



Tactical meeting on judicial cooperation in tax crime matters

Eurojust, The Hague, 28 October 2016

OUTCOME REPORT



1. Introduction

The tactical meeting on judicial cooperation in tax crime matters was organised by Eurojust and held at its premises in The Hague on 28 October 2016. The participants included practitioners from the Member States, Norway, Switzerland and the USA, as well as representatives from Europol and the JITs Network Secretariat.

The focus of the tactical meeting was to discuss in three different sessions the obstacles, best practice and solutions that could help overcome challenges in the investigation and prosecution of cross-border tax crime, as well as specific judicial cooperation issues in relation thereto. The **first session** consisted of presentations from national prosecutors of selected Member States. The **second session** was dedicated to the role of joint investigation teams in tax crime cases. The **third session** was devoted to the freezing and confiscation of the proceeds of tax crime, including obstacles in the execution of freezing and confiscation orders and issues of dual criminality in mutual legal cooperation. Combining presentations with in-depth discussions, the tactical meeting offered a forum to share best practice and experience in the investigation and prosecution of cross-border tax crime.

With a view to stimulating the debate, a *Background Paper* summarising the experience of Eurojust as regards the main legal obstacles encountered in the investigation and prosecution of cross-border tax crime was provided to the participants prior to the tactical meeting.

2. Opening session

Mr Ladislav Hamran, Vice-President of Eurojust, opened the meeting, highlighting the importance of the tactical meeting as a forum to foster a common and effective judicial response to tax crime. Mr Hamran stressed that Eurojust operational tools are already available to support Member States in the fight against this crime type, and noted the increase in the number of fraud cases referred by national authorities to Eurojust in 2015, including tax fraud cases. As an additional way to address this growing area of criminality, Eurojust, in cooperation with the Slovak EU Presidency, devoted this tactical meeting to the obstacles in judicial cooperation in tax crime matters, bringing together high-level prosecutors specialised in fighting tax fraud.

3. Plenary sessions

3.1. *First session – Legal obstacles and solutions encountered in judicial cooperation in tax crime*

Mr Leif Görts, National Member for Sweden at Eurojust, explained what constitutes tax crime under Swedish law. The failure to comply with the accounting duty is a criminal offence in Sweden. Under the Bookkeeping Act, a person who intentionally or through carelessness neglects the obligation to maintain accounts by failing to enter business transactions or by entering false information into the accounts shall be sentenced for *bookkeeping crime* to imprisonment for a maximum of two years, or, if the crime is petty, to a fine or imprisonment for a maximum of six months. If the crime is gross, imprisonment for *gross bookkeeping crime* for not less than six months and not more than six years shall be imposed. This has implications for international cooperation, as some countries, albeit criminalising the conduct, have a different *nomen iuris* for this conduct, leading to the need for

additional clarifications on the part of the Swedish authorities. Moreover, in accordance with the Tax Crime Act, the submission of an incorrect tax return constitutes tax crime in Sweden, and not merely an attempt to commit such crime. A person who intentionally gives incorrect information or neglects to give authorities declarations, salary statements or other information giving rise to possible tax avoidance shall be sentenced for *tax crime* to prison for a maximum of two years. If the crime is deemed to be gross, imprisonment of not less than six months and not more than six years shall be imposed.

Mr Serge Roques, Deputy Prosecutor from the French National Financial Public Prosecution Office, presented the role of the National Financial Public Prosecution Office and the Central Office for the Fight against Corruption and Financial and Fiscal Criminality (*Office central de lutte contre la corruption et les infractions financières et fiscales* - OCLCIFF), created in 2013. Mr Roques presented a case involving cross-border carousel fraud related to VAT evasion on emissions allowance units. France exempted the emission quota from VAT taxation in 2009, which has led to a defrauding scheme in which offenders earned millions of euros by purchasing carbon rights exempt of tax by an operator subject to French VAT through a foreign company, and reselling those rights to an operator subject to VAT. Ultimately, the collection of VAT takes place without repaying it to the Treasury before disappearing. Finally, Mr Roques referred to the main issues of international cooperation such as the differences in judicial systems and in the definition and elements of tax crime.

Ms Maria Schnebli, Liaison Prosecutor for Switzerland at Eurojust, noted that Switzerland is a partner in the fight against tax crime based on the Anti-Fraud Agreement between the EU and Switzerland. The Federal Office of Justice in Berne (FOJ) delegates an incoming Letter of Request (LoR) to the competent Swiss authority in charge of its execution. The Federal Customs Directorate executes incoming LoRs in VAT fraud cases and in duty fraud/customs fraud cases. The twenty-six cantonal prosecutors' offices and cantonal police forces execute incoming LoRs in tax fraud cases and can also give advice on the question of double criminality. If an LoR concerns investigative acts in various parts of Switzerland, the FOJ will nominate one Swiss authority as 'leading authority' to coordinate the execution of the LoR. Ms Schnebli emphasized that obtaining MLA cooperation from Switzerland is not possible in matters of tax evasion regarding direct taxes. However, full cooperation is given in all matters of indirect taxes (VAT, duty and customs taxes) without the need to fulfil the 'higher threshold' of the criteria for tax fraud as opposed to tax evasion.

