3.12. Spain

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3.12.1. Questions of implementation

1. As far as mutual assistance in tax matters is concerned not only the tax assessment but also the collection of the taxes is of importance. Consequently, several Council Directives are relevant for this topic.

When did your country implement the following Council Directives:


Apart from previous national regulations, this was implemented by means of Royal Decree 704/2002, of 19 July, which incorporates the modifications of certain community Directives on the mutual assistance in collection matters.

In relation to Council Directive 76/308 EEC, it should be noted that this has been substantially amended on several occasions. Therefore, its codification was deemed essential, and has been consequently incorporated by means of Council Directive 2008/55/EC of 26 May 2008, on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures. As the European Commission points out, this Directive has proved insufficient to meet the requirements of the evolving internal markets over the last 30 years. In order to overcome these limitations, the European Commission has made the “Proposal for a Council Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures” (COM (2009) 28).


By means of Royal Decree 1326/1987 of 11 September 1987, the procedure for the application of Community Directives on exchange of fiscal information was established. This Royal Decree has been amended by the following laws:

By means of Royal Decree 1408/2004 of 11 June 2004; conversely, it should be noted that the Council Regulation (EC) 1798/2003 of 7 October 2003 is the only current legal instrument available for Administrative cooperation in the field of Value Added Taxation (VAT). Therefore, specific Spanish regulations are not applicable to this type of taxation.


Finally, by means of Royal Decree 175{2006 of 10 February 2006.

Please refer to the answer to Question 5 on the specific purpose of these modifications.

We would like to mention the "Proposal, presented by the European Commission, for a Council Directive on Administrative Cooperation in the field of Taxation (CM (2009) 29 final, Brussels, 2.2.2009", which if approved by the Council will involve the repeal of Directive 77/799/EEC. This proposal has evolved from the belief that the present Directive is unable to give Member States sufficient powers to cooperate at an international level to overcome negative effects of an ever-increasing globalization of the internal market. Therefore, the proposed Directive is an entirely new text that does not cover direct taxes and taxation of insurance premiums, unlike Directive 77/700, but instead covers all indirect taxes that are not yet dealt with in a European Community Act, i.e. indirect taxes other than VAT and excise duties.

The aim of the current proposal is to create an all-encompassing legal instrument for enhancing administrative cooperation in the field of taxation, in order to allow the smooth functioning of the internal market by circumventing the negative effects of harmful tax practices.

This approach will bring this collaboration into line with the existing provisions of VAT and excise duties administrative cooperation.


By means of Royal Decree 1778/2004, 30 July 2004, information obligations regarding preference shares and other debt instruments as well as regarding certain income obtained by individuals resident in the EU are regulated.

2. In which legal provisions can the implementation be found?

See Answers to Questions 1 and 3.
3. Does your country’s legislation provide a constitutional framework that governs mutual assistance in tax matters? Are there any conflicts or inconsistencies among constitutional guarantees for the taxpayer and rules concerning mutual assistance? Are there any conflicts or inconsistencies among the provisions in human rights treaties and those concerning mutual assistance?

The Spanish Constitution guarantees the protection of certain individual rights that could possibly be infringed during the process of information interchanges between different States.

In this sense, Article 18.1 of the Spanish Constitution grants “the right to honour personal and family privacy and the right to reputation”. Moreover, Article 18.4 provides that “law will limit the use of computing in order to grant the honourable, personal and familiar intimacy of citizens and the full exercise of their rights”. Therefore, one can find two fundamental rights: the right to privacy (Article 18.1) and right to data protection (Article 18.4).

In a broader sense, the principle of legal certainty could also be affected when information between States is exchanged. It should be noted that this principle finds further constitutional protection under Article 9 of the Spanish Constitution.

The Spanish Constitutional Court has given interpretations of these provisions. Concretely, in relation to data protection and privacy, the courts have pointed out that these are not absolute rights and in fact may be limited in terms of relevant constitutional rights weighed against the duty of tax contribution. (Judgment 292/2000). Despite every limitation to a fundamental right, it must be proportional and justifiable, as prescribed by law (Judgment 292/2000, paragraph 10). Likewise, these limitations must respect the legal certainty principle (paragraph 7).

Organic Law 15/1999 13 December on the Protection of Personal Data (OLPD), in compliance with Article 18.4 of the Spanish Constitution, grants the protection of personal data against illegal use. Articles 33 and 34 OLPD make the international transfer of data conditional on the existence of a comparable level of protection in the receiving State as that of the Spanish legal system. However, this requirement will not be applied when the transfer arises in the application of treaties or conventions signed by Spain, or when the transfer is necessary for the safeguarding of a public interest. This happens, according to the OLPD, when the information is requested by a tax or customs administration for the proper execution of its competences.

Some academics criticize the way this interchange of information is regulated in the OLPD. They argue that a taxpayer is not informed a priori of an international transfer of information (Article 21 OLPD). A taxpayer will only have knowledge a posteriori of an international transmission of information and even in these cases the OLPD (Articles 23 and 24) has introduced limitations to the exercise of access rights, rectification and cancellation that can detrimentally affect the knowledge of and the control of this flow in data (See CALDERÓN CARRERO, J.M.: “Artículo 26. La cláusula de intercambio de información?, Comentarios a los convenios para evitar la doble imposición y prevenir la evasión fiscal concluidos por España, Fundación Pedro Barrié de la Maza, A Coruña, 2004, pp. 1256 et seq.).

The General Tax Act (GTA) provides for the regulation of tax secrets in Article 95. Indeed, Article 95. 1. b) could be seen as permitting the interchange of information between different States without any limitations. The provision states that “Data, reports and information obtained by the Tax Administration in the exercise of its duties will be confidential and may only be used for the actual application of taxes they are charged with as well as for sanctioning, and that no transfer to a third party may be made, unless the transfer has for objectives of ... cooperation with other Tax Administrations in order to comply with tax obligations within their competences”.

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Commentators have also criticized this provision, arguing that its protection of the taxpayer is weak as it does not require any type of limitation to a transfer, namely, that information may be transferred in order to be used for tax purposes (See CALDERÓN CARRERO, J.M.: "Artículo 2677, op. cit., pp. 1259).

We do not share this opinion. One should remember that Council Directive 77/799/EEC was implemented into the Spanish legal system by Royal Decree 1326/1987 of 11 September 1987. This contains a requirement that information must be essential for the correct settlement of taxation, in every provision relating to the interchange of information (Articles 1, 2, 4, 5, 6). In this same way, Article 9 provides that the limitations for the interchange of information are similar to Article 8 of the Directive.

Therefore, Royal Decree 1326/1987 serves to cancel out the deficit in the protection of the taxpayer that could arise from the application of the GTA and the OLPD, granting a tax secret in a similar way as regulated in European and treaty instruments.

A right to privacy is not only a fundamental and constitutionally enshrined protection but a right that is instilled in other human rights instruments. We would like to make reference to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome in November 1950, ratified by Spain by means of instrument on 26 September 1979, and in effect from the moment the ratification instrument was deposited (4 October 1979). Article 8 of the aforementioned Convention refers to the right to the respect of private and family life and provides that:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Commission of Human Rights has interpreted this provision as granting the right to privacy in relation to the examination powers of tax inspectors. However, the Commission decision in Hardy-Spirleton on 7 December 1982 upheld the position of the Belgium Administration, agreeing that the exercise of the power was proportional and suitable to one of the objectives presented in the norm: namely: “the economic welfare of the nation”.

Later, in a similar case, Funke, (8 October 1991), the Commission also upheld the position of the French Government understanding that “house searches and seizures were the only means available to the authorities for investigating offences against the legislation governing financial dealings with foreign countries and thus preventing the flight of capital and tax evasion”.

However, on 25 February 1993, the European Court of Human Rights adopted different criteria, condemning the State for infringement of Article 8, holding that even if “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”; however, “above all, in the absence of any judicial warrant requirement the restrictions and conditions provided for in law, emphasised by the Government, appear too lax and full of loopholes for the interferences with the applicant’s rights to have been strictly proportionate to the legitimate aim pursued”.

This decision has special relevance, as it is the first time the Court accepted the protection of human rights in the field of tax proceedings.

The requirement of proportionality invoked by the ECHR for house searches and seizures should also apply to the exchange of information between Member States (See SOLER
In fact, the European Commission of Human Rights applied this reasoning in order to adjudicate in proceedings involving the German Tax Administration exchanging information with their Netherlands counterparts. The controversy was whether the German authorities infringed the right to respect private life granted by the ECHR when spontaneously transmitting taxpayer (fiscal) information to the Netherlands Tax Authority. The European Commission concluded that the transmission did not infringe the right under Article 8 of the ECHR, as the transmission of information in question was based upon Section 2, para. 1 of the EC Mutual Administrative Assistance Act, which was made in the interest of the economic well-being of a country, while it also aimed at preventing crimes, both proportionately and necessarily.

In this sense, the Spanish Constitutional Court has held that even though on some occasions the duty to pay taxes should prevail under the right to privacy, the limitation of fundamental rights that takes place is not absolute but needs to be made in such a way that the essential content is respected. Therefore, the limitation of these fundamental rights should respect the following conditions:

Firstly, the law should prescribe it. Secondly, it should be fundamental to achieving a goal enshrined by the Constitution. Thirdly, it must be proportional. Finally, it must respect the essential content of the fundamental right that is being limited. (Judgments 22/84, 159/86, 120/90, 197/91, 28/93, 57/94, 143/94 and 52/95).

As we pointed out above, Royal Decree 1326/1987 of 11 September 1987 implemented the limitations for the exchange of information provided by the Directive in the Spanish legal system. These can be understood as a means of protection for the taxpayer when exchanging information.

4. Article 9 of the Council Directive 77/799/EEC allows Member States to make bilateral agreements on specific matters concerning tax cooperation (automatic exchanges of information, simultaneous assessments, etc.). Has your country concluded this kind of agreements? If so, with which Member States?

Some agreements could be interpreted under the protection of Double Tax Treaties or Article 9 of the Council Directive.

Firstly, with reference to the agreements on the automatic exchange of information, no direct information on these agreements is officially published. We made contact with the Ministry of Economics and the Treasury but were denied access to these agreements. Therefore, it is impossible to ascertain the actual scope of their contents.

On 24 October 2006, in Madrid, tax agencies from Spain and Portugal signed a Cross-Border Mechanism of Exchange for Fiscal Information in order to combat fraud and the tax evasion. This agreement, signed by the General Director of Taxes, Portugal and the Director of the Department of Fiscal Examination of the Spanish Agency of Fiscal Administration, is incorporated into a framework of measures adopted by both countries in order to combat VAT evasion since 2005.

It is a Cross-Border Agreement on the direct exchange of fiscal information in order to detect tax fraud and evasion situations efficiently.

This agreement includes the exchange of information in relation to VAT and income tax and is applicable to regional services in both countries located at border locations: Galicia, Castilla y León, Extremadura and Andalucía (Spain), and Viana do Castelo, Braga, Vila Real, Bragança, Guarda, Castelo Branco, Portalegre, Évora, Beja and Faro (Portugal).

The "targets" in this exchange of information are companies that relocate to border locations, causing damage to their respective residence country; companies that operate in
activities and sectors considered to be risky, namely haulage companies, games arcades, construction companies and construction hardware trade companies, and other companies usually involved in VAT fraud schemes.

There is also an Agreement between Spain and Portugal regarding Mutual Administrative Assistance, signed in September 2004. As part of this agreement, various meetings between the competent authorities from both countries have been taking place.

Furthermore, we should point out that on 11 April 2006, in Amsterdam, Spain and the Netherlands signed an Agreement for the development and strengthening of mutual assistance in tax matters.

Finally, in relation to simultaneous tax examinations, agreements have been adopted by the Tax Authorities of two (or more) States in order to carry out simultaneous and independent investigations by each authority in their territory of the tax situation of a certain taxpayer in which Tax Administrations of these States have a common interest. The goal of this examination is to mutually exchange any information that could have relevance for the purposes of the investigation. Several civil servants working for the Ministry found legal grounds for these simultaneous tax examinations under Article 9.2 in Directive 77/799/EEC (See RODRIGUEZ MORENO, R.: "La asistencia administrativa mutua en la Unión europea: cooperación entre autoridades tributarias en el ámbito de los impuestos directos y del impuesto sobre el valor añadido?, n° 6, 1997, p. 696).

However, after Council Directive 2004/56/EC of 21 April 2004 amended Directive 77/799/EEC, it could be concluded that the legal grounds for these simultaneous tax examinations is Article 8 tier, where a regulation is established. In the Spanish legal system, they are regulated in Article 7 of Royal Decree 1326/1987. We would like to point out that, currently, the Proposal for a Council Directive on Administrative Cooperation in Taxation, referred to in Question 1, maintains the wording of this Article 8b, copying its content in Article 11 on "simultaneous controls".

Information provided by tax inspectors shows that simultaneous tax examinations constitute a technique often used in the scope of VAT, as part of the Fiscalis Community Program framework. However, in spite of their advantages, this instrument is not a widespread measure among fiscal authorities in our environment, for direct taxation (See RODRIGUEZ MORENO, R.: "La asistencia administrativa mutua??, op. cit. 697; TRAPÉ VILADOMAT M.: "El régimen fiscal de los precios de transferencia?, Manual de fiscalidad internacional, IEF, Madrid, p. 468). Other authors answering this questionnaire have established that Spain had taken part in 19 simultaneous tax examinations during 2003-2006.

It is necessary to point out, that the Proposal for a Council Directive on Administrative Cooperation in Taxation allows tax officials in any given Member State to be present in the territory of another Member State, and to actively participate – with the same inspection powers – in administrative enquiries carried out externally. Therefore, Chapter III of the proposed Directive regulates the presence of officials in other Member States' administrative offices and their participation in procedures. Currently, combined examinations are only covered by Article 6 of the Council Directive 77/799 EEC:—“For the purpose of applying the preceding provisions, the competent authority of the Member State providing the information and the competent authority of the Member State for which the information is intended may agree, under the consultation procedure laid down in Article 9, to authorise the presence in the first Member State Tax Administration officials of the other Member State. The details for applying this provision shall be determined under the same procedure". In our legal system combined examinations are regulated by Article 7 of Royal Ordinance 1326/1987, as are simultaneous examinations”.

5. According to Article 1 paragraph 4 of Council Directive 77/799/EEC, paragraph 1 should also apply to any identical or similar taxes imposed subsequently, whether in addition to or in place of


Council Directive 77/799/EEC was incorporated into our legal system, coupled with modifications carried out by Council Directive 79/1070/EEC, through Royal Decree 1326/1987 of 11 September, establishing the application procedure of European Community Directives on the exchange of tax information. Consequently, this Royal Decree was amended by Royal Decree 1624/1992 of 29 December, giving execution to that prepared in the Council Directive 92/12/EEC of 25 February 1992 to include excise duties. However, the fight against fraud has become demanding and efforts by Member States to achieve the necessary instruments for a more effective exchange of information, continues. With this in mind, Council Regulation (EC) No. 1798/2003 of 7 October on administrative cooperation in the area of VAT, derogating from EEC Regulation No. 218/1992, established a sole legal instrument for Community cooperation, in this tax area and which has involved the non application of both Directive 77/799/EEC and the Spanish norm implementing this Directive into Spanish legal order (Royal Decree 1326/1987, 11 September).

Furthermore, another Regulation was approved being (EC) No. 2073/2004 of 16 November 2004 on administrative cooperation in relation to excises and came into force on 1 July 2005 by virtue of Article 37. Thereafter, the Directive was no longer applicable to excises. Therefore, Royal Decree 175/2006, 10 February amended Royal Decree 1326/1987, 11 September in the same vein.

6. According to Article 8 of Council Directive 77/799/EEC, a Member State's competent authority has the right to refuse the provision of information in the cases listed in Article 8. How has this right been implemented in your country's legislation? For which of these reasons for refusing the exchange of information has a prohibition to provide information and for which the right (possibility) to refuse information been implemented in the national legal system? Why?

We wish to point out that the "Proposal for a Council Directive on Administrative Cooperation in the field of Taxation" which would repeal Directive 77/799/EEC, Article 16 introduces the disproportionate administrative burden and exhaustiveness principles and provides grounds for the refusal to cooperate. The exhaustiveness principle was provided for in Article 2 Directive 77/799/EEC in relation to exchanges on request.

According to Article 2 paragraph 2 of Royal Decree 1326/1987, "the Minister of Economy and Treasury shall not be required to meet information requests from requesting States, if, domestic laws of the requesting State's usual sources of information have not been exhausted to obtain data, reports or related background, that could be harmed without the proper settlement of taxation being made." This provision contains more of...
a right of the host State, in this case Spain, to refuse to commence a procedure of obtaining of information in its territory, than a prohibition to facilitate this information.

Furthermore, Article 9 paragraph 1 of the above-mentioned Royal Decree largely reproduces sections 1 and 2 of Article 8 of the Council Directive, adding that the Minister of Economy and Treasury may rightly withhold certain information requested by another Member State when the provision would lead to the disclosure of a trade, business or profession or a trade that would be contrary to public policy. Finally, the Minister of Economy and Treasury may refuse to provide information when the State concerned is unable, for practical or legal reasons, to provide similar information.

7. Information can also be exchanged between the Member States on the basis of double tax treaties. In some double tax treaties there are extensive information clauses (for example, in Article 26 of the OECD Model Tax Convention; hereinafter: OECD Model) and in others there are petit information clauses.

A distinction between a minor and a major clause must be drawn (See CALDERÓN CARRERO, J.M.: Intercambio de información y fraude fiscal internacional, CEF, 2000, p. 85 et seq).

A minor clause is one of exchange of information that is limited to grant the application of a Double Taxation Treaty (DTT). A major clause allows the use of exchange of information in order to grant the application of national tax legislation of a contracting State, and not only by treaty.

The OECD Model of 1963 included an exchange of information clause deemed necessary "for carrying out provisions of this Convention and of domestic laws relating to taxes covered by the Convention" (minor clause).

On the other hand, the OECD Model of 1977 referred to an exchange "for carrying out the provisions of this Convention or of domestic laws concerning taxes covered by the Convention" (major clause).

The 2000 and 2005 versions of the Model have considerably widened the scope in the exchange of information by virtue of Article 26 paragraph 1 of the Model. In particular, the 2000 version's literal text of Article 26 paragraph 1 was amended so that contracting States could exchange necessary information in order to "carry out the provisions of this Convention to administer or to enforce domestic laws concerning taxes of every kind, a description imposed on behalf of the Contracting States". In the same sense, it was established that "the exchange of information is not restricted by Articles 1 and 2". The widening of the objective scope in the exchange of information is evident, ranging from the taxes covered by the Double Taxation Treaties to all taxes that make up the tax system in contracting States.

In relation to this question, we would like to point out that Article 18 of the Proposal for a Council Directive on Administrative Cooperation in the field of Taxation introduces the most-favoured nation principle, in that a Member State has to provide cooperation to another under the same conditions as to a third country. Therefore, the configuration of these information clauses within Double Taxation Treaties would have important consequences if the Proposal is approved.

7.a. What kind of information clauses can be found in your country's double tax treaties with the other Member States? In which of the double tax treaties are there extensive information clauses and in which petit information clauses? (Please provide for each double tax treaty with a Member State the kind of information clause that has been implemented.)
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<tr>
<th>Member State</th>
<th>Minor clause</th>
<th>Major clause</th>
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<tr>
<td>Cyprus</td>
<td>1972, Art. 27.1, Protocol 17/03/2000 (without modifications)</td>
<td>1995, Art. 26.1</td>
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<td>Estonia</td>
<td>1967, Art. 27.1</td>
<td>1995, Art. 26.1</td>
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<td>Finland</td>
<td>1963, Art.39</td>
<td>1995, Art. 27.1</td>
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<td>France*</td>
<td>1963, Art.39</td>
<td>1995, Art. 27.1</td>
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<td>Hungary</td>
<td>1972, Art. 27.1</td>
<td>1995, Art. 27.1</td>
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<td>Ireland</td>
<td>1975, Art. 27.1</td>
<td>1995, Art. 27.1</td>
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<td>Italy</td>
<td>1979, Art. 27.1</td>
<td>1995, Art. 27.1</td>
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<td>Latvia</td>
<td>1976, Art. 27.1</td>
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<td>Lithuania</td>
<td>1977, Art. 27.1</td>
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<td>Luxembourg</td>
<td>1979, Art. 27.1</td>
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<td>Malta</td>
<td>1980, Art. 27.1</td>
<td>1995, Art. 27.1</td>
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<td>The Netherlands **</td>
<td>1971, Art. 28.1</td>
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<td>Portugal</td>
<td>1968, Art.27.1</td>
<td>1993, Art. 26.1</td>
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<td>United Kingdom****</td>
<td>1975, Art. 27.1</td>
<td>1993, Art. 26.1</td>
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<td>Romania</td>
<td>1979, Art. 28.1</td>
<td>1993, Art. 26.1</td>
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<td>Sweden</td>
<td>1976, Art. 27.1</td>
<td>1993, Art. 26.1</td>
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<tr>
<td>Norway</td>
<td>1963, Art. 27.1</td>
<td>1993, Art. 26.1</td>
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* The DTT signed in Madrid on 8 January 1963 between France and Spain provides for a minor clause, in the field of income and inheritance tax (Article 39). The DTT 1997 (Article 32.3) imposes the validity of the named provision.

** Here, the minor clause indubitably provides that "the competent authorities of the contracting States will exchange the necessary information in order to carry out the provisions of this Convention."

*** Though this does not exactly follow the terms of the 1963 OECD Model, a grammatical and systematic interpretation of the article leads us to consider it a minor clause.

**** The exchange of information clause established in the DTT between Spain and United Kingdom (1975, Article 27 paragraph 1) is ambiguous, although the literature states that the purpose of the contracting States was to establish a minor clause; this is, only to allow the exchange to the effects of the application of the DTT. (See CALDERÓN CARRERO, J.M.: Intercambio de información y fraude fiscal internacional, CEF, 2000, p. 88).

Nevertheless, we must highlight that none of these Conventions has established an exchange of information clause in the terms of the 2000 and 2005 Models' remit, including those ratified after that date.

7.b. In case there are extensive information clauses in the double tax treaties with some Member States and petit information clauses in the double tax treaties with other Member States, please give the reasons for these distinctions. Is there a certain policy that defines with which countries what kind of information clause is agreed?
Everything points to the fact that States with an ingrained tradition of bank secrecy (namely Austria), establish minor clauses. It should be noted that in 2006 Switzerland agreed to introduce an information clause in its DTT with Spain, by inserting a new Article 25 bis into the Convention (About the terms of this information clause, See question 6 of the part II of this work related with “Question of use in general”). In relation with the bank secrecy, it should be note that during the last year, countries like Austria or Switzerland, have agreed to relax the bank secrecy, under the pressure of the G-20 and the OCDE, in order to tackle the financial crisis.

7.c. The revised Article 26 of the 2006 version of the OECD Model includes a new paragraph 5, which prohibits refusing to provide information just because the information is held by a bank, a trustee, etc. Is the new Article 26 included in any of your country’s double tax treaties? Do laws on bank secrecy exist in your country so that certain information is not obtainable by your tax authorities? If so, please indicate if there are situations in which the information can be obtained by the tax authorities anyway.

We would like to point out that the Proposal for a Council Directive on Administrative Cooperation in the field of Taxation (COM (2009) 29 final), includes a provision based on Article 26, paragraph 5 of the OECD Model. Therefore, Article 17, paragraph 2 ensures that the limitations to the obligations to provide information (see Article 26.2 and 26.4 of the Proposal) cannot be used to refuse information solely on the basis that it is held by banks and or other financial institutions, when the information is in relation to a person resident for tax purposes in the requesting Member State. Therefore, the proposal abolishes banking secrecy in relationships between tax authorities when a requesting Member State is assessing the tax situation of one of its residents”.

Indeed, a new paragraph 5 in Article 26 of the OECD Model denies the possibility of a Contracting State declining to supply information solely because it is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. Austria, Belgium and Luxembourg have reserved the right not to include this clause in their respective Conventions.

Spain has only concluded a DTT with Malta (as far as Member States are concerned) incorporating the above-mentioned new paragraph in Article 26 of the OECD Model (2005 version). The Agreement between the Kingdom of Spain and Malta is to prevent Double Taxation and to prevent fiscal circumvention in relation to income tax (although it is not applicable to Patrimony Tax), as of 8 November 2005. Indeed, Article 25, paragraph 5 of this Convention incorporates the prohibition to decline to supply information "held by banks, other financial institutions, or person acting in an agency or a fiduciary capacity."

Furthermore, banking secrecy does not apply in Spain. Therefore, due to Article 93 paragraph 2 of the GTA, banks and other financial institutions will collaborate with the tax administration in assisting individual requests. Such requests will specify the identified data relating to the cheque or payment order, or any other operations subject to investigation, as well as to tax obligations affected and the respective period. Therefore, an investigation will be able to trace the origin and destination of the movements or of the cheque payments as well as other payment orders, although in these cases—as the provision mentioned- the information required by the rule "shall not exceed the identification of persons and bank accounts other than the source and destination".

8. The 2002 version of the OECD Model includes a new Article 27 on assistance in the collection of taxes. Has your country adopted in some of its double tax treaties a rule identical or similar to the new Art. 27 OECD Model? If so, in which of the double tax treaties can such a regulation be found?
Thus far, only DTTs concluded with France and Belgium include (aside from clauses on exchange of information) a provision establishing mutual administrative assistance for the collection of taxes. These clauses establish executive assistance in terms much like those discussed in connection with Article 27 of the OECD Models 2003-2005.

We refer to Article 27 of the Convention with Belgium, of 4 July 2003 and Article 28 of the Convention with France, of 10 October 1995.

Article 27 OECD Model 2003-2005 is the sole article in the Model that is annotated in the Convention by means of a footnote, granting special relevance to factors described in paragraph 1 in the Commentary to the revised Article 27 of the Model.

The collaboration does not solely refer to residents of several contracting States nor exclusively to income and capital taxes.

However, the Commentary to Article 27, paragraph 1, refers to the possibility of restricting the scope of Article 27 only in relation with Article 1 (but not regarding Article 2). This possibility allows the assistance in collection to be confined to contracting State residents (paragraph 4). However, section 2 of the Commentary to article 27, allows a limitation of the objective scope, in order to restrict the assistance in relation with the cases in which a State tries to recover losses arising from the incorrect application of the Convention to persons not covered by the subjective scope of the Convention (See GARCÍA PRATS, F.A.: "Asistencia mutua internacional en materia de recaudación tributaria?, Manual de Fiscalidad Internacional, IEF, Madrid, 2007, p.1264).

The only conventions signed by Spain containing clauses on assistance in collection follow neither the Model nor the Commentary in relation to the taxes affected. Both conventions with Belgium and France refer to "assistance" with respect to taxes covered by the Convention – income and capital tax – as reflected in Article 2.

National Treaty Practice Regarding the Components of Fiscal Debt
The DTTs signed by Spain specify the components of the tax claim covered by assistance. It could be possible that these components do not appear as such in the legislations of the two Contracting States. However, the mention to these components is made in order to allow the assistance regarding the components laid down only in the legislation of one of the Contracting States. Therefore, the reference to those "increments" or to those "indemnities" that that have no reference point in the Spanish legal system must be appreciated. (See GARCÍA PRATS, F.A.: "Asistencia mutua internacional en materia de recaudación tributaria?, Manual de Fiscalidad Internacional, IEF, Madrid, 2007, p.1272).

On the other hand, contrary to the text proposed by the Model, the Spanish DTTs specify the inclusion of "recargos" (additions and surcharges) – generically referred to as part of economic benefits owed and non-payments, which an assisted tax collection could address. In short, Spanish DTTs extend assistance "to surcharges, compensations for delay, interest, and expenses..." (Article 28, paragraph 1, DTT with France), and to those "overcharges, increments, interests, expenses and tickets without criminal character corresponding to these taxes" (Article 27, paragraph 1, DTT with Belgium).

From the perspective of the Spanish legal system, it could be argued that administrative assistance in the collection process is provided for all the components of tax debt (GTA 230/1963 (Article 58), or for all tax debt and tax penalties of an administrative nature, according to the configuration provided by the GTA 58/2003 (Article 58).

Differences with the Model in relation to the requirements for the application of assistance in tax collection
DTTs signed by Spain establish requirements for the provision of assistance in tax collection that differ from these ones established in the Model. (In relation with this, see. GARCÍA PRATS, F.A.: ?Mutual assistance in collection of tax debts?, Intertax, vol. 3, n° 2, 2002, p. 67).
In short, Article 27, paragraph 3 of the Model provides that the application of assistance is subject to these conditions:
- debt should be executable in the requesting State.
- the taxpayer should not have available options to impede the execution of that debt.

There is no requirement for the tax debt to be enforceable – administratively or judicially – nor that the debt is administratively settled, as the simple fact of an executable tax debt is not open to dispute.

The apparent extension of possibilities in the application of assistance, by limiting the conditions that permit this application are, however, restricted by the incorporation of conditions and provisions relating to the part of assistance provided by the contracting State. Verification from State to State in relation to the debt on which assistance is sought is enforceable under the provisions of legislation in the requested State in accordance with the Model text that incorporates a requirement of reciprocity in the application and delivery assistance.

In relation to the Spain-Belgium DTT, applications for assistance in tax debt are executive and should not be subject to appeal in accordance with the legislation of the requesting State (Article 27, paragraph 1). This is true of the Model where exhaustion of remedies is not included as a requirement for an application but instead is an exception to the obligation of providing assistance on the part of the requested State which can – although this may not be the case – refuse the request for assistance of the other contracting State when all collection instruments at its disposal are not exhausted in its own territory (Article 27.3).

On the other hand, the Spain-France DTT requires that executive title be omitted, that the debt has not been appealed or may not been appealed, meaning that it is a final debt, although this DTT permits the authorities to establish exceptions to this requirement (Article 28, paragraph 3). Furthermore, the rule of “exhaustion of remedies” is included as an exception to the obligation of processing the request for assistance of the requesting State (Article 28, paragraph 4).

As García Prats explains, the requirements of DTTs adopted by Spain maintain some correlation with the Model, although they establish more demanding requirements for the assistance, involving more regard to the principle of legal certainty. These conventions require not only the exhaustion of remedies in the requesting State but also the finally of the settlement act in order to use assistance for a tax collection (See GARCÍA PRATS, F.A.: "Asistencia mutua internacional en material de recaudación tributaria?, Manual de Fiscalidad Internacional, IEF, Madrid, 2007, page 1276 et seq).

Differences in the Adoption of measures of conservancy.

Article 27, paragraph 4 of the Model subjects the application of this mode of assistance to several requirements. Primarily, as a contracting State may request the adoption of measures of conservancy on the part of another contracting State, it is necessary that, the requesting State can also adopt measures of conservancy according to its own national legislation regarding these debts.

DTTs with France and Belgium do not make the request of measures of conservancy dependant on its admission in the national legislation of the requesting State. The absence of this requirement could be due to the fact, that legislations in the States involved allow, actually, its adoption. The Model does not require:
- the debt to be enforceable
- that the debt cannot be challenged
- that the measures of conservancy provided for by legislation in both the requesting and requested States be analogous.

The DTTs with France or Belgium:
- Require that tax liability is subject to appeal or is still open to appeal
- Are not specific, like the Model, as to whether the debt is enforceable.

Both the Model and the DTIs agreed with France and Belgium provide for the adoption of measures of conservancy to be carried out in accordance with legislation of the requesting State.


Spain has not ratified this Convention to date.

The final text of this Convention was opened to signing by Member States of the Council of Europe in January 1998 and up to the time of preparation of this report; 12 States including (Azerbaijan, Belgium, Denmark, France, United States, Finland, Iceland, Italy, Norway, Netherlands, Poland and Sweden) have signed it. The Ukraine and Canada have signed the Convention but not ratified it. The United Kingdom signed this Convention on 24 May 2007.

10. In 2002 the OECD developed the “Model agreement on exchange of information on tax matters”. The purpose of this model agreement is to serve as a basis for countries to conclude bilateral exchange of information agreements with third States considered to be “tax havens”. What are your country’s criteria for deciding that another country is a “tax haven”? Did your country conduct negotiations with third States (“tax havens”) to adopt this OECD model agreement? Has your country concluded any bilateral or multilateral treaties on the exchange of information based on this model agreement? If so, please describe the parts in which these treaties follow the model agreement and give the reasons for discrepancies if they exist.

In order to define the territories considered tax havens, Spanish legislation chose a closed list model. Specifically, Spain considers countries or territories specified in Royal Decree 1080/1991, of 5 July, amended by the Royal Decree 116/2003, to be tax havens.

These countries or territories are the following:
- Andorra
- Netherlands Antilles
- Aruba
- Kingdom of Bahrain
- State of Brunei, Abode of Peace
- Republic of Cyprus
- United Arab Emirates
- Gibraltar
- Hong Kong Special Administrative Region of the People’s Republic of China
- Anguilla
- Antigua and Barbuda
- Bahamas
- Barbados
- Bermuda
- Cayman Islands
- Cook Islands
- Dominican Republic
- Granada
- Republic of the Fiji islands
Furthermore, in accordance with the law, a country will no longer be considered a
tax haven once it has signed a DTT with Spain that contains a clause on the international
exchange of information or an agreement to exchange tax information, which expressly
provides for affected countries to lose their classification as a tax haven when such
agreements are implemented. However, if these agreements are annulled, a country or
territory will return to its previous status of tax haven.

The Spanish closed list system has the advantage of providing legal certainty, by
setting out clearly and precisely which territories are considered tax havens. In contrast,
the main drawback of this closed system is that it is rigid and lacks the dynamism
needed to keep up with the changing realities of international tax practice.

Therefore, in order to give the closed list system more flexibility, Law 36/2006, of
29 November, provided measures for the prevention of tax fraud, incorporating two
additional concepts into the Spanish legal system: zero taxation and effective exchange
of tax information.

Specifically, zero-taxation territories are those that do not use a tax identical or
analogous to the personal income tax or income tax relating to non-residents. It is there­
fore understood that an identical or similar tax to either the personal income tax or cor­
porate income tax is applied when a country or territory in question has signed a DTT
with Spain "which applies with the specifics provided for in the convention."

On the other hand, according to Law 36/2006, the effective exchange of tax infor­
mation with these countries or territories will exist when:

- Channel Islands
- Jamaica
- Malta
- Falkland Islands
- Isle of Man
- Mariana Islands
- Republic of Mauritius
- Montserrat
- Republic of Nauru
- Solomon Islands
- Saint Vincent and Grenadines
- Saint Lucia
- Republic of Trinidad and Tobago
- Turks and Caicos Islands
- Republic of Vanuatu
- British Virgin Islands
- United States Virgin Islands
- Hashemite Kingdom of Jordan
- Great Socialist People's Libyan Arab Jamahiriya
- Republic of Liberia
- Principality of Liechtenstein
- Grand Duchy of Luxembourg
- Macau Special Administrative Region of the People's Republic of China
- Principality of Monaco
- Sultanate of Oman
- Republic of Panama
- Most Serene Republic of San Merino
- Republic of Seychelles
- Republic of Singapore
a) A DTT with a clause on the exchange of information has been concluded, provided this agreement does not express the level of exchange of tax information to be insufficient for the purposes of this norm.

b) An agreement to exchange information in tax matters, whenever this agreement expressly provides that the exchange of tax information is sufficient for the purposes of this norm.

Finally, it should in fact be noted that Spain has signed the following bilateral agreements with certain tax havens, in relation to the automatic exchange of information on savings income in the form of interest payments:

- With the Netherlands, on behalf of Aruba (26-11-2004 and 11-4-2005).
- With the United Kingdom and Northern Ireland on behalf of the Cayman Islands (26-11-2004 and 26-4-2005).
- With the United Kingdom and Northern Ireland, on behalf of Montserrat (26-11-2004 and 7-4-2005).
- With the United Kingdom and Northern Ireland, on behalf of the Virgin Islands (26-11-2004 and 11-4-2005).
- With the Isle of Man (26-11-2004 and 18-2-2005).
- With the United Kingdom and Northern Ireland, on behalf of the Turks and Caicos Islands (26-11-2004 and 4-4-2005).
- With the Netherlands, on behalf of the Netherlands Antilles (26-11-2004 and 12-4-2005).
- With the Island of Guernsey (26-11-2004 and 17-2-2005).
- With the United Kingdom and Northern Ireland, on behalf of Anguilla (26-11-2004 and 21-1-2005).

On 3 June 2005 the Council of Ministers determined that the following 1 July would mark the beginning of the application of previous agreements, thereby removing doubts on this point.

11. Do rules exist in your country that oblige subsidiaries (e.g., for transfer pricing issues) to provide information held by the parent company? If so, please describe these rules and how they affect (international) taxation.

Law 36/2006, of 29 November contains measures on the prevention of tax fraud required to adapt Spanish legislation on transfer pricing to the international context and, in particular, according to the guidelines of the OECD, as well as the European Forum on transfer pricing. In this regard, the activities of the Spanish Tax Administration are harmonized with countries in this respect. While at the same time providing certainty in relation with the proceedings of the Tax Administration by requiring the taxpayer to document the determination of an arm's length price in related party transactions. (Article 16, paragraph 1 of Royal Decree-Law 4/2004, of 5 March which approves the text of the Corporate Tax Act). Therefore, if the operation in Spain relates to a non-resident parent company, of a subsidiary acting in Spain, the latter will be forced to supply the Spanish Tax Administration with information, that if need be will also be required of the former.

To this end, paragraph 2 of Article 16 provides that "individuals or associated companies should maintain documentation for the Tax Administration established by law". To date, these documentation obligations have not been given specific legislative attention. Therefore, we must wait until a regulation exists in order to evaluate how this affects information held by parent companies conducting operations with their subsidiaries and associated companies.
12. With which of the Member States have bilateral treaties concerning legal assistance on law regarding tax offences been concluded? What kind of exchange of information on tax crimes has been arranged in these treaties? How is this exchange organized?

Spain signed a Convention on judicial cooperation in criminal and civil matters with Portugal in Madrid on 19 November 1997 (Official Gazette of the Kingdom of Spain, BOE, No. 18/1999 of January 21). Tax crimes are not specifically addressed, but they are treated like any other criminal matter. The working of this agreement is rather unclear, as it does not contain an implementation protocol. However, we can say that cooperation takes place between the courts of Spain and Portugal in the border areas. Judicial authorities of these courts must direct requests for judicial assistance. Judicial authorities of these courts must direct requests for judicial assistance, even though, the transmission channels provided by Conventions between both parties can also be used, if necessary. A "frontier court or courts" exist where the jurisdictions are geographically contiguous. The two sides will draw up a list of the respective Tribunals that border each country, for the purposes of this Convention. The list is to be constantly updated. (Article 3 of the Convention).

13. Has your country ratified the European Convention on Mutual Assistance in Criminal Matters and its additional protocol in tax matters? What is the definition of tax fraud/tax crime/tax offence in your country?

Spain has ratified the Convention established by the Council in accordance with Article 34 of the TEU, on Mutual Assistance in Criminal Matters between the Member States of the EU, signed in Brussels on 29 May 2000, with a provisional application published in the Official Gazette of the Kingdom of Spain, BOE No. 547 of 15 October 2003. Spain ratified the Convention on 27 January 2003 and it became effective on 23 August 2005.

The Protocol to the Convention was adopted by the Council in accordance with Article 34 of the Treaty on European Union in Luxembourg on 16 October 2001, with a provisional application published in the Official Gazette of the Kingdom of Spain BOE No. 89, 14 April 2005. Spain ratified the Protocol on 5 January 2005, coming into force on 5 October of that year.

Tax crimes are regulated by Article 305, paragraph 1, in the Spanish Penal Code (Organic Law 10/1995, of 23 November, amended by Organic Law 15/2003 of 25 November) under the section of Public Treasury Fraud. The following is considered a tax crime:— to defraud the Public Treasury (state, autonomous, regional or local), by acts or omissions, avoiding the payment of taxes, withholdings, or what should have been withheld, income on account, obtaining undue refunds, unduly or enjoying tax benefits in the same way, whenever the quantity of the defrauded quota, undeclared retentions, income on account, refunds or unduly obtained/enjoyed tax benefits exceed EUR 120,000.

14. What is the borderline between the application of administrative assistance on the basis of tax treaties and administrative assistance on the basis of conventions for assistance in criminal matters? In other words, when does your country see the necessity to stop cooperation under tax treaties and continue such cooperation under treaties concerning legal assistance on tax offences?

This question regards the exchange of information and its importance in relation to the effects of criminal tax. The OECD document on "Guidelines for an Agreement regarding Disloyal Practices" (HTC MOU 2000) does not refer to the type of instrument that should be used to exchange this type of information. Numerous doubts exist as to whether the clauses on mutual administrative assistance provided for in the DTT can be used to exchange this information. According to CALDERÓN CARRERO, agreements on Mutual
Assistance in Penal Matters or \emph{International Request Letters} probably constitute instruments that are more appropriate.

The OECD Report of 2000 on "Access to Bank Information with Fiscal Effects" indicates that such exchanges of information should be made through DTTs, i.e., by means of clauses on mutual administrative assistance. According to \textsc{Calderón Carrero}, exchange of information within criminal taxation should be made through specific agreements of judicial assistance in criminal matters, or through \emph{Letters of Request}.

Several paragraphs of the OECD 2000 Report (par. 96) refer to the Council of Europe Convention as an instrument of assistance in criminal matters; this is the same for the 1994 OECD Report on exchange of information (paragraphs 6 and 41). Nevertheless, paragraph 21 of the 2000 OECD Report is ambiguous and seems to acknowledge both possibilities. In short, the election of either instrument could depend on the requesting State, and in short, under national legislation, the Tax Administration could carry out or collaborate in criminal taxation investigations, (as in Canada) (see \textsc{Calderón Carrero} J.M.; "Tendencias actuales en material de intercambio de información entre administraciones tributarias, Documento del IEF n°. 16/2001; and \textsc{Calderón Carrero}, J.M.; "Artículo 26. La cláusula de intercambio de información?, Comentarios a los convenios para evitar la doble imposición y prevenir la evasión fiscal concluidos por España, Fundación Pedro Barrié de la Maza, A Coruña, 2004, pp. 1248 et seq.").

15. How have the EU regulations influenced the design of the rules and practices in your country that are aimed at preventing tax fraud and tax evasion? Please give examples and describe the state of the discussion in the scientific literature where possible and appropriate.

We must draw attention to developments in Spanish law since the approval of the tax package, including Council Directive 2003/48/EC on the taxation of savings income in the form of interest payments, on 21 January 2003 in the ECOFIN. The application of this norm is based on the automatic exchange of information among Member States in relation to personal bank accounts and the establishment of transitional periods for States with traditions of banking secrecy, where the exchange of information is replaced by increasing deductions on savings income to share with the taxpayer's country of residence (in the host State).

On this point, Spanish law has developed internationally as well as domestically. On the international front, due to previous negotiations with selected countries and territories in the European Community, in order to acquire commitment for the application of equivalent measures to those agreed by Members States, Spain has signed ten agreements with dependent and associated territories of Member States, as described in our answer to Question 10 above.

Nationally, the incorporation of Directive provisions on the exchange of information to the Tax Administration took effect via Royal Decree 1778/2004, of 30 July. In short, Article 13 provides that those companies and other entities, as well as \emph{individuals who, in the exercise of their economic activity, pay or intermediate in the payment of income from individual residents} in another EU Member State, will have to satisfy the obligations of providing information. Article 15 lists those persons who must supply information according to their differing types of income. Within this group of selected persons, a specially regulated case exists: this one refers to \emph{entities in the attribution of income (transparent partnerships)}. When expecting income, these entities will provide information to the Tax Administration corresponding to individual residents in other Member States from the European Union to whom such income relate. On the other hand, Article 17 determines the procedure that the payer must follow in order to identify the collector and residence in order to supply the information properly, with the objective that any Member State can receive their residents' data.
The immediate effect in the exchange of information in relation to savings is the reduction of tax avoidance that, conversely, could provide Member States a greater capacity in the area of income tax, in making eventual company tax harmonization a reality. (See CRUZ AMOROS, M.: "El intercambio de información fiscal y el fraude fiscal?, Nuevas Tendencias en Economía y Fiscalidad Internacional ICE, nº 825, 2005, pp. 173 et seq.; DELMAS GONZÁLEZ, F. J.: "Comentarios al Reglamento de obligaciones de información respecto de participaciones preferentes y otros instrumentos de deuda y de determinadas rentas obtenidas por personas físicas residentes en la Unión Europea?, Documento del IEF, Nº 2/2005; MARTOS BELMONTE, P. y VERDÚN FRAILE, E.: "El intercambio de información fiscal en el ámbito internacional?, Cuadernos de Formación de la Inspección Financiera, Colaboración 09/07 – Volumen 3/2007, pp.135 et seq.).

16. Which legal foundations with the other Member States concerning the collection of taxes exist in your country? Are there clauses related to this in your country's double tax treaties?" If so, with which countries?

As in Question 8, there are two DTTs that contain a clause on the mutual administrative assistance regarding collection. These are the treaty with France (1995, Article 28), and the treaty with Belgium (2003, Article 27).

Another basis for administrative assistance in relation to tax collection is the law implementing EC legislation on this matter. We refer to Royal Decree 704/2002, of 19 July 19 (RCL 2002/1958).

This was supplemented by the following regulation: Order HAC/2324/2003, of 31 July, establishing details on the application of the relating provisions on mutual assistance regarding collection, in development of Royal Decree 704/2002, of 19 July.


Finally, Order EHA/564/2007, of 7 March has, recently amended Order HAC/2324/2003.

Many norms contained in the GTA are of equal application in the field of mutual assistance collection, as the specific regulation only refers to certain aspects of the various procedures provided for in Directive 76/308/EEC.

Furthermore, as previously mentioned, Spain has not signed the multilateral Convention on mutual administrative assistance in fiscal matters (OECD) in cooperation with the Council of Europe in 1988 – currently ratified by Denmark, Norway, Sweden, USA, Finland, Belgium, Iceland and Poland.

3.12.2. Use

3.12.2.1. In relation to domestic law

1. What activities may tax officials generally engage in when assessing taxes in your country? May the tax authorities request additional information from a person or institution other than the taxpayer himself (e.g. banks, insurers or business partners)? If so, please mention these? What are the requirements to request information from them?

In Spain, the Department of Collection for the State Agency of Tax Administration (AEAT) is the competent organ that formulates or receives petitions for assistance, as either the requesting or the requested authority, respectively.
This Department is not obliged to grant assistance to collection petitions or the adop-
tion of measures of conservancy remitted by a requesting authority when, due to a
debtor's situation, the collection could create serious economic and social difficulties in
Spain, in that the provisions and Spanish Administrative practices allow this action for
similar national taxation credits.

On the other hand, Spanish collection organs may exercise their ability to obtain
information under the terms of the GTA (General Taxation Law) (Arts. 93 and 94). Specif-
ically, the reporting requirements may be addressed to the taxpayer or to third parties
(all types of individuals, companies, public or private persons as well as entities without
legal personality) and will be designed to ascertain the existence, identification and val-
uation of property assets and the amount of tax payable in order to cover debt and,
where appropriate, investigate the solvency of the taxpayer. These include requirements
relating to bank account transactions, and even if legislation is silent on the matter, it
seems that they are subject to the requirement of prior authorization issued by the
Director of the Department of Revenue at the AEAT.

In addition, as soon as practicable the Department of Collection at the AEAT (as
the requested authority) will provide the requesting authority the reports asked of it,
relating to the credit collection which originated from the requesting Member State's
Authority headquarters.

2. Which measures are available if a requested party fails to supply information (e.
g. fines, penalties, etc.)? Are the same domestic measures available when your country's tax administration has received a request for information from another State?

In our legal system, According to Article 199 of the GTA, the breach of an obligation in
responding to an individual request for information by the Tax Administration consti-
tutes criminal behaviour. The amount of the fine depends on whether the requirement
relates to monetary or non-monetary data. In the first case, the penalty ranges between
EUR 500 and 2% of the amount relating to the operation. In the second case, the sanc-
tion imposed will be EUR 200 for each fact or group of related data per person.

3. When your country's tax administration as the requested State is not in the possession of the
requested information does the tax administration have the legal right to change or adjust a ques-
tion in order to make it easier to answer the question or in order to even improve the answers before
it is forwarded the taxpayer or a third person/institution?

Spanish law does not know this possibility, though other requirements on the procedure
for obtaining information are imposed, as follows:
- If the information requested cannot be obtained due to special circumstances of the
case the authority must be notified, stating reasons for the unsuccessful yield of data.
- In any case, six months after receiving a request for information, results will be com-
municated to the requesting authority of the investigations carried out so far.
- If, after taking into account the reports provided, the requesting authority wishes to
continue the investigation, this request must be made in writing or by electronic
means, within two months of the date of receipt of the reported results, and will be
-treated in accordance with the provisions of the initial request.

4. Is the tax administration allowed to use the information obtained for the purpose of assisting
another country in order to adjust an earlier assessment of domestic tax?
The possibility of a third State (distinct from the requesting State) to take advantage of information obtained by the tax authorities of the requesting State is not expressly considered in Spanish law, at least not in the form of a recovery procedure.

A different question would relate to "spontaneous" exchange of information carried out by way of Council Directive 77/799/CEE, as Article 5 of Royal Decree 1326/1987 provides for the possible transfer of information obtained under the following terms:

- The Minister of Economy and Treasury will communicate to the competent authority of any other interested Member State, without the necessity of a previous application, information that prepares the correct liquidation of IRPF, for Corporate Income Tax, Capital Gains or Income Tax for non-residents in the following cases:
  a) When it has been proved that a taxpayer has obtained or enjoyed tax benefits, tax deductions or rebates unduly, in the amount of a tax debt for taxes in another Member State.
  b) When a taxable person has obtained tax benefits, tax deductions, refunds or a decrease in the amount of tax debt in Spain that originated subject to a correlative increment of the amount of tax due to another Member State.
  c) If the transactions between a taxable person in Spain and a taxable person in another Member State are made through a permanent establishment of those taxpayers or third parties, in a third country, so that this procedure may lead to a decrease in the amount of tax due in Spain or in another Member State or in both.
  d) If it can be reasonably assumed, that there has been a decrease in the amount of tax due through the transfer of profits within groups of companies or firms.
  e) When the use of information provided by another Member State allows to obtain new information or materials which could be utilizable by it.

- The Minister of Economy and Treasury may extend the exchange of information to any other case determined under the procedure laid down in Article 9 of Directive 77/799/EEC of December 19 (OJ 1977 L 336).

- The Minister of Economy and Treasury must communicate with other Member States, and must notify the competent authorities of any information, reports or materials that may be of importance for proper tax assessment of taxes cited.

5. In 2006 the OECD published the "Manual on the implementation of exchange of information provisions for tax purposes". Does your country follow this manual? If not, please give the reasons for this and discuss potential deficiencies in the manual.

Yes, it follows this in general terms. Moreover, when signing a new DTT, OECD material is considered, i.e. the Protocol to the DTT with Malta, regarding Article 25 paragraph 5 expressly refers to tax fraud as defined in Section V, subsection A of the 2003 OECD Progress Report on the improvement of access to bank information for tax purposes.

3.12.2.2. Use in general

6. According to Article 1 paragraph 1 of Council Directive 77/799/EEC, the exchange of information takes place between the "competent authorities" defined for each country in Article 1 paragraph 5. What does the organization of the exchange of information from your country's competent authority to the competent authority of the Member State that made a request look like? Which authorities and agencies are involved in answering the request? Are there (administrative) rules that regulate the organizational structure for answering a request has to be like? If so, what are they?

Royal Decree 1326/1987 defines the Minister of Economy and Finance as the Spanish Competent Authority and authorizes delegation in other authorities. The Minister has delegated his powers to the Secretary General of Finance (Order 9 February 1988) and to the General Director of the Tax Agency. The Director of the Tax Inspection Department (reporting to the General Director) is an authorized representative who may communicate and hold consultations with the competent authorities of other Member States. Other authorities and public servants may be authorized to hold consultations in particular cases.

Under the authority of the Director the procedures are carried out by the National Office of Fraud Investigation, integrated by two units: the Missing Traders Unit, specialized in VAT fraud and the Central Information Unit.

The details on organization and procedures are regulated by the Resolution of the Tax Agency of 24 March 1992, modified on 21 September 2004.

There are no differences in the organization concerning the automatic or the spontaneous exchange of information.

7. Please describe the administrative procedures in your country when the requested information is not in the hands of the requested authority.

Royal Decree 1326/1987 provides that, when the requested information is not the hands of the Spanish authorities, the competent tax authority will carry out the suitable enquiries to get the information from the taxpayers or third persons. If, due to serious reasons, it is not possible to get the information, the Secretary General of Finance will inform the Minister so that he can give explanations to the requesting authority (Article 3).

8. Do special bilateral treaties concerning administrative assistance in tax matters exist that shorten the administrative procedures involved in answering requests? If so, please mention these treaties and describe the administrative procedures they entail.

Spain has signed administrative agreements on exchange of information with France, Sweden, Portugal and the Netherlands following the OECD Model. They include the procedure of direct consultation. Moreover, Spain has signed cross-border agreements with France and Portugal, which allow direct exchange among specialized units (heads of regional inspection offices).

The Agreement in matters of Mutual Administrative Assistance between the Spain and Portugal was signed in September 2004, and on 24 October 2006, the Agreement for a Transfrontier Mechanism for Exchange of Tax Information was signed in Madrid.

On 11 April 2006 an Agreement was signed in Amsterdam by the competent authorities of the Netherlands and Spain for developing and strengthening mutual assistance in tax matters.

In the area of the European Union, a meeting was held in Madrid on 19 May 2006 between the National Directors of the Tax Agencies in France, Italy, Portugal and Spain, at which the creation of a European Tax Unit was discussed, a topic which is the subject of much debate in the Commission.

It is also worth mentioning, regarding the Latin American countries, that on 3 April 2006 in Florianopolis (Brazil), during the CIAT General Assembly, an Administra-
tive Agreement between the Spanish and Chilean authorities was signed, regarding the exchange of information and mutual assistance.

9. How is the exchange of information organized when the request is based on Articles 5 et seq. of Council Regulation (EC) No. 1798/2003 of 7 October 2003 in the field of value added tax? Which authorities and agencies are involved?

The same procedures are applied according to Royal Decree 1408/2004, of 11 June, but there are more decentralized activities carried out by several territorial authorities.

10. Which authorities and agencies deal with incoming requests for recovery under 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? How is the collection organized in your country when a Member State makes a request for recovery? Is a judgment of a national court required to collect another Member State’s tax?


Within the framework of mutual assistance between European Union Member States, during 2006 the Tax Agency received 58 notification requests, 164 requests for information, 8 requests for adoption of precautionary measures and 743 requests for collection. In terms of administration, there was an increase of over 30% in the number of proceedings in which the Tax Agency collected on behalf of other European Union Member States, with an almost doubled increase in the total amount collected.

In 2005, within the framework of mutual assistance between the Member States of the European Union, the Tax Agency received: 15 notification requests, 158 requests for information, 11 requests for precautionary measures to be adopted and 782 requests for payment. With regard to management, the number of files charged by the Local Tax Office State Agency in favour of other Member States of the European Union increased by almost fifty percent, although the total amount charged was maintained. With regard to requests sent by Spain, data relating to the lower number of requests made in comparison with those received from abroad was maintained.

In 2004, following the Ministerial Order of 9 October 1989 and Royal Decree 704/2002, within the framework of mutual assistance between the Member States of the European Union, the Tax Agency received: 12 notification requests, 95 requests for information, 11 requests for precautionary measures to be adopted and 405 requests for payment. With regard to management, the number of files charged by the Local Tax Office State Agency in favour of other Member States of the European Union and the total amount charged increased. With regard to requests sent by Spain, a lower number of requests was made in comparison with those received from abroad.
11. If bilateral treaties exist on legal assistance relating to tax offences: How is the exchange of this information organized in your country?

Some bilateral treaties provide for exchange of information regarding tax offences (e.g. Article 25.5 DTT Spain / Malta, or Article 25 bis DTT Spain / Switzerland, as modified on 29 June 2006). In this case, the same procedures apply as far as no criminal courts are involved.

Due to its importance, we reproduce below the detailed text of the recent Amending Protocol to the Convention of 26 April 1966 between the Swiss Confederation and Spain for the avoidance of double taxation with respect to taxes on income and on capital. It inserts a new Article 25 bis concerning exchange of information into the Convention:

’Article 25 bis

1. The competent authorities of the Contracting States shall exchange, on request, such information as is necessary:
   a) for carrying out the provisions of this Convention in relation to the taxes which are the subject of this Convention;
   b) for the administration or enforcement of the domestic laws in the case of holding companies, in relation to taxes which are the subject of this Convention;
   c) for the administration or enforcement of the domestic laws in cases of tax fraud or the like which have been committed by a resident of a Contracting State or by a person subjected to a limited tax liability in a Contracting State, in relation to taxes which are the subject of this Convention.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
   a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
   b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
   c) to supply information, which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In cases of tax fraud or the like the provisions of paragraphs 1 and 3 shall not be construed so as to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.
And in the Protocol, section IV. Ad Article 25 bis adds the following:

1. Both Contracting States agree that under subparagraph b) of paragraph 1 of Article 25 bis, only information may be exchanged which are in possession of the Tax Authorities and which do not necessitate specific investigation measures.

2. It is understood that, as regards subparagraph b) aforementioned, Swiss companies covered by Article 28, paragraph 2 of the Federal Law on Harmonization of direct taxes of 14 December 1994 and the Spanish companies covered by Articles 116 to 119 of the Spanish Corporate Income Tax Law, (Legislative Royal Decree 4/2004, of 5th March) are considered as holding companies.

3. It is understood that the term "tax fraud" means fraudulent conduct, which is deemed to be an offence under the laws of both States, and is punishable by imprisonment either at the time where the fraud has been committed or where the request has been submitted.

4. The term "tax fraud or the like" includes:
   a) Cases below the monetary limit as provided for in Article 305 of the Spanish Criminal Code (Organic Law 10/1995, of 23rd November) which imply the same fraudulent conduct as it is the case for tax fraud under the law of the requested State.
   b) Cases substantiated under the simulation procedure as provided for in Article 16 of the Spanish Ley General Tributaria (Law 58/2003 of 17th December), (General Tax Code); simulation would be understood only with reference to Article 1275 of the Spanish Civil Code (Código Civil español).

5. In particular, fraudulent conduct is assumed in situations when a taxpayer uses, or has the intention to use a false piece of documentary evidence, and in situations where the taxpayer uses, or has the intention to use a scheme of lies (?Lügengebäude?) to deceive the tax authority.

6. It is understood that, in determining whether tax fraud or the like exists in a case involving the active conduct of a profession or business (including a profession or business conducted through a sole proprietorship, partnership or similar entity), the requested State shall assume that the record keeping requirements applicable under the laws of the requesting State are the record-keeping requirements of the requested State.

7. In any case, the provision of information presupposes a direct connection between the fraudulent conduct and the requested administrative assistance measure.

8. It is understood moreover that the administrative assistance provided for in paragraph 1 of this Article does not include measures aimed only to simple collect of pieces of evidence ("fishing expeditions").

9. Notwithstanding paragraph 2 of Article 25 bis, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of the supplying State. In case of doubt, the competent authorities shall endeavour to resolve by mutual agreement any divergence related to the interpretation of the laws of the requested State.

10. The requested State shall provide information where the requesting State has a reasonable suspicion that a certain conduct would constitute tax fraud or the like. The requesting State's suspicion of tax fraud or the like may be based on:
   a) Documents, whether authenticated or not, and including but not limited to business records, books of account, or bank account information;
   b) Testimonial information from the taxpayer;
   c) Information obtained from an informant or other third person that has been independently corroborated or otherwise is likely to be credible; or
   d) Circumstantial evidence.

11. a) Should Switzerland conclude with a Member State of the European Union, in relation to exchange of information, any Agreement of whatever kind and nature or any provision in a Double Taxation Agreement, related to taxes covered by this Convention,
Switzerland shall give to Spain the same level of co-operation as in such Agreement or provision or the part of them and Spain will act accordingly.

b) Notwithstanding paragraph 11, sub-paragraph a) here above, where Switzerland has defined in a Double Taxation Agreement with an other Member State of the European Union one or more individual categories of cases falling under tax fraud or the like according to Article 10, paragraph 4 of the Agreement between the Swiss Confederation and the European Community providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments and the respective Memorandum of Understanding and Spain would consider that there is a similar situation under the Spanish domestic laws, then the Spanish competent authorities will address the Swiss competent authorities in order to find an agreement to adapt that Protocol accordingly. The agreement will be submitted for approval to the respective Parliament of both Contracting States.

12. As regards the procedures followed in Spain for obtaining information, including banking information, in the case of tax fraud or the like under Article 25 bis, the Spanish competent authorities will apply the internal procedures provided for by the Spanish internal law in order to comply with the information request of the Swiss competent authorities.

The person involved in a Spanish proceeding may not invoke irregularities in the Swiss procedure for appealing his case before a Spanish Court.

Should the taxpayer appeal the decision of the Swiss Federal Tax Administration concerning the transmission of the information to the Spanish competent authority, any delay derived there from will not be considered in computing the applicable time-limits established by the Spanish Tax Legislation concerning fiscal tax administration proceedings.¹

In general terms, turning to the practical data regarding tax offences available in the year 2006, these are the following:

<table>
<thead>
<tr>
<th>Cooperation</th>
<th>at the request of Spain</th>
<th>at the request of members states</th>
</tr>
</thead>
<tbody>
<tr>
<td>With members states</td>
<td>26</td>
<td>131</td>
</tr>
<tr>
<td>With third countries</td>
<td>29</td>
<td>226</td>
</tr>
</tbody>
</table>

Judicial assistance follows the Council Act of 29 May 2000 establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Protocol to that Convention [Official Journal C 326 of 21.11.2001]. Moreover, in cases of serious crimes including fraud and corruption and any criminal offence affecting the European Community's financial interests or the laundering of the proceeds of crime, the EUROJUST Agency could be involved (Council Decision of 28 February 2002 setting up EUROJUST with a view to reinforcing the fight against serious crime) and Law 16/2006 refers to the Spanish representative in EUROJUST.

12. According to some scholars, a request for information may only be based on one legal instrument. Does your country follow this or does it refer to all instruments available? What is the tax authorities' opinion on the conflicting rules in different instruments? What is the relationship between the double tax treaties and Council Directive 77/799/EEC? Which is the preferred way to exchange information and why?
Spanish authorities base the request on one legal instrument: the one more suitable to get the requested information. There is no administrative doctrine on conflicting rules in different instruments. Regarding the Directive and the Treaties, the more favourable rule in order to get the information usually prevails. There is a kind of ‘pro-assistance’ principle.

For instance, the DTT with Malta does not apply to companies regulated by the Merchant Shipping Act approved in 1973.

13. What precautions are taken in your country to make sure that no information containing commercial, industrial, business or professional secrets or details about commercial processes are provided?

Spanish standards are applied (see answer to question 1). So far, there has been no special question regarding commercial or industrial secrets.

14. What precautions are taken in your country to guarantee that the information conveyed is kept confidential in the requesting Member State?

There is no special precaution. The bona fide principle applies.

15. What guarantees are available in your country to ensure that only the persons or agencies listed in Article 16 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 have access to the documents and information provided to your country by another Member State?

In general terms, Article 95.3 of the General Tax Act regulates the tax secret and typifies its breach as a serious offence. Moreover, Article 7 of Royal Decree 1068/1988 only allows to use the information for the recovery of tax claims foreseen in the Directive.


The access to IT databases is restricted to the public servants who are competent for carrying out the procedures according to the physical and logical security requirements implemented by the IT Tax Department, integrated in the Tax Agency (Article 8.f of the Ministerial Order PRE/3581/2007, of 10 December 2007).

17. Do the authorities in your country make investigations on their own when they are the requested authority or do they (merely) work with existing files?

They make the investigations which are needed to get the information as they do in domestic cases.

18. On which occasions does your country take part in simultaneous tax examinations? How often are permanent establishments in your country affected by a simultaneous tax examination? Do your country's legal rules allow foreign tax officers to take part in tax examinations?

Spain has taken part in 19 simultaneous tax examinations during the period 2003-2006. They are particularly related to VAT fraud schemes. There is no peculiarity regarding per-
manent establishments. Spanish legal rules allow foreign tax officers to take part in tax examinations as far as it is foreseen in a tax treaty, but they cannot exert any active legal power, their presence is merely passive.

19. Are there cases in which the use of certain kinds of evidence is allowed simply to make the mutual assistance easier even though the use would normally be forbidden in your country? If so, please describe this type of evidence and give reasons for the exception.

No. There are not.

20. Can anything be said generally about the situations in which the tax authorities use one method (the exchange on request, the automatic exchange of information or the spontaneous exchange of information) rather than others to get the information they need?

Exchange on request is the more usual method.

21. How does the exchange of information influence possible restrictions to the free movement of capital with third countries?

Tax haven provisions do not apply to third countries which have signed an agreement on exchange of information or a double tax convention with an exchange of information clause.

22. What is the relationship between criminal and tax proceedings and judgments in your country? Do they influence each other?

Spanish rules provide that the information collected in the audit procedure will be used in the infringement procedure (Article 210(2) General Tax Act, GTA). There is no explicit rule excluding information which was obtained through the use of compulsion on the incriminated persons.

Moreover, the General Tax Act provides that the information obtained in tax procedures may be used to prosecute tax infringements and any kind of public criminal offences (Article 95(1)a) GTA).

Furthermore, the infringement procedure will be usually carried out by the same person who dealt with the audit procedure. Even if that is not so, the procedure would be decided as a general rule by the superior of the unit which dealt with the audit procedure (Article 211(5)d).

If there are signs of a criminal offence, the tax authorities will report to the criminal prosecutor and call off the audit procedure (Article 180(1) GTA). Nevertheless, that will only happen once the tax inspectors have collected (under the use of compulsion) enough evidence to be certain that the criminal procedure will succeed. Until the Law for the Prevention of Tax Fraud (2006), the tax inspector should receive the taxpayer in audience before sending the records to the public prosecutor. The rule was abolished by that law, because it encouraged criminals to destroy remaining evidence and to run away, putting their money somewhere safe.

<table>
<thead>
<tr>
<th>Automatic exchange of data for direct taxes</th>
<th>Number of cases:</th>
<th>Number of taxpayers:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data sent to other countries (1)</td>
<td>25</td>
<td>1,854,821</td>
</tr>
<tr>
<td>Data received from countries (2)</td>
<td>25</td>
<td>596,730</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Data exchanged spontaneously for indirect taxes (3)</th>
<th>Number of cases:</th>
<th>Number of taxpayers:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data sent to other countries (4)</td>
<td>46</td>
<td>48</td>
</tr>
<tr>
<td>Data received from other countries (5)</td>
<td>168</td>
<td>3,452</td>
</tr>
</tbody>
</table>
1 The proceedings affect 20 countries.
2 The proceedings affect 17 countries.
3 The data are fundamentally from Form 296 and the 2005 tax year.
4 The proceedings affect 5 countries.
5 The proceedings affect 16 countries.

Statistics

23. How many requests from other Member States does your country get each year? How many requests to other Member States does your country make each year? How many spontaneous and automatic exchanges of information does your country send to the other Member States and how many of these exchanges of information does your country receive each year? If possible, please provide statistics for the past ten years.

In 2005 the data related to automatic and spontaneous exchange in direct taxation are the ones included in the figure below. Council Directive 2004/56/EC of 21 April 2004 amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxation of insurance premiums, was implemented through Royal Decree 161/2005, of 11 February.

And referring to VAT, the data published in 2006 are included in the next table:

<table>
<thead>
<tr>
<th>Mutual assistance for VAT</th>
<th>From Spain to third countries</th>
<th>From third countries to Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information requests</td>
<td>488</td>
<td>2,104</td>
</tr>
<tr>
<td>Other requests received</td>
<td></td>
<td></td>
</tr>
<tr>
<td>VAT numbers (cases processed)</td>
<td>501</td>
<td>105</td>
</tr>
<tr>
<td>Various requests</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Following requests (Part of process)</th>
<th>From Spain to third countries</th>
<th>From third countries to Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information requests</td>
<td>765</td>
<td>2,670</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Without prior requests (not part of processes)</th>
<th>From Spain to third countries</th>
<th>From third countries to Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sending of information (spontaneous) without prior request</td>
<td>26</td>
<td>438</td>
</tr>
<tr>
<td>Without prior requests (part of processes)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sending of information (spontaneous) without prior request</td>
<td>110</td>
<td>317</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Automatic information</th>
<th>Sent by Spain</th>
<th>Received by Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>VAT numbers assigned (2)</td>
<td>2,573</td>
<td>335</td>
</tr>
<tr>
<td>VAT numbers cancelled</td>
<td>2,326</td>
<td>-</td>
</tr>
<tr>
<td>VAT return to non-established persons (3)</td>
<td>37,927</td>
<td>12,215</td>
</tr>
<tr>
<td>New vehicles</td>
<td>-</td>
<td>151</td>
</tr>
<tr>
<td>Missing Traders (4)</td>
<td>-</td>
<td>277</td>
</tr>
</tbody>
</table>

514
(1) Corresponds to the commitments assumed by Spain for sending automatically, without previous request, specific information, and logically the automatic receipt of such information. The number of files sent and received are listed.

(2) Assigned to taxpayers of other member states, in the case of information supplied by Spain and assigned to Spanish citizens in the case of information received.

(3) Refunds to Spanish citizens in the case of information received and refunds to citizens outside Spain in the case of information supplied by Spain.

(4) Operators implicated in community VAT defrauding schemes on which action has to be taken rapidly before they disappear.

Requests: see question 25.
Automatic exchanges regarding direct taxes:
2006:
- Received: 13 files
- Sent: 12 files


This information (how often) is currently not available. In 2006 198,977 records where received regarding the directive.

25. Does your country request information more often from certain Member States than from others? Do certain Member States more often request information than the other Member States? If so, please list these countries.

First, let us show how most of the cooperative efforts have been concentrated in the European area during 2006

<table>
<thead>
<tr>
<th>Exchange of Information with other countries, direct taxes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exchange of Information following request(4)</td>
</tr>
<tr>
<td>Information requests</td>
</tr>
<tr>
<td>----------------------</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>
In the same year 2006, regarding VAT, the information available is shown below:

<table>
<thead>
<tr>
<th></th>
<th>Requests from other Member States</th>
<th>Spanish requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>941</td>
<td>181</td>
</tr>
<tr>
<td>Austria</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Belgium</td>
<td>127</td>
<td>38</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>Denmark</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td>Estonia</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Greece</td>
<td>74</td>
<td></td>
</tr>
<tr>
<td>Finland</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>France</td>
<td>155</td>
<td>68</td>
</tr>
<tr>
<td>UK</td>
<td>31</td>
<td>29</td>
</tr>
<tr>
<td>Hungary</td>
<td>23</td>
<td></td>
</tr>
<tr>
<td>Ireland</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Italy</td>
<td>393</td>
<td>19</td>
</tr>
<tr>
<td>Latvia</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Lithuania</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>Luxembourg</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Malta</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>The Netherlands</td>
<td>14</td>
<td>35</td>
</tr>
<tr>
<td>Poland</td>
<td>65</td>
<td>2</td>
</tr>
<tr>
<td>Portugal</td>
<td>196</td>
<td>93</td>
</tr>
<tr>
<td>Sweden</td>
<td>9</td>
<td>3</td>
</tr>
<tr>
<td>Slovenia</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>9</td>
<td></td>
</tr>
</tbody>
</table>

In 2004, the data referred to the exchange of information with other countries through DTT and Directives were the following ones:
- requests of information: 732 received, 366 sent.
- spontaneous exchange: 635 received, 234 sent.
- automatic exchange: 94 received, 14 sent.

Exchange of information (VAT) contained in the VIES with other EU Tax Administrations—without including the ones directly made by the units in charge of fraud chains:
- 2,604 requests sent by Spain.
- 2,447 requests received.
- 43 sent by Spain without request.
- 585 received by Spain without request.

There were 743 checks of the VAT number and 566 proposals of eliminations from the VIES Census.

In 2004 many of the activities carried out by the Oficina Nacional de Información e Investigación (416 of 908 files) were initiated under the mutual assistance—including OLAF, Member States and Third Countries.

In 2003 the National Fraud Investigation Office (CLO) At the international level, under the terms of DTTs and EC directives, the unit processed 1,403 requests for information exchanges with the tax authorities of other countries. The Central Information Squad also acts as a liaison for the management of the intra-Community cooperation system for supervising VAT, handling 5,243 information-
sharing requests. It verified and maintained the VIES Census in order to remove people registered in it who do not belong there. In all, there were 7,072 actions in this regard, with a total of 1,276 eliminations from the VIES Census.

It participates in the Standing Committee for Administrative Cooperation (SCAC) created by Regulation 218/92, initially for the purpose of supervising the operation of the VIES system and mutual assistance on VAT matters, although it was ultimately given additional responsibilities. Also, it participates in the working groups set up by the committee on an ad-hoc basis to address certain tax fraud issues.

Together with the Central Liaison Office, the National Information and Investigation Office, which is organically and functionally subordinate to the Deputy Directorate General of Auditing and Investigation of the Customs and Excise Department, is essentially responsible for studying everything that has an impact on the fight against tax and customs fraud, particularly analysing sectors and enterprises that are considered high risk. It also centralizes and coordinates a vital tool in the fight against fraud, mutual administrative assistance in customs and excise matters, with the European Anti-Fraud Office (which is in charge of fighting the kind of fraud that hurts the EC budget), other European Union Member States and other countries.

In 2003 this office handled a total of 1,044 cases. The next table shows the information used as the basis for initiating these cases.

<table>
<thead>
<tr>
<th>Origin</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Information and Investigation Office (ONII)</td>
<td>78</td>
</tr>
<tr>
<td>Other Deputy Directorate Generals in the Customs Department</td>
<td>203</td>
</tr>
<tr>
<td>Regional offices</td>
<td>298</td>
</tr>
<tr>
<td>Mutual assistance (*)</td>
<td>408</td>
</tr>
<tr>
<td>Other</td>
<td>57</td>
</tr>
<tr>
<td>Total</td>
<td>1,044</td>
</tr>
</tbody>
</table>

(*)This refers to the European Anti-Fraud Office, Member States and Third Countries Source: Customs and Excise Department

In 2002 the Office tallied up a total of 1,228 proceedings acting on information from the sources listed in Table 59. Study and analysis of these proceedings led the Office to a series of conclusions that it duly reported to the proper Auditing Services, eventually giving rise to tax reports or reports of offences, whose results by subject are given in the following table.

<table>
<thead>
<tr>
<th>Origin</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Information and Investigation Office (ONII)</td>
<td>262</td>
</tr>
<tr>
<td>Other subdirectories-general in the Customs Department</td>
<td>123</td>
</tr>
<tr>
<td>Regional offices</td>
<td>361</td>
</tr>
<tr>
<td>Mutual assistance (*)</td>
<td>386</td>
</tr>
<tr>
<td>Other</td>
<td>96</td>
</tr>
<tr>
<td>Total</td>
<td>1,228</td>
</tr>
</tbody>
</table>

(*) This refers to the European Anti-Fraud Office, Member States and Third Countries Source: Customs and Excise Department
In 2001 the Oficina Nacional de Investigación del Fraude dealt with 701 files on exchange of information with other States' tax authorities, through the DTC and the EU Directives.

The Oficina Nacional de Información e Investigación in 2001 opened 1,524 files. Their origin is shown in the table below. After the analysis of these files, conclusions were sent to the different Audit Services, which resulted in tax adjustments or reports on tax crimes.

<table>
<thead>
<tr>
<th>Source of information used to open the files of the national office of investigation and information</th>
<th>Files</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Office of Investigation and Information (ONII)</td>
<td>102</td>
</tr>
<tr>
<td>Other Deputy General Directorates of the Customs Department</td>
<td>346</td>
</tr>
<tr>
<td>Regional Offices</td>
<td>557</td>
</tr>
<tr>
<td>Exchange of Information</td>
<td>402</td>
</tr>
<tr>
<td>Others</td>
<td>117</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>1524</strong></td>
</tr>
</tbody>
</table>

Source: Department of Excises and Custom Duties

26. How long does it take your country to answer a Member State's request? How long does it take for a Member State to answer your country's requests? If possible, for both questions, mention the number of requests that took less than three months and those that took over three months. Please give statistics from the past ten years.

It would depend on the case and we do not have statistical figures regarding this item.

27. Do the incoming requests and the requests made by your country and the automatically and spontaneously exchanged information mainly focus on certain types of direct tax? If so, please mention the type of tax and the number of requests.

We do not have information available.

28. Under Article 8 of Council Directive 77/799/EEC it is possible to refuse the provision of information. How many times per year does your country refuse to answer incoming requests for the reasons listed in Article 8? How often do other Member States refuse to answer your requests for the reasons listed in Article 8? What is the most frequent reason given to refuse the exchange of information? If possible, please give statistics for the past ten years. Are there any other instruments available in your country to refuse the provision of information? If so, please describe them.

We do not have information available. Probably there are refusals in cases where the requests are not properly made.

29. How many times per year does your country exchange information with other Member States on the basis of a double tax treaty? If possible, please give statistics for the past ten years.

We do not have aggregated information relating to DTTs within the EU. Nevertheless, regarding automatic exchange with third countries in 2006 the following figures can be given:
3.12.3. Efficiency and effectiveness of mutual assistance in tax matters

1. The aim of Council Directive 77/799/EEC was to reduce tax evasion and tax avoidance across the frontiers of Member States by strengthening the collaboration between the Member States. With regard to the exchange on request, the automatic exchange of information and the spontaneous exchange of information: Do you think one of these is more effective in achieving these aims than the others? If so, please give reasons for your opinion.

The three types respond to different circumstances and each is useful in its own area: a) information will be supplied on request when possible irregularities have been detected and it is necessary to confirm some information in another country; b) spontaneous information when there are other data that indicate a possible irregularity in another country that may be unknown to this one; and c) automatic information to apply more generic mechanisms of risk analysis. In the medium term, it seems necessary to promote the latter, which requires specific reciprocal agreements with the different countries involved. Moreover, an acceptable quality of the information is required in order to ensure efficiency.

2. Where a taxpayer in your country has larger or more extensive duties to cooperate when the facts and circumstances affect a foreign country (see question V.2): Do you think these duties are more effective in reducing tax evasion and tax avoidance than the possibilities to exchange information given by Council Directive 77/799/EEC or the other instruments on cross-border information exchange?

In practice, the exchanges based on the two types of legal instruments have been extended to the same procedural model.

3. Do you see any differences in the effectiveness in reducing tax evasion and tax avoidance between the double tax treaties and the relevant Council Directives? If so, can you say what these differences are and what they result from?

Although these instruments are very similar in practice, individual cases must be examined in the light of treaties. Some treaties are somewhat more restrictive in specific aspects, while others incorporate aspects not included in Council Directive 77/799/EEC (although included in other Community Directives or Commission Regulations), such as the exchange of information for other taxes not covered by the treaties or the collection of taxes.
4. How efficient is the exchange of information via the electronic database VIES as regulated in Articles 22 et seq. of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax? What potential problems do you envisage and which problems have already occurred when using VIES?

Given the free circulation of goods without border controls within the EU, the VIES exchange system is essential for the control of the Value Added Tax. The current VAT system has led to types of avoidance and evasion that require both a high degree of collaboration between the administrations of the MS and quickness of response. In this system the delay between the occurrence of events and the use of information by the affected country is long, and specific areas, such as services, remain uncovered. On the other hand, where irregularities are supposedly detected, it is usually necessary to request additional, more detailed information.


The system responds to the previously mentioned idea of strengthening automatic exchange mechanisms. The primary problem detected is the identification of the information holders, given the absence of a single system of personal identification. This problem has been solved in the case of VAT or special taxes but not in the case of personal taxes. This reduces the system efficiency since it limits automation and increases the cost of dealing with the information.

6. How efficient is exchange of information in preventing tax fraud and connected problems in the EU?

7. Article 8 of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments enumerates the information that the paying agent has to report to the competent authority of the Member State where the beneficial owner is resident. Do you think the minimum amount of information provided for in Article 8 is sufficient to ensure the effective taxation of savings income? If not, which additional information would be necessary?

8. Do you see possibilities to amend the way information is exchanged on the basis of Council Directive 2003/48/EC of June 2003 to ensure the effective taxation of savings income and to remove undesirable distortions of competition? If so, please describe the amendments that could be made.

9. One of the problems in mutual assistance in tax matters between the Member States is that misunderstandings may occur because of the different languages involved. How do you generally assess the linguistic quality of the information given to your country? ("understandable in a good and easy way" or "understandable in bad way") How much of the information your country gets each year is understandable in a bad way? If possible, please give statistics for the past five years.

The problem created by the use of various languages in the exchange of tax information is obvious; nevertheless, it is an assumed and inevitable difficulty, and all available means are employed to make sure the information received is taken into account.

Except in rare circumstances, however, the information is usually received in English and is basically of a highly technical, tax nature.

10. How many times per year does your country have to make additional or further enquiries concerning information already given by a Member State? How many times per year does a Member
State make additional or further requests concerning information your country has already given to that Member State?

Although there are no available statistics to back up the following: in theory, a partial response is part of the process and can sometimes be very useful due to its immediacy. However, the records are not complete until a full response is received. Similar requests are responded to while identical requests (duplicates) are rejected by indicating when and with what reference a response was made.

11. Are there any differences among the Member States concerning the quality of the answers provided? In your view, what could be the reasons (e.g. differences in the material domestic tax law, administrative tax law or bank secrecy) for these problems?

Some of the information sent by certain countries is limited because of domestic laws, including banking secrecy. However, the most general limitations are due to practical reasons: little development of structures devoted to the exchange of information and limited resources to deal with the increasing need for this exchange.

In addition, clear differences between countries exist in the three types of exchange, and because of any of the reasons mentioned above, together or separately. To those reasons another very important must be added: the degree of development and the level of progress of the various tax offices. In the case of automatic information, differences are not only observed in terms of their content, but also in terms of their format and the identification of the information received.

12. Do you think the official channels of answering incoming requests are reasonable or do you think they are too circuitous?

13. Do you think there are any ways mutual exchange could be made easier and quicker? What are they?

Promoting the exchange of automatic information seems to be a necessary and efficient way to deal with the increasing need for information about operations abroad.

14. Under Article 18 of Commission Directive 2002/94/EC of 9 December 2002, a Member State should inform the other Member State immediately if a request for recovery or precautionary measures becomes devoid of purpose as a result of payment of the claim or of its cancellation for any other reasons or if the amount of the claims is changed. What are the experiences with this rule in your country? In your opinion, how well does the exchange of this kind of information between the Member States work?

At present, messages of this type are mostly sent through CCN mail (a secure mail system between the proper authorities related to mutual assistance for tax collection purposes), although some of them continue to arrive by normal mail, and are then sent by fax to the corresponding actuarial offices. Thus, in the majority of cases it is possible for the requested authority to quickly suspend the debt recovery procedure.

However, it is relatively frequent to find that money has been collected before the revocation order is received and that it has not been transferred to the requesting authority, which leads to either a refund of undue payments or to their being eventually sent to the requesting authority as indicated in their instructions.

15. Under Article 11 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, the requested authority has to inform the requesting authority immediately about all of the measures taken that
concern a request for recovery. Do you think that the exchange of information meets these requirements in practice?

In practice, the requested authority quickly acknowledges receipt of the requests received and subsequently presents a report of the "result" of the debt collection to the requesting authority. Reports about "collection proceedings in progress" are only issued in particular cases, that is for relevant reasons or when the requesting authority asks for them.

16. In your view, how effective is the European Convention on Mutual Assistance in Criminal Matters in solving cases that affect tax crimes?

Within the framework of the European Union, the legal instruments used are Directive 77/799 and the exchange clause contained in the DTIs. (The treaties take precedence if they allow broader formulas of cooperation.) We cannot identify the legal instrument that the question refers to, but if it were the Agreement concerning Judicial Assistance in Criminal Matters, the Tax Office would not have to comment on it.

17. In your view, how effective are common audits to prevent tax avoidance and to solve cases that affect tax crimes?

18. Are there any national reforms or do you expect any national reforms to facilitate the use of evidence held by banks or other institutions in the tax procedure?

19. How efficient is the collection of taxes as regulated in Council Directive 76/308/EEC, on the basis of double tax treaties and on basis of bilateral treaties, if these exist? If possible, please give reasons for differences in the efficiency of the various legal instruments. How efficient is the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters in this regard?

20. Do you see reasons why foreign tax administrations fail to supply information?

3.12.4. Legal Protection

3.12.4.1. In general

In most jurisdictions taxpayers have certain rights with respect to an information exchange. Please describe the legal rights of a taxpayer affected by an information exchange.

3.12.4.2. Legal protection with respect to incoming requests

1. What kind of legal protection exists for the taxpayer if another Member State makes a request concerning him? Is he informed that a Member State made a request concerning him?

The protection of taxpayers affected by an information exchange is envisaged in general regulations. In Spain there is no specific regulation with regard to the taxpayer in this situation, apart from the regulations on legal protection of taxpayers in general. It should be mentioned, nevertheless, that there are some regulations referring to the position of taxpayers affected by an exchange of information procedure, whose objective scope is exclusively domestic.

In particular, the provisions of the Spanish Constitution (CE), which constitute the starting point for this topic, may be mentioned. Article 18.1 CE refers to the right to
honor, the right to privacy and the right to freedom from injury to reputation. Besides, Article 18.4 CE regulates the right to control the information provided, as can be seen from its wording: “the use of computer information shall be legally limited in order to grant the right to honor and the right to privacy of the citizens and the complete exercise of their rights”. Likewise, Article 105 CE establishes the right of citizens to participate in administrative procedures, and Articles 103 and 106 CE envisage the right to control the legality of administrative acts.

In the case of a request for information made by another State, the Spanish taxpayer may not be informed about the request, but may be made aware of particular proceedings carried out by the Spanish Tax Administration in order to accomplish the transfer of information. Should the Spanish authorities already have the information requested, Article 95.1 of the GTA allows the transfer of that information without the taxpayer's authorization. In this sense, Article 11 of Act 15/1999 on the protection of information provides that if the information requested is already in the authorities' database, the taxpayer's consent to provide it it not be necessary provided that this is legally authorized. This last aspect is covered by Article 95.1 GTA, as stated above.

On the other hand, under Article 23.2 of Act 15/1999 the exercise of rights such as the right to enter, or the right to modify or to cancel information may be refused if it obstructs the administrative procedures and, in particular, when the taxable person is involved in a tax examination procedure. Nevertheless, there is an Instruction of the Spanish Agency for information protection (Agencia de protección de datos) on the international transfer of information in 2000 that requires the prior acknowledgement of the person involved in case of transfer of information abroad. On balance, it can be said that the obligation to notify the taxpayer about the exchange of information procedures must be legally introduced, as held by the Constitutional Court (hereinafter, TC) in its judgment 292/2000 (question of law 13), in which it ruled that any limitation of this right to be informed of such procedures must be justified in order to avoid a constitutional violation.

Another point we would like to raise concerns the situation in which the Tax Administration receiving the request does not have the information in question, but can obtain it directly from the taxpayer. In this case, the taxpayer is informed about the content of the information requested and the period of time to which this information refers, pursuant to Article 55 of Royal Decree 1065/2007 of 27 July. Moreover, when the Tax Administration addresses a third person in order to obtain tax information about a taxpayer as a consequence of a request for information made by another State, the third person should be informed about the proceedings in course, but not so the taxpayer concerned who, on the contrary, is not informed of this circumstance.

Even in the case of bank information, the obligation of the Tax Administration to notify the taxpayers concerned of requests for information received by credit entities was recently abolished under Article 57 of Royal Decree 1065/2007 of 27 July. In the past the taxpayer even had the right to be present in the bank when the tax examination was carried out but, in accordance with the new regulation, these rights have been eliminated as far as Spanish law is concerned.

2. Does there have to be a hearing before information concerning him is transferred to another Member State? Does provisional/interim legal protection exist in these cases?

Article 105 c) CE provides the right of audience of the person involved in administrative procedures. In line with this, the Spanish Supreme Court (hereinafter, TS) reasoned in its decision of 17 January 1992 that a citizen should be heard in all administrative procedures, even though it is not explicitly envisaged in the proceedings. However, Spanish law has not yet regulated the right of audience of the taxpayer prior to the transfer of
information to the other State. The GTA envisages this right exclusively in the internal procedures set out in this Act, but not in connection with the international exchange of information mechanism.

Obviously, the right to be heard to be exercised by the taxpayer prior to transfer of the information requested by the other State is dependent on prior notification of this request for information, otherwise it would not be possible to exercise this right to be heard. If the information is obtained directly from the taxpayer, he will have the right to be heard before the information is transferred to the other Member State. Needless to say, this right to be heard is of special relevance when the information concerns a commercial or business secret of the taxpayer involved. In this situation, it is the taxpayer and not the Tax Administration who should clarify whether the information to be exchanged represents a commercial secret or not.

Finally, in contrast to the opinion that the right to be heard is only recognized in the course of the procedures to be completed by an administrative act, it should be highlighted that as long as it is not expressly excluded, and this is not the case, the right to be heard of the person affected should be granted in any type of administrative procedure whatever.

3. **Does the taxpayer have the right to bar the requested state from giving tax information concerning him to another Member State?**

From the point of view of the taxpayer, the only way to prevent the transfer of information by Spain to the other State is to request a review of the legality of this administrative procedure. It should be borne in mind, nevertheless, that these administrative appeals only imply the so called a posteriori control.

4. **Does an objection have suspensive effect? Does the taxpayer have the right to appeal and does an appeal have suspensive effect?**

At present Spanish law does not provide any right to appeal against the decisions on the exchange of information system; notwithstanding this, it could be asserted that Article 227.1 GTA contains a right to appeal against these kinds of decisions inasmuch as these acts decide the case or bring an administrative procedure to an end.

The question of the suspensive effects of an appeal depends on whether the taxpayer requests a suspension and the necessary guarantees provided by him (Article 233 GTA). It is important to note that the Spanish Tax Administration will have no information concerning any such guarantees and will transfer the information without taking into account the tax assessment of the other State. Apart from the decision on the transfer of information, the way that information is obtained by the Tax Administration, either from the taxpayer or from a third person, may also be challenged. The taxpayer concerned may not appeal against the request for information made to a third person, due to the fact that the taxpayer will not generally be notified about such requests.

3.12.4.3. **Legal protection with respect to a request being made**

5. **What kind of legal protection exists for the taxpayer where his country of residence intends to send a request to another Member State about his tax situation there? Is the taxable person taxpayer informed about this intention and does there have to be a consultation with the taxpayer?**

In the case that the Spanish Tax Administration intends to request information from another State about a taxpayer resident in Spain in the course of a tax examination, it should be taken into consideration that this fact constitutes a justified cause of interruption of the prescription period, whereby this request should be notified to the taxable
person resident in Spain. In this respect, it can be said that there is no administrative obligation to consult with the taxpayer as regards the convenience of the exchange of information with the other State, but only to inform him of the intention of the Spanish Tax Administration to transfer that information.

6. **Does the taxpayer have the right to bar his country of residence from requesting a Member State concerning him? Does provisional/interim legal protection exist in these cases?**

The taxpayer has no right to bar the Spanish Tax Administration from requesting information from a Member State concerning him. As stated above, the only way the taxpayer can prevent his country of residence from requesting information is by an appeal to review the legality of these administrative procedures but, indeed, these appeals only imply a control after the fact.

7. **Does an objection have suspensive effect? Does the taxpