights.

4. The competence to levy taxes also implies that the public interest in recovering unpaid taxes can justify appropriate limitations on tax debtor's rights. In its *Rousk* judgment, the ECHR stated that: "*States (are allowed) to pass such laws as they may deem necessary to secure the payment of taxes. It is clear to the Court that measures of that kind, taken*

¹ In fact, even administrative penalties or criminal sanctions, applied in case of non-payment of taxes, not only have a

punitive (repressive) character, but also a deterrent effect, at least to those who pay their taxes.

*in order to facilitate the enforcement of tax debts and secure tax revenue to the State, are in the general interest."*²

5. Therefore, States have a certain margin of appreciation to frame and organise their tax policies and make arrangements to ensure that taxes are paid. This also applies to the dissuasive measures that they apply. National reports indeed confirm different national views on what is allowed to dissuade non-payment of taxes, e.g.:

- some Member States publish names of tax defaulters/debtors, even with indications of the amounts due, while this is considered to be out of the question in other Member States³;
- the Netherlands is the only state that reported a deterrent measure consisting in refusing the granting of scholarships to the family members of a tax debtor.^{4, 5}

² ECHR *Rousk v Sweden* (n°27183/04) 25.01.2013, EUITCN 2014/1, 10, point 111.

³ E.g. pursuant to Article 95 of the Spanish General Tax Act, it would be illegal to implement such action in Spain, given the official secrecy of all data with tax significance

⁴ Note: in so far as a tax debtor is entitled to social security payments or other payments (subventions), the simple compensation of the benefits with the amount of the tax debt produces a similar effect.

⁵ The same type of measures can be found in the area of social assistance legislation: unemployment benefits can be reduced or even suspended if the beneficiary does not make demonstrable efforts to obtain employment. This principle was expressly confirmed by the European Commission and Court of Human Rights.

In the *Talmon* case, a Dutch, unemployed citizen received benefits pursuant to the Dutch social assistance scheme for the unemployed since June 1984. In December 1990, the authorities concerned decided to reduce his unemployment benefits by 18 % for a period of three months, in view of the fact that he had failed to comply with the obligation to look for suitable employment. In August 1991, a similar decision was taken, reducing his unemployment benefits by 24 %. Mr Talmon complained that by reducing his unemployment benefits the authorities were forcing him to accept employment other than that of independent scientist and social critic. He submitted that he had conscientious objections against all other types of employment. He invoked a violation of Art. 4 para. 2 ("No one shall be required to perform forced or compulsory labour."), Art. 9 (freedom of thought, conscience and religion) and Art. 10 (freedom of expression). The European Commission of Human Rights noted that in order to qualify for unemployment benefits, the applicant was required to look for and accept employment which was deemed suitable for him. Since he refused to comply with this condition, his benefits were temporarily reduced. It did not appear, however, that Mr Talmon was in any way forced to perform any kind of labour or that his refusal to look for other employment than that of independent scientist and social critic made him liable to any other measures than the reduction of his unemployment benefits. In these circumstances, the Commission concluded that his application was manifestly ill-founded (Eur. Com. HR, *Talmon v. the Netherlands*, 26.12.1997 (No. 30300/96); cf. Eur. Com. HR, *X. v. the Netherlands*, 13.12.1976, No. 7602/76).

The ECHR also took the same approach in a more recent case, with regard to a Dutch law obliging general welfare beneficiaries to make demonstrable efforts to obtain and take up generally accepted employment (including employment

6. In any case, such national measures should be reasonable and proportionate. This has been confirmed by several ECHR and EUCJ judgments in areas where deterrent measures (may) affect fundamental rights and freedoms⁶. This proportionality assessment should be made not only when new tax legislation is designed, but also when these measures are applied in an individual case.

7. In fact, this proportionality requirement is not limited to specific dissuasive measures; it applies to all recovery measures taken by the tax authorities. This was recently illustrated by two judgments – of the ECHR and the Swedish Supreme Court – with regard to enforcement measures allowing the eviction of the tax debtor and his family from his house, which was sold in an auction. Whilst acknowledging that measures of that kind, taken in order to facilitate the enforcement of tax debts and secure tax revenue to the State, are in the general interest, the courts recalled that it is expected that the authorities strike a fair balance between the demands of the general interest of the community and the requirement of protection of the individual's fundamental rights⁷.

3. Case law relevant with regard to specific measures

3.1. Measures affecting the free movement of tax debtors

8. A few Member States are able, in certain circumstances, to apply measures affecting the free

with which the beneficiary has no affinity and only excluding employment which is not generally socially accepted or work in respect of which the unemployed has serious conscientious objections): "In the view of the Court, it must in general be accepted that where a State has introduced a system of social security, it is fully entitled to lay down conditions which have to be met for a person to be eligible for benefits pursuant to that system. In particular a condition to the effect that a person must make demonstrable efforts in order to obtain and take up generally accepted employment cannot be considered unreasonable in this respect. This is the more so given that Dutch legislation provides that recipients of benefits pursuant to the Work and Social Assistance Act are not required to seek and take up employment which is not generally socially accepted or in respect of which they have conscientious objections." (ECHR, *Schuitemaker v. the Netherlands*, 04.05.2010, No. 15906/08).

⁶ For instance: protection of property; right to a fair trial; respect for the private and family life; freedom to conduct a business; protection of personal data.

⁷ See ECHR *Rousk v Sweden* (n°27183/04) 25.01.2013, EUITCN 2014/1, 10 (The proportionality of the measures taken in this particular case has been assessed in the context of article 1 of protocol 1 of the Convention, (right to the peaceful enjoyment of a property) and Article 8 of the Convention, (respect for family life and home); Supreme Court Sweden, 27.12.2013 D.W. and A.W., EUITCN 2014/1, 16.

movement of their citizens which did not comply with their tax obligations. These measures include: denial of leaving the country, withdrawal of the passport, refusal to renew the expired passport before the tax debts are paid in full⁸.

9. The possibility to apply this kind of dissuasive measures has already been discussed before the ECHR and the EUCJ. The general conclusion of this case law is that such measures can be applied. However, they cannot be applied automatically, without taking into account the specific (exceptional) circumstances. Otherwise, such restrictions are contrary to the free movement principle (enshrined in EU provisions and in Art. 2 of Protocol N° 4 to the ECHR) and possibly also to the respect for the private and family life (Art. 8 of the ECHR).

10. The decision of the ECHR related to a Bulgarian national, Ms *Riener*, who moved to Austria in 1985. In 1986, she married an Austrian national. In December 1989 she obtained the Austrian nationality. Until December 2004 she also remained a Bulgarian national. Her daughter was born in 1963 in Bulgaria, but at the time of the proceedings, she was an Austrian national living in Austria with her husband and children (the applicant's grandchildren). Ms Riener was co-owner and commercial director of a company registered in Austria. In January 1991 she also registered in Bulgaria as a foreigner conducting economic activities there. Her main business was the importation of coffee in Bulgaria. Between 1991 and 1995, she spent most of her time in Bulgaria. She remained there ever since. In 1992 a district fiscal authority in Sofia found that she owed excise duties (for about 1 million United States dollars ("USD")). Her appeals were dismissed. In 1992 and 1993 the tax authorities attached certain monies in bank accounts of Ms Riener and her company. It appears that less than 2 % of the debt was collected in 1992. In 1993 the tax authorities attached another USD 50,000. In 1995, the Passport Police issued an order which stated that a prohibition was imposed against this person leaving the country.

In this *Riener* case⁹, the ECHR acknowledged that the public interest in recovering unpaid tax of such an amount could warrant appropriate limitations on the applicant's rights, and that States have a certain

margin of appreciation to frame and organise their fiscal policies and make arrangements to ensure that taxes are paid. The Court expressly accepted that the restriction on the individual's freedom of movement was initially warranted (point 121 of the judgement)¹⁰. However, the Court found that maintaining this restriction automatically over a lengthy period of time could become a disproportionate measure violating the individual's rights. In this regard, the Court emphasized that *"It follows from the principle of proportionality that a restriction on the right to leave one's country on grounds of unpaid debt can only be justified as long as it serves its aim – recovering the debt. That means that such a restriction cannot amount to a de facto punishment for inability to pay. In the Court's view, the authorities are not entitled to maintain over lengthy periods restrictions on the individual's freedom of movement without periodic reassessment of their justification in the light of factors such as whether or not the fiscal authorities had made reasonable efforts to collect the debt through other means and the likelihood that the debtor's leaving the country might undermine the chances to collect the money."* (points 122-124).

The ECHR noted that the courts and the administrative authorities automatically upheld the travel ban against the applicant for about 8 years, without allowing an effective review possibility: the duration of the restrictions imposed on the applicant, the applicant's potential ability to pay, questions such as whether or not the fiscal authorities had explored other means of collecting the debt and whether there was concrete information indicating that lifting the travel ban might result in compromising the chances of collecting the debt were all irrelevant for the national courts and administrative authorities. The applicant's right to respect for her private and family life was also considered as irrelevant and no attempt was made to assess whether the continuing restrictions after certain lapse of time were still a proportionate measure, striking a fair balance between the public interest and the applicant's rights. Under these circumstances, the ECHR concluded that the European Convention on Human Rights had been violated (violation of Art. 2 of Protocol 4 (freedom to leave the country) and violation of Art. 13 (no effective remedy)).

11. On 17 November 2011, the EUCJ also delivered an interesting judgment with regard to the

⁸ See the ECHR *Riener v. Bulgaria* (no. 46343/99) 23.05.2006 about the proportionality of the travel ban imposed on the applicant (automatic measure of indefinite duration) violation of Article 2 of Protocol No. 4 of the Charter of Human rights.

⁹ European Court of Human Rights, 23 May 2006, N° 46343/99, *Riener v. Bulgaria*.

¹⁰ In points 72-80 of its judgement, the ECHR gave an overview of States' practices in this field.

application of restrictions to the free movement.¹¹ This case related to a Bulgarian national, Mr Aladzhov, who was a joint manager of a company. The tax authorities decided to prohibit him from leaving the national territory until such time as the tax debt owed to the Bulgarian State by that company was paid or a security covering full payment of that debt was provided. The adoption of that measure by the tax authorities was mandatory in this case. It followed several unsuccessful actions to recover the tax debt (amounting around EUR 22 000) from the company itself. The referring court also stated that that debt was not time-barred and that attachments of company bank accounts and motor vehicles did not achieve payment of the sum claimed, since the accounts were not in funds and the vehicles could not be located.

Here as well, the adoption of such a measure was accepted in principle, but its application was submitted to a twofold condition. The EUCJ decided:

"1. European Union law does not preclude a legislative provision of a Member State which permits an administrative authority to prohibit a national of that State from leaving it on the ground that a tax liability of a company of which he is one of the managers has not been settled, subject, however, to the twofold condition that the measure at issue is intended to respond, in certain exceptional circumstances which might arise from, inter alia, the nature or amount of the debt, to a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that the objective thus pursued does not solely serve economic ends. It is for the national court to determine whether that twofold condition is satisfied.

2. Even if a measure imposing a prohibition on leaving the territory such as that applying to Mr Aladzhov in the main proceedings has been adopted under the conditions laid down in Article 27(1) of Directive 2004/38/EC (...) of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (...), the conditions laid down in Article 27(2) thereof preclude such a measure, - if it is founded solely on the existence of the tax liability of the company of which he is one of the joint managers, and on the basis of that status alone, without any specific assessment of the personal conduct of the person concerned and

with no reference to any threat of any kind which he represents to public policy, and

- if the prohibition on leaving the territory is not appropriate to ensure the achievement of the objective it pursues and goes beyond what is necessary to attain it.

It is for the referring court to determine whether that is the position in the case before it."

3.2. Publication of information concerning tax debtors/defaulters

12. On this point, some national reports indicated that some questions could be (or had been) raised with legal impediments relating to data protection and privacy issues. Seemingly, the Member States that have set up a publication scheme for debtors managed to deal with those issues according to their national legislation¹² either in the tax area or in a more general framework about transparency of personal data. For instance, Sweden clarified that the information about the tax debt is public information. Therefore everyone can visit the Swedish revenue for information about a specific person or a company tax debt. Other countries which do not have such publication of tax defaulters acknowledged that such procedure would not be in conformity with their national provisions on privacy and protection of personal data.

13. In this respect, the progress of the data Protection Reform package¹³ which includes the revision of directive 95/46¹⁴ – to be replaced by a Regulation – could be of interest when considering or implementing deterrent measures in taxation.

14. From an EU perspective, it could be argued that information about tax debts can (only) be published, in so far as that publication can be justified. In this regard, it can be observed that the EUCJ even accepted that data about income of

¹² For instance the details of the tax defaulters are only published only in case of criminal acts (UK) or bankruptcy (NL).

¹³ Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012)11 – 2012/0011(COD), and Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012)10 – 2012/0010(COD).

¹⁴ Directive 95/46/EC on the protection of individuals with regard to the protection of personal data and on the free movement on such data, OJ L 281, 23.11.1995, p. 31.

¹¹ EUCJ, Case C-434/10, Peter Aladzhov.

persons can be published, if that publication is justified.¹⁵

15. Even if such publication is justified in principle, it still needs to be verified to which extent this information can be made public, taking into account the need to make it proportionate to the public interest objective. In this regard, some

¹⁵ EUCJ, C-465/00, C-138/01 en C-139/01, 20.05.2003, Österreichischer Rundfunk.

In this case, the EUCJ was asked to reply to the question whether Community law (in particular the provisions on data protection (of Directive 95/46/EC) and Article 8 of the European Convention on Human Rights) is to be interpreted as precluding national legislation which requires a public broadcasting organisation to communicate, and a State body to collect and transmit, data on income for the purpose of publishing the names and income of employees of a broadcasting organisation governed by public law.

The Court held:

"81. It appears from the order for reference in Case C-465/00 that the objective of Paragraph 8 of the *BezBegrBVG* is to exert pressure on the public bodies concerned to keep salaries within reasonable limits. The Austrian Government observes, more generally, that the interference provided for by that provision is intended to guarantee the thrifty and appropriate use of public funds by the administration. Such an objective constitutes a legitimate aim within the meaning both of Article 8(2) of the Convention, which mentions the economic well-being of the country, and Article 6(1)(b) of Directive 95/46, which refers to specified, explicit and legitimate purposes.

82. It must next be ascertained whether the interference in question is necessary in a democratic society to achieve the legitimate aim pursued.

83. According to the European Court of Human Rights, the adjective necessary in Article 8(2) of the Convention implies that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim pursued (see, *inter alia*, the *Gillow v. the United Kingdom* judgment of 24 November 1986, Series A no. 109, § 55). The national authorities also enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, § 59)."

The EUCJ concluded (points 90 and 94) that:

- The interference with private life resulting from the application of national legislation which requires a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by the bodies subject to that control, where that income exceeds a certain threshold, may be justified under Article 8(2) of the European Convention on Human Rights only in so far as the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the State body in question but also of the names of the recipients of that income is both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being a matter for the national courts to examine;

- Articles 6(1)(c) and 7(c) and (e) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data **do not preclude national legislation such as that at issue in the main proceedings, provided that** it is shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the *Rechnungshof* but also of the names of the recipients of that income **is necessary for and appropriate** to the objective of proper management of public funds pursued by the legislature, that being for the national courts to ascertain.

Member States indeed reported that they make clear distinctions based, *inter alia*, on the amounts of the debts.

On this point, reference could also be made to another EUCJ judgement, relating to the publication of information on the beneficiaries of funds deriving from the European Agricultural Funds.¹⁶ Even though the Court accepted that the publication of such information was justified in principle, it nevertheless concluded that the regulations concerned did not respect proportionality requirements. The Court held:

"80. As far as natural persons benefiting from aid under the EAGF and the EAFRD are concerned, however, it does not appear that the Council and the Commission sought to strike such a balance between the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds, on the one hand, and the fundamental rights enshrined in Articles 7 and 8 of the Charter, on the other.

81. There is nothing to show that, when adopting Article 44a of Regulation No 1290/2005 and Regulation No 259/2008, the Council and the Commission took into consideration methods of publishing information on the beneficiaries concerned which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries' right to respect for their private life in general and to protection of their personal data in particular, **such as limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received.**"

16. A recent EUCJ judgement about the "right to be forgotten"¹⁷ could also be relevant in this field, for instance with regard to tax debtors lists, records on insolvency or payment failure, data on tax payers, their business or family connections. It could be deduced from this judgment that publications of tax defaulters/debtors should be updated and that such information should finally be erased on all media containing or leading to data related to the initial publication. This case related to proceedings between, on the one hand, Google Spain SL ('Google

¹⁶ EUCJ Cases C-92/09 and C-93/02, 9 November 2010, *Schecke and Eifert*,

¹⁷ EUCJ Case C-131/12, 13 May 2014, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD)*.

Spain') and Google Inc. and, on the other, the Agencia Española de Protección de Datos (Spanish Data Protection Agency; 'the AEPD') and Mr Costeja González, concerning a decision by the AEPD upholding the complaint lodged by Mr Costeja González against those two companies and ordering Google Inc. to adopt the measures necessary to withdraw personal data relating to Mr Costeja González from its index and to prevent access to the data in the future.

Mr Costeja González had lodged with the AEPD a complaint against La Vanguardia Ediciones SL, which publishes a daily newspaper with a large circulation, in particular in Catalonia (Spain), and against Google Spain and Google Inc. The complaint was based on the fact that, when an internet user entered Mr Costeja González's name in the search engine of the Google group ('Google Search'), he would obtain links to two pages of La Vanguardia's newspaper, of 19 January and 9 March 1998 respectively, on which an announcement mentioning Mr Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts. By that complaint, Mr Costeja González requested, first, that La Vanguardia be required either to remove or alter those pages so that the personal data relating to him no longer appeared or to use certain tools made available by search engines in order to protect the data. Second, he requested that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so that they ceased to be included in the search results and no longer appeared in the links to La Vanguardia. Mr Costeja González stated in this context that the attachment proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant.

By decision of 30 July 2010, the AEPD rejected the complaint in so far as it related to La Vanguardia, taking the view that the publication by it of the information in question was legally justified as it took place upon order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible. On the other hand, the complaint was upheld by the AEPD in so far as it was directed against Google Spain and Google Inc. The AEPD considered in this regard that operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries in the information society. The AEPD took the view that it has the power to require the withdrawal of data and the prohibition of access to certain data by the operators of search engines

when it considers that the locating and dissemination of the data are liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense, and this would also encompass the mere wish of the person concerned that such data not be known to third parties. The AEPD considered that that obligation may be owed directly by operators of search engines, without it being necessary to erase the data or information from the website where they appear, including when retention of the information on that site is justified by a statutory provision.

Google Spain and Google Inc. contested this decision of the AEPD, but the EUCJ supported the reasoning of the AEPD. The EUCJ decided, *inter alia*:

*"Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. **As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name.** However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question."*

17. On this point, it may be interesting to note the solution adopted by a Belgian court in a dispute

concerning the access to information (in view of making it public) about official food safety controls in restaurants. One of the arguments invoked against making this information public, related to the interference with the privacy of the controlled restaurants. In order to substantiate this argument, it was also argued that the information concerned was not (necessarily) up to date, as restaurants could be expected to have taken measures to remedy their situation in case of negative control results. This argument was not accepted by the Belgian court, which gave more weight to the public character of the information collected by the official control agency.¹⁸

3.3. Other measures

18. With regard to other dissuasive measures (seizure of cars on the road; prohibitions to exercise specific activities, etc.), the same rules appear to apply.

In principle, such measures can be applied. The protection of the State revenue, the protection of the society and the '*ordre public*', etc. can be invoked to justify such measures. In this regard, reference can also be made to the observation of the ECHR in the case *Riener v Bulgaria*, point 115, concerning the obligation to respect property rights (of Art. 1 of Protocol N° 1 to the Convention): "*The Court observes that Article 1 of Protocol No. 1 to the Convention, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes.*" The same goes for the freedom to conduct a business.

19. Here again, however, the measures applied should respect the proportionality test; they should not go beyond what can be considered necessary in the specific circumstances of each case.

This requirement can also be illustrated by another judgment of the ECHR, relating to the detention of a person who was accused of tax fraud (so this case was not directly linked to tax recovery). Mr. Neumeister, an Austrian citizen, was the owner and director of a large transport firm. At a certain moment, the Public Prosecution requested the Criminal Court to open an enquiry concerning Mr Neumeister and some other persons. On the previous day, the Revenue Office had denounced the parties in question before the Public Prosecution; it suspected some persons of having defrauded the exchequer by improperly obtaining, between the years 1952 and 1958, "reimbursement" which was

designed to assist exports (Ausfuhrhändlervergütung and Ausfuhrvergütung) of more than 54,5 million schillings in turnover tax, and some persons - Neumeister in particular - of having been involved in these transactions as accomplices. Mr Neumeister was arrested and he stayed in preventive detention for several years. His requests for liberty were refused by the Austrian authorities because of the danger that, by absconding, Mr Neumeister would avoid appearing before the court.

In this regard, the ECHR observed:

"10. The Court finds it understandable that the Austrian judicial authorities considered the danger of flight as having been much increased in July 1962 by the greater gravity of the criminal and civil penalties which Rafael's new statements must have caused Neumeister to fear.

*The danger of flight cannot, however, be evaluated solely on the basis of such considerations. **Other factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial.***

It should also be borne in mind that the danger of flight necessarily decreases as the time spent in detention passes by for the probability that the length of detention on remand will be deducted from the period of imprisonment which the person concerned may expect if convicted, is likely to make the prospect seem less awesome to him and reduce his temptation to flee."

20. Similarly, it can be argued that different factors (the occupation of a tax debtor, his assets, ...) have to be taken into account when tax authorities consider to apply other recovery measures. Hence, this raises another important question, namely with regard to the balance between:

- the interest of the individual tax debtor, where the proportionality principle could be considered as implying that the recovery authorities choose the recovery measures that are the least detrimental to the tax debtor; and
- the public interest, managed by the tax authorities, where another proportionality aspect could be recognised: the tax authorities should be able to have recourse to the procedures that are the most efficient to secure a

¹⁸ Raad van State, 21.11.2013, n° 225.549.

speedy and cost effective recovery of the tax debt (taking into account the administrative burden; financial cost; ...).¹⁹

In our view, the latter proportionality aspect should also be taken into account in case of discussions about the justification of (dissuasive) recovery measures in a particular case.

21. Further, it can be argued that in order to address the need – confirmed by the case law's emphasis – to take account of different factors related to the personal situation of a tax debtor (such as the occupation of the person concerned, his assets, ...) also implies that the tax recovery authorities should be able to obtain the information that is required to make a correct assessment of the specific situation of the individual tax debtor. For that reason, exchange of information between authorities should not be unduly hindered on the basis of arguments relating to the privacy or confidentiality of these data (bearing in mind that the tax authorities are bound by their official secrecy obligation and their obligation to secure the data that are processed).

4. General considerations

4.1. Motivation and effective judicial control requirements

22. The implementation of deterrent measures raises issues of respect of the fundamental rights, protected by the Convention of Human rights (ECHR) or the EU Charter of fundamental rights²⁰. The case law cited above makes it clear that any measure applied by the tax authorities should be open to an effective judicial control, which provides "effective procedural safeguards" for the persons concerned.²¹

That conclusion is also in line with the considerations of the ECHR's judgement in the case

¹⁹ This "principle" has also been applied in Art. 11(2)(b) of Directive 2010/24/EU, in so far as it allows the applicant authority to make a request for recovery, without applying appropriate recovery procedures available in the applicant Member State, "where recourse to such procedures in the applicant Member State would give rise to disproportionate difficulty".

²⁰ Protection of property, right to a fair trial, right to respect for private and family life, protection of personal data, freedom to conduct business,

²¹ ECHR *Rousk v Sweden* (n°27183/04) 25.01.2013, EUITCN 2014/1, 10, points 136 and 142. The same principle has also been confirmed in case law relating to other measures affecting personal freedoms and property (e.g. EUCJ, C-300/11, 22; EUCJ, C-584/10 P, C-593/10 P and C-595/10 P, 18.07.2013).

Funke v France (n° 10828/84) of 25 February 1993 (which related to a house search and seizures of statements and cheque-books from foreign banks, in a tax control phase):

"56. Undoubtedly, in the field under consideration - the prevention of capital outflows and tax evasion - States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and to the immense scope for international investment, made all the easier by the relative porousness of national borders. The Court therefore recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. Nevertheless, **the relevant legislation and practice must afford adequate and effective safeguards against abuse** (see, among other authorities and *mutatis mutandis*, the *Klass and Others* judgment previously cited, Series A no. 28, p. 23, para. 50).

23. The judicial control requirement also implies that the tax authorities must be able to motivate their decision to apply a specific measure.

4.2. Ne bis in idem ?

24. Further, it seems important to approach dissuasive measures as contributing to the recovery of taxes. In their national reports, several authorities indeed emphasized that these measures are essentially preventive, rather than assuming a punitive or coercive function.

25. If it would appear that a specific measure is (more) applied as a punitive sanction (cf. the discussion in the above mentioned case *Riener v. Bulgaria*), then another question could be raised, concerning the interference of the "ne bis in idem principle"²² (of Art. 6 ECHR and Art. 50 of the Charter of Fundamental rights of the EU).

26. On this point, it must however be taken into account:

- that not all sanctions are considered to be "criminal in nature" : see EUCJ judgment of 26 February 2014 ²³:

²² No-one may be prosecuted or convicted twice for the same facts or the same punished conduct.

²³ EUCJ Judgment of the Court (Grand Chamber) 26 February 2014, in Case C-617/10, Åklagaren v Hans Åkerberg Fransson, EUITCN 2014/2, 43.

“The ne bis in idem principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine”²⁴.

- that this principle does not forbid to impose accompanying sanctions, forming an integral part of a conviction.

This was confirmed in the *Maszni* judgment of the ECHR of 21.09.2006²⁵:

Mr Maszni, a Romanian national, who had already been disqualified from driving, was stopped while driving his vehicle in possession of a forged driving licence. The police officer suspected of having produced the forged document and the applicant were both tried by a Court. Mr Maszni was found guilty of offences including incitement to forgery and making use of forged documents, and was given a suspended sentence of one year and four months' imprisonment. That decision was upheld on appeal. At the end of the period during which the applicant was disqualified from driving, the police returned his driving licence to him. However, afterwards, the chief of the county police revoked the licence on the ground that the applicant had been convicted with final effect of a road traffic offence. Mr Maszni complained, relying on Article 4 of Protocol No. 7 (right not to be tried or punished twice), that the revocation of his driving licence had amounted to a second penalty for the same acts that had resulted in his criminal conviction by the court for a road traffic offence. This complaint was however rejected. The close connection between the two penalties imposed on the applicant led the ECHR to conclude that the revocation of his driving licence appeared to be a penalty **accompanying and forming an integral part of the criminal conviction**. It therefore held unanimously that there had been no violation of Article 4 of Protocol No. 7.

However, combined sanctions should also respect the proportionality requirement. See the

ECHR judgment of 26.02.2009 in the *Grifhorst* case²⁶:

Mr Grifhorst, a Dutch national, lived in Andorra. His case concerned a penalty - the confiscation of a sum of money plus a fine - imposed on him for failing to declare the sum of money to the customs authorities at the border between France and Andorra. On 29 January 1996, on his way into France from Andorra, the applicant was stopped by French customs officers. When asked twice by the customs officers if he had any money to declare, the applicant replied that he did not. The customs officers searched him and his vehicle and found 500.000 Dutch guilders in his pockets, the equivalent of 233.056 EUR. They seized the full amount. The applicant declared that he had withdrawn the money from a bank in Andorra to buy a property in Amsterdam. It appeared that the Dutch authorities suspected Mr Grifhorst of money laundering, but no evidence could be produced. In 1998, the French court found him guilty of failure to comply with the obligation to declare money, securities or valuables (Art. 464 of the French customs code). He was sentenced to the **confiscation of the full amount plus a fine equal to half the amount he had failed to declare** (in accordance with Art. 465 of the customs code).

Mr Grifhorst complained about a violation of Article 1 of Protocol No. 1 (property right). He argued that the confiscation and fine amounted to a disproportionate penalty, considering the nature of the charge against him.

The Court considered that this interference with the property right was provided for by French law and pursued a legitimate aim in the public interest, namely combating the laundering of the proceeds from drug trafficking. The Court found that requiring people to declare any cash they were carrying when they crossed a border, and punishing them if they failed to do so was an effective means of controlling cross-border capital flows. However, the Court also observed that the French authorities had to respect a fair balance between the demands of the general public interest and the protection of Mr Grifhorst's fundamental rights. In this regard, the Court noted first of all that there was no indication in the case file that the applicant had been tried for, or convicted of, money

²⁴ Paragraph 1 operative part of the judgment.

²⁵ ECHR, *Maszni v Romania*, N° 59892/00, 21.09.2006.

²⁶ ECHR, 26.02.2009, No. 28336/02, *Grifhorst v. France*.

laundering. The only offence he was known to have committed was that of deliberately not declaring the money he had been carrying when crossing the border. The ECHR also emphasised the severity of the penalty applied in this case, namely the combined confiscation of the total sum Mr Grifhorst had been carrying and a fine of half that amount. The Court observed that the other Council of Europe Member States in such cases mostly applied a fine, and that only the part of the sum in excess of the permitted amount was subject to confiscation. Moreover, the Court noted that Art. 465 of the Customs Code had been amended in 2004, so that it no longer provided for an automatic confiscation, and the fine had been reduced to a quarter of the sum concerned. The Court also observed that in most of the relevant international instruments reference was made to the need for the penalties imposed to be "proportionate". Under these circumstances, the ECHR concluded that the penalty imposed on Mr Grifhorst had been disproportionate, in violation of Article 1 of Protocol No. 1.

5. Conclusions

27. The above analysis clearly demonstrates the need to consider the balance between the fundamental rights of the individual tax debtor and the public interest. This general concern also applies in the field of tax enforcement measures, including deterrent measures, as it is shown by the growing interference of the ECHR and the EUCJ in such cases.

EU FPG 080 Tax collection practices Report

How to avoid notification problems caused by absence of information about address changes of the debtor (in purely internal situations)?

Report by: H. Steffens, L. Vandenberghe

Contributors: P. De Mets, M. Roekaerts, D. Kirova, H. Steffens, L. Mulqueen, J. McCormack, A. Bravo Diaz, S. Nagy, H. Rathgeber, J. P. Cordeiro, C. Coelho, A. P. Matos, R. Zamfir, J. Ščepková, A. Öbrink

Tax collection generally implies that the tax debtor has been informed about the existence of his tax debt. This report relates to the difficulties caused by absence of information about the actual address of tax debtors.

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1. Introduction

1. The notification of documents is an essential part of the tax collection procedure. The documents concerned (e.g. decisions) have to be disclosed to the person for whom they are intended or to other persons affected. The function of this notification “is to make it possible for the addressee to understand the subject-matter and the cause of the notified measure and to assert his rights”.¹ So an administrative act can only have legal effects on a person if that act is validly delivered.

Sweden indicated in its reply that according to Swedish law, tax debts don't need to be served before they are submitted for enforcement. The Tax Agency only sends a letter of information about the assessment decision without any formal notification or service of document procedures. The reason is that Swedish citizens, according to law, are obliged to be aware of tax decisions without being formally notified or served. However, the certificate of the enforcement of a tax decision has to be formally served.

2. Given the increased mobility of persons, it is appropriate to analyse the following issue: how to avoid notification problems caused by absence of information about address changes of the debtor (in purely internal situations)?

3. In view of sharing experiences and (best) practices, 11 Member States transmitted contributions to explain their national proceedings. The content and the level of details of these contributions are quite diverse.

4. This analysis report summarises the main aspects of the Member States' replies and presents some insight in “alternative” notification proceedings.

5. This topic is divided in 3 sub-questions:

- Is there a duty to inform the (tax) authorities of your address change? How is this enforced? What are the consequences of not-fulfilment of this obligation?
- What do you do if the address of a person appears to be incorrect or is unknown?
- How do you inform taxpayers if you don't know and do not find their address?

¹ EUCJ, Case C-233/08 *Kyrian*, paragraph 58, with reference to Case C-14/07 *Weiss und Partner*, paragraph 73.

2. Is there a duty to inform the (tax) authorities of an address change? How is this enforced? What are the consequences of non-fulfilment of this obligation?

6. In some Member States, the registration of addresses of taxpayers is a competence of the tax authorities (e.g. Sweden). In other Member States, the address registration of citizens and companies belong to the competence of other authorities - but the tax authorities have an access to the registers concerned – or the taxpayers registers are kept by a specific office, as a shared competence of tax authorities and other authorities.

Of course, this organisation influences the way in which tax authorities are informed about address changes and the obligations imposed on taxpayers.

7. Several Member States reported that their legislation obliges taxable persons to inform the tax authorities about their address and to report address changes:

- In Belgium, any person who changes residence has to inform the municipal authorities of this change (under penalty of fine). This change is subsequently registered in the national register of natural persons. If it is determined that a person is no (longer) living on his official address, this person can be ex officio removed from the national register, which can lead to administrative problems for the person concerned.

- In Bulgaria, the official registers containing information on taxpayers' addresses – one for natural persons and one for legal entities – are kept by other authorities.

However, the representatives of legal entities have the obligation to inform (within 3 days) the tax authorities when they change their address, if a procedure has been opened under the Tax and Social Security Code of Procedure, for which the taxpayer has been regularly notified. Otherwise, all the acts and documents in this procedure shall be attached to the file and shall be considered validly notified.²

Moreover, if the representatives of a legal entity or a sole entrepreneur are absent from their correspondence address for more than 30 days, they must authorize a person to whom notifications and other statements shall be delivered.³ The non-fulfilment of this obligation

may lead to an administrative penalty. As for VAT taxpayers, the sanction for such a non-notification could be the deregistration under the VAT act. For the VAT taxable persons there is also another requirement: they have to specify a valid e-mail address. In case of changing this e-mail address, the taxpayer must inform the tax authorities within 7 days. Otherwise, a VAT deregistration could be applied.⁴

Individuals, against whom a procedure has been opened, for which they are notified, and who reside abroad for more than 30 successive days, are obliged to indicate a person in Bulgaria that shall represent them before the tax authorities and to whom all the notifications and other statements shall be delivered.⁵

- The German tax law does not contain any provision applicable to natural persons by which the taxpayer is obliged to notify the tax authorities about address changes. However, any natural person is obliged to notify the competent registration authorities of address changes. In turn, the registration authorities have to notify the tax authorities of changes to the register. Any breaches of the obligation to register may be punished as offences with a fine of up to € 500.

For tradesmen and freelancers the following registration obligations apply:

- Among others, corporations, associations and conglomerations of assets are obliged to notify the tax authorities of the transfer of place of business or registered office.
- Whoever runs a business is obliged to notify the municipality of his/her business. The municipality then informs the responsible tax office. Whoever takes up the provision of professional services has to notify the responsible tax office.
- Any business that seeks to acquire or manufacture excisable goods as well as companies to which special taxes apply are obliged to register this with the competent tax authority before the start of this activity.

In addition to the above mentioned obligations to register in accordance with the tax legislation, there are further registration obligations applying to tradesmen. For the acquisition of

² Art. 28(3) of the Tax and Social Security Code of Procedure.

³ Art. 28(4) of the same act.

⁴ Art. 176(2) of the VAT Act.

⁵ Art. 28(5) of the same act. The conformity of this rule with EU law is not discussed here.

information, the tax authorities may use the following registers:

- Business register (tradesmen)
Whoever does not notify the operation of a business is deemed to have committed an offence. The offence may be punished with a fine of up to € 1.000.
- Trade register (merchants to be registered, partnerships, corporations)
Certain tradesmen/tradeswomen (e.g. corporations, partnerships, merchants to be registered) are subject to the additional obligation to have their business entered in the trade register kept by the competent local court if the business volume exceeds the annual turnover of € 250.000. For the enforcement of the registration, penalty payments of up to € 5.000 may be imposed.

The tax authorities are authorized to use these registers in order to gather information.

- In Spain, taxpayers must communicate their fiscal address and the changes in their fiscal address to the competent office of the Spanish tax administration. The infringement of the obligation to communicate to the tax authorities the fiscal address or the changes relating to the fiscal address is categorized as a minor tax violation and has a punishment fine of 100 €.
- In Ireland, the taxpayers are obliged to inform the tax authorities of address changes. But there are no penalties for not doing so.
- In Hungary, taxpayers have to inform the tax authorities about any changes affecting their tax liability. The fine amounts between 200.000 and 500.000 Forint (about € 650 and € 1600).
- In Austria, if the taxpayer changes his address during the taxation procedure or tax assessment proceedings, he has the duty to inform the tax authority. Should it become evident (by a query of the Central Registration Register) that (s)he does not fulfil this obligation and the tax authority cannot find out the current address, the tax authority is entitled to deposit the decision (or information) in the file. If the taxpayer changes his address outside a taxation procedure or tax assessment proceedings and the tax authority cannot find out the current address, the tax authority is entitled to publish

the decision (or information) on the official notice board.

- In Portugal, it is mandatory to communicate the taxpayer`s address – and address changes – to the tax administration.⁶ Any change of address is ineffective until it is communicated to the tax authorities.⁷ Persons who are or may be involved in any proceedings or process in the tax administration, or participate in tax court cases, should communicate changes of address, headquarters and electronic mailboxes within 15 days.⁸
- In Romania, legal entities are obliged to inform the tax administration if they change their address. Non-fulfilment is an offence punishable by fine (between € 200 and € 1.100). Natural persons are obliged to notify the police authority.
- In Sweden the Tax Agency is handling the national registration of natural persons. Every person has to report his address to the Tax Agency.⁹ The Tax Agency can order an individual to report his new address if the Tax Agency has a reason to believe that the individual has changed his address.¹⁰ Under those circumstances, the Tax Agency can order a landlord to give information about an individual.¹¹ The Tax Agency can combine an order with a fine. The Tax Agency can decide in registration matters even if the individual has not given any information. It is possible to appeal against these decisions. Such an appeal has to be brought before an administrative court. However, this legislation does not solve all problems with debtors hiding themselves.

⁶ Art. 19 General Tax Law (LGT).

⁷ Art. 19 of the same act.

⁸ Art. 43 of the Code of Tax Proceedings and Process (CPPT).

⁹ § 25 of the National Registration Act (1991:481).

¹⁰ § 31 of the same act.

¹¹ § 32 of the same act.

3. What do you do if the address of a person appears to be incorrect or is unknown?

8. In order to investigate the correct address or the residence of a debtor, Member States' tax authorities initiate database queries. For this purpose, they may use different databases depending on their national legislation and organisational structure (see the replies to the previous question). In principle registers for legal entities and natural persons are available in all these MS, within the tax authorities or in other places. Depending on whether the person concerned is a legal entity or a natural person *inter alia* the following databases are used:

- Central Registration Register (Austria)
- Court of registry (Hungary)
- the authority appointed to the control of private entrepreneurs
- trade register
- register of personal data and address records of citizens / registration authorities (Hungary, Germany)
- database of tax identification numbers
- Social Security, Social Protection databases (Spain, Ireland).

In Belgium, if the consultation of databases available to the tax authorities did not yield a (valid) address, the tax collection authority, under its broad investigative powers, may submit a request for information with the landlord of the building where the taxpayer was registered before, the tenant if the databases of building owners (CADNET) reveals the existence of a building, the (former) employer, paying agencies (unemployment, social benefits, year-end bonuses, paid holidays allowances, ...), accountants, clients (see client listing), financial institutions

9. Moreover taxpayers are contacted by phone or e-mail to confirm addresses; outdoor officers are instructed to check on the addresses; relatives, previous landlords, "former" neighbours, or the local Police station is contacted for information, if possible/required.

10. One Member State (Hungary) reported that its tax authority is not required to search for the new address of the taxpayers. If they do not comply with their obligation to inform the authorities about address changes, they will have to bear the consequences. If a document cannot be notified because the document is "undeliverable", "unclaimed" or "refused" the document shall be

considered delivered. That also applies to documents delivered by electronic means.

4. How do you inform taxpayers if you don't know and do not find their address?

11. If the address of a taxpayer is unknown or cannot be found, the taxpayer cannot be informed directly. Under these circumstances, Member States apply various procedures in order to notify tax administration documents in an alternative way.

4.1. Public disclosure

12. One way frequently used is to disclose tax notices by "public disclosure", e.g. on a notice board, an electronic blackboard. However, before notifying effectively on a notice board different preconditions have to be fulfilled:

- In Bulgaria, notifications are placed in a proper place in the tax administration and are also published in the Internet if tax officials e.g. establish that the correspondence address does not actually exist. Upon the expiry of 14 days the respective statements and documents are considered to be duly delivered.
- In Spain, if a document could not be delivered, despite two attempts of notification in the tax debtor's fiscal address or in the place designated for that purpose by this person or his representative, it is possible to notify the document concerned by its publication in the Electronic Office of the Spanish tax administration or in the Spanish Official bulleting. If after 15 days, the taxpayer or his representative does not collect the document in the offices of the Spanish tax administration, it will be considered as validly notified. Nevertheless, the taxpayer can, at any time, ask for a copy of the document that was notified by publication.
- In Austria, if the taxpayer changes his address not during the taxation procedure or tax assessment proceedings, the tax authorities are entitled to publish the decision (or information) on the official notice board, which implies that the delivery is considered to be effected. If the taxpayer changes his address during the taxation procedure or tax assessment proceedings and he/she does not fulfil the obligation the tax authority is entitled to deposit the decision in the file.
- In Portugal, if the address is unknown, the summons is made by edicts, which are affixed in the local tax office of the taxpayer's last known address.

- The instrument of “public disclosure” is also used by Slovakia if the tax recovery notice could not be notified to the tax debtor to a known address beyond the territory of the Slovak Republic, the domicile or the address of the tax debtor is unknown or the tax debtor does not reside at the delivery address.

13. Regarding the notification by “public disclosure” certain regulations may have to be complied with.

14. In addition, the document must include the information that the document is serviced publicly and that deadlines may start to run, which may lead to the expiry of certain rights.

4.2. Authorized representative

15. Another approach to solving notification problems is to nominate an authorized representative. The possibility of notifying duly to an authorized representative is mentioned by several Member States (e.g. Bulgaria, Germany, Spain, Slovakia).

16. In Portugal, taxable persons resident abroad as well as those who, although resident in Portugal, are absent for a period exceeding 6 months, as well as collective persons and other entities legally equivalent to them who cease their activity, must appoint a representative for tax purposes residing in Portugal. The designation of a representative is also a condition for the exercise of rights of taxpayers towards the tax administration, including administrative claims, appeals or court claims.

17. Insofar as such rules impose absolute obligations on persons moving to another Member State, and on persons resident in other Member States, there may be questions with regard to their compatibility with EU law.

4.3. Other ways of notification

18. In some Member States (Bulgaria, Spain), it is possible to serve documents under certain conditions in the taxpayer’s place of employment, in the place where his economic activity is developed or at any other suitable place where the taxpayer can be found.

19. In Belgium, the tax authorities only have a limited access to the national register of natural persons but there is a special e-mail address

available for the tax collector to obtain a full extract of the national register. It is also possible for the tax authorities to use the service of a bailiff (who has an unrestricted access to this register). If no address is found, acts of prosecution are validly notified to the public prosecutor.

20. One Member State (Romania) declared that a valid notification via post cannot be effected if the full identification data are unknown. In that case the documents can be served by publishing on the tax administration website. The document is considered to be delivered after 15 days.

4.4. Use of electronic mailboxes to facilitate the notification of documents

21. In addition to the above mentioned “traditional way of notifying” via mail, some Member States (Spain, Portugal) use electronic means in order to transmit data.

22. In Portugal, the tax residence also includes an electronic mailbox. Such an electronic mailbox is obligatory for taxpayers of income tax of corporations with headquarters or effective management in the Portuguese territory and permanent establishments of companies and other non-resident entities, as well as resident taxpayers framed in the normal VAT arrangements. The obligation of an electronic tax domicile can also be imposed on other taxable persons. Notification by transmission of electronic data is considered to be made at the moment the taxpayer accesses his electronic mailbox. If the taxpayer doesn’t access his electronic mailbox, the notification is considered to be made at the 25th day following its dispatch, except in case the addressee demonstrates he has reported a change of his electronic mailbox or he proves it was impossible to do such communication.

23. The Spanish tax administration created an electronic notification system. Most legal entities and some individuals are obliged to receive almost all notifications – with some exceptions – from the Spanish tax administration by electronic means, in a special electronic address created for this purpose. Documents to be notified are uploaded to this electronic address of the taxpayers. If the taxpayers provide an e-mail address, an e-mail is sent to the taxpayers to inform them that a new document has been uploaded. After ten days the uploaded document is considered to be validly notified.

5. Summary

24. Taking the above mentioned into consideration the following strategies can be noticed.

- In most of the Member States, there are obligations to inform (tax) authorities about address changes. Based on the information given by the taxpayer, the communication between the taxpayer and the tax authorities is ensured.
- If the taxpayer does not fulfil the obligation or if the address of a taxpayer is unknown, not correct or if the current address cannot be investigated, the national legislations of most Member States include regulations about “alternative” proceedings regarding the notification of administrative acts. Significant differences exist regarding the way of this “alternative” notification.

EU FPG 080 Tax collection practices Report

Insolvency

Report by: J. Ščepková, A. van Eijdsden, C. Lamur

Contributors: A. van Eijdsden, C. Lamur, D. Steffl, P. Simon, K. Meško, R. Zamfir, M. Roekaerts, J. P. Cordeiro, C. Coelho, A. P. Matos, J. Ščepková, A. Öbrink

This overview summarizes the main conclusions on the topic “insolvency”. The questions concerning this topic focused, inter alia, on issues of prevention, the possibility of the tax authority to minimize the risk, the use of a warning system, and the approach in case of fraudulent insolvency.

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1. Measures to prevent insolvency

1. Generally, in order to help taxpayers to tackle and avoid financial problems, which could lead to insolvency or bankruptcy, tax authorities are entitled to agree with a payment plan, to provide a possibility of payment by instalments. Other tools to prevent insolvency include: tax rescheduling, relief of interest, collateralisation of tax debts, remissions, redemption plans, guarantees, precautionary measures, whereby it is presumed that all these measures are laid down in the tax law.

Example of a guarantee applied in accordance with the Belgian legislation:

When the solvency of certain taxpayers is not assured by the existence of sufficient assets in Belgium and when the regional director of direct taxes or VAT has reasons to believe that these taxpayers will resort to stratagems to evade the payment of their direct taxes or VAT, he can require them to furnish a collateral or personal guarantee (Income Tax Code/VAT Code). This decision is only applicable if the net market value of that person's assets located in Belgium, which form the guarantee of the Belgian Public Treasury, after deduction of liabilities and expenses, is insufficient to cover the presumed amount of the obligations for which he is liable over a period of one year. The required collateral or personal guarantee is not intended as a security for the payment of direct tax or VAT arrears for which the taxpayer concerned would remain liable, but only covers future tax debts, i.e. debts which are not yet due at the time when the decision is made. The collateral or personal guarantee must be furnished within two months following notification of the director's decision, unless the taxpayer ceases to pursue his professional activity before the expiry of that period.

2. Procedures which may run in order to avoid that the tax debtor goes bankrupt could be divided into two groups:

- (1°) out of court settlements, and
- (2°) court procedures, both of them focus on financial restructuring of the debts.

According to the replies, an out of court settlement is allowed by the law in the Netherlands, Sweden, Belgium and Slovenia. However, in the Netherlands an out of court insolvency scheme called amicable debt restructuring is only used for debts from private persons and from non-corporate businesses.

3. Other specific measures are adopted in some countries.

Examples:

Law on Continuity of the Companies (Belgium):

- *involves a possibility to solve the financial problems of entrepreneurs and companies via a non-judicial amicable settlement or a judicial reorganisation,*
- *providing a temporary protection from its creditors with aim to maintain the continuity hereof,*

Information obligation of notaries (Belgium):

- *based upon the information provided by the notaries, the tax authority is able to take a legal mortgage on the debtor's property.*

Rescue possibilities stipulated in Dutch civil law:

- *moratorium - i.e. suspension of payments with a restructuring objective,*
- *bankruptcy, debt restructuring arrangement in court - for private persons, as well as the above mentioned amicable debt restructuring agreement as an out of court procedure.*

2. Filing for bankruptcy or insolvency by the tax administration

4. Apparently, there is a general possibility for the tax authorities to file for bankruptcy or insolvency, as well as the debtor may file for the insolvency proceedings himself.

In some Member States, particular approaches can be observed:

- in case of the Netherlands, there is a policy rule that the tax authority may file a bankruptcy only of business – taxpayers, but not of private individuals;
- in Sweden, it is rather common that the company with financial problems applies itself to court for bankruptcy, in order to prevent that the director of this company is held liable for the company's tax (and possible other public) debts.

5. With regard to the number of creditors required to file insolvency proceedings in accordance with the domestic legislation, it appears that in most of the Member States, only one creditor is required; an exception can be found in Slovakia and the Netherlands, where the existence of at least two creditors is required.

6. The basic conditions to start the insolvency proceedings are:

- a proved state of the debtor's insolvency,
- existence of overdue valid claims,
- sufficient assets of the debtor to cover the costs of the proceedings.

Additionally, the existence of the debts and the debtor's inability to pay his obligations, inability to improve the financial situation, no possibility to apply recovery measures shall be proved or verified if the tax authority is petitioning the insolvency proceedings.

7. It appears there are two views concerning the practice of filing for bankruptcy or insolvency and its efficiency.

On the one hand, initiating bankruptcy proceedings is considered to be a helpful tool to prevent the tax payer from creating new debts. In this regard, it was observed that filing for insolvency at an early stage is important in order to reduce the risk of bankruptcy (Austria). One Member State explicitly confirmed that the number of its petitions for bankruptcy has increased in recent times (Slovenia).

On the other hand, when considering filing for bankruptcy, other criteria and conditions could also be taken into consideration, for instance:

- costs and fees linked to the insolvency proceeding,
- equal position of all other creditors, which means in some Member States a loss of the preferential treatment of the tax claims,
- use of own recovery measures (Slovenia),
- threshold amount applied for filing the petition for bankruptcy (Romania),
- proving an unsuccessful enforcement proceeding (Hungary, Netherlands),
- authorization of the Ministry of Finance (Netherlands).

8. In general, the loss of the priority position among the other creditors was pointed out as a reason why bankruptcy is found contraproductive in comparison with the tax recovery procedures.

3. How to assess the risk the tax payer goes bankrupt, how to minimise the risk for the tax authority in case of a bankruptcy, a use of an early warning system?

3.1. Assessment of the risk

9. Generally, evaluation of the insolvency risk is considered very useful, not only in order to prevent the tax payer's bankruptcy, but also to minimize the risk for the creditors.

10. However only a few Member States reported the use of special means of risk assessment. For instance Austria introduced an internal regulation helping to assess a possible upcoming insolvency, taking into account the following circumstances:

- (i) other creditors conducting enforcement measures,
- (ii) media reports on financial problems,
- (iii) no reduction of the tax debts while a sector-specific information (arrear analysis) shows a typical increase of arrears within the occupational group or branch. If a tax debtor exceeds the limit, this is an indication for possible upcoming insolvency.

The Belgian tax authorities presented a data mining model called DELPHI and HERMES. While DEPHI is a predictive model to detect business failure of legal entities, HERMES as a data mining model determines the probability of payment of the companies to which DEPHI attributed a credit score of a "very high risk".

The Portuguese tax authorities mentioned a specific provision in the Portuguese legislation (Commercial Law) which is relevant with regard to the possible indicators of insolvency: the loss of half of a company's share capital implies an obligation to call a general meeting and inform the stakeholders of the situation in the company. The application of this rule is considered as an indicator of a possible insolvency.

11. Besides the data mining models and tools described above, it is worth to mention the notification obligation laid down in Dutch tax law. Corporate businesses-taxpayers are obliged to inform the tax collector immediately or within 14 days after the due payment date of the tax debt when there are financial or tax payment problems. Failure to do so leads to the legal presumption that the director is personally liable for the tax debts of the corporate business-tax payer and thus the director is often held liable by the tax collector. It should be

observed that in practice this instrument has proven to be rather effective.

3.2. Minimising the risk

12. As stated before, it is obvious that when the tax payer goes bankrupt or becomes insolvent, this may jeopardise the position of the tax authorities in relation to the settlement of taxes due. Because opening the insolvency proceedings leads to a suspension of the tax recovery procedures in general, it means for the tax authorities that a competition with the other creditors begins. Moreover, in some Member States, the tax authorities lose their privileged position against the other creditors. Therefore, it is useful to find a way to avoid or at least to minimize the negative effect of such a situation for the tax authorities.

13. Therefore, it could be suggested that the collection process should start as soon as possible and recovery procedures should be as fast and effective as possible, so the tax debt increases are minimized.

Likewise preventive measures such as a general lien on the debtor's property, as well as mortgages could be applied. Apparently, a position of the "secured" creditor brings a better chance for the settlement of the outstanding claims lodged into the insolvency estate.

To sum up the main findings linked to the question of how to minimize the risk of insolvency or bankruptcy:

- starting tax recovery procedures as soon as possible,
- applying precautionary measures such as a lien or a mortgage in order to achieve a high ranking among the creditors or a preferential treatment of the tax claims (if possible according to the legislation),
- filing for bankruptcy at an early stage,
- helping the tax debtor to overcome his financial problems by providing special payment plans (payment by instalments, remissions, out of court settlements, restructuring plans, etc.).

At the end, an example of a "best practice" is provided by the Netherlands:

- use of the special seizure right – a unique power of the Dutch tax collector to seize assets belonging to third parties on the premises of and used by the tax debtor (only in relation to the some taxes: VAT, wages tax amongst others; not for corporate tax).

4. Approach of fraudulent bankruptcy or insolvency situations

14. Concerning the question how to deal with cases of fraudulent bankruptcy or insolvency, in most of the contributions a criminal aspect was pointed out, i.e. activities linked to false bankruptcy may be handled as a criminal offence under criminal law. The main issues reported in this regard are:

- non-monetary sanctions, e.g. the impossibility to exercise certain economic activities, the impossibility to practise certain types of economic activities (Portugal),
- possibility to continue a procedure in order to obtain the payment of the tax liabilities related to the period of time predating the declaration of bankruptcy, if the person declared bankrupt is not declared excusable (Belgium),
- possibility to recover the tax debt as a civil law claim and to have a civil claim for damages (Netherlands),
- third party liabilities: joint liability, secondary liabilities, third party tax liabilities (*holding the director personally liable*), common law liabilities,
- responsibility of the statutory body for not filing for insolvency proceedings in a timely manner and thereby causing a lower settlement of the creditor's claims lodged into the proceedings (Slovakia),
- not agreeing to the proposed restructuring plan,
- actio Pauliana (Netherlands, Belgium), applied with the purpose to render unenforceable those acts by which the tax debtor has reduced his assets at the detriment of creditors.

15. Useful examples of third party liabilities applied under the Dutch law are the following:

- a third party liability of the business-director and former business-director for business-tax debts (mostly VAT and wages tax),
- a third party liability of the representatives of bodies not established but active in the Netherlands,
- the managers of a permanent establishment in the Netherlands,
- a third party liability of the subsidiaries of a group treated as a single entity for the corporation tax or VAT,
- a third party liability of some shareholders of corporate businesses for corporation tax,
- a third party liability in some cases of insurance companies, for income tax,
- a third party liability of spouses and children for income tax.

5. Cross border insolvency

16. To make this topic complete, the issue of dealing with insolvency proceedings opened in another Member State, i.e. the cross border insolvency, should be included. In general, the Council Regulation 1346/2000 on insolvency proceedings applies to these situations. With regard to mutual recovery assistance in cases where insolvency proceedings are opened in the requested Member State, Member States appear to apply different practices.