Ms Sandra Kersch, Avocat General, Luxembourg, explained that the General Public Prosecutor is the central authority in charge of the MLA procedure in tax matters in Luxembourg. The General Public Prosecutor can refuse assistance if the execution of the MLA request is likely to prejudice the sovereignty, security or *ordre public*, or if the request concerns an offence that is considered to be a political or fiscal offence, other than tax swindle. After the General Public Prosecutor has verified that the MLA request meets the legal requirements, he/she will transfer the entire file back to the prosecution. The prosecutor will then request the *Chambre du Conseil* to authorise the transfer of the seized objects/documents to the requesting State. The *Chambre du Conseil* will at that stage analyse the regularity of the proceedings, and will order the transfer of the seized objects/documents to the requesting State. Finally, the General Public Prosecutor sends the requesting authority the executed

MLA request. Ms Kersch highlighted that an imbalance exists between the procedures for cooperation in the prosecution of VAT fraud and direct taxes. Under the existing regime [in October 2016], MLA can only be executed in the case of tax swindling (*escroquerie fiscale*) and not in the case of fraud. However, draft law N°7020 was introduced in the Luxembourg Parliament in July 2016, which extends the definition of tax fraud and introduces a distinction between simple tax fraud, aggravated tax fraud and *escroquerie fiscale*. The new law should enter into force on 1 January 2017 and will apply to MLA requests received after that date¹.

3.2. Second session – Joint investigation teams (JITs) in tax crime cases: challenges and opportunities

Mr Vincent Jamin, Head of JITs Network Secretariat, Eurojust, highlighted the potential benefits of JITs to respond to the challenges identified in cross-border tax crime cases. He noted that JITs are increasingly used in financial investigations, including tax crime and VAT carousel fraud cases. JITs allow the expeditious collection of financial evidence as well as the coordination of MLA cooperation and common strategy towards States outside the JIT. Due to the close cooperation and coordination established between the national authorities involved, the JIT framework can also provide a platform to anticipate investigative/prosecutorial steps such as jurisdictional issues and admissibility requirements. He further highlighted the possibility to include asset freezing/recovery in the purposes of the JIT, and the appointment of asset recovery experts as JIT members. In this regard, the involvement of CARIN experts for countries outside the European Union was emphasized. Mr Jamin finally underlined that Eurojust offers key support to JITs by facilitating the resolution of legal or practical issues during the setting up and operation of the JIT and by providing financial support to its activities.

Mr Marcus Painter, Public Prosecutor, PPO Augsburg, Germany, presented the key challenges encountered in Operation Vertigo and the added value of Eurojust to expedite the execution of MLA requests in that case. The OCG behind this carousel fraud case used a sophisticated infrastructure (buffer companies, missing traders, companies functioning as ‘alternative payment platforms’ to facilitate money laundering and crime-related money transfers) spread over various Member States and third States, defrauding EU citizens of approximately EUR 320 million in tax revenues. Mr Painter noted that the size of the investigations necessitated cross-border cooperation; in Germany alone, more than 500 MLA requests were issued. Furthermore, due to the large scope of the criminal activities, a number of investigations had been initiated in the affected States and parallel investigations needed to be identified. The presence at Eurojust of national authorities from participating countries during the common action days allowed for a quick judicial response to new evidence/information (for example, new freezing orders, searches), and the prompt resolution of practical problems.

¹ Law No 7020 was adopted in December 2016.

3.3. Third session – Freezing and confiscation of the proceeds of tax crimes

Mr Mario Ernest, Assistant to the National Member for the Slovak Republic at Eurojust, presented the main legal obstacles in the recognition and execution of LoRs and freezing orders. Freezing and seizing orders may be refused and not executed when the freezing certificate issued by the requesting Member State is incomplete or inaccurate, or when the amounts reflected in the certificate do not correspond to the freezing order. Moreover, Framework Decision 2003/577/JHA requires that the location of the property or evidence is precisely indicated. However, compliance with this requirement is often not possible and the judicial authorities of the executing State may refuse to recognise the freezing order. Practitioners are thus required to make use of MLA procedures to identify the location of the property. Mr Ernest further noted that freezing orders issued for the purpose of compensation of victims may not be executed as they do not correspond to the purpose of the 2003 Framework Decision, i.e. securing evidence or subsequent confiscation of property.

Ms Svetlana Kloučková, Head of the International Affairs Department, Supreme Public Prosecutor's Office of the Czech Republic, referred to the concept of dual criminality as an issue in mutual legal cooperation in tax crime matters. The Czech Republic applies the '*in concreto*' assessment of dual criminality exclusively (assessment of punishability of a specific act according to the law of both concerned States). Within the frame of this concept, the Czech Republic distinguishes between two basic situations. If the Czech Republic must **fully apply its jurisdiction**, it cannot cooperate in tax crime matters due to dual criminality. The only situation is a transfer of criminal proceedings. The Czech Republic cannot take over tax crime proceedings, since the Czech Republic as the requested State does not protect the tax system of other States by means of its criminal law. On the other hand, the Czech Republic can provide any other form of cooperation in criminal matters (EAW, mutual legal assistance, recognition of a decision) concerning tax crime investigated and prosecuted abroad, even in cases in which the assessment of dual criminality is required, since these forms of cooperation do not require the application of criminal jurisdiction and criminal substantive law of the Czech Republic. In such cases, the Czech Republic does not assess whether the tax crime described in the LoR (EAW, freezing order, etc.) **constitutes** a criminal offense according to its law, but whether such a tax crime **would constitute** a criminal offense according to its law if it was committed against the tax system of the Czech Republic (the '**analogical transposition**' principle). It follows that the meaning of the term 'dual criminality' then differs depending on the form of international cooperation in criminal matters.

4. Closing remarks

Mr Ladislav Hamran, Vice-President of Eurojust, summarised the main points expressed by the participants during the meeting, including the main challenges and best practice identified by the participants on the basis of their practical experience in prosecuting tax crime cases. Finally, Mr Hamran thanked all participants for their contributions and their personal involvement, which allowed a fruitful exchange of experience to take place.

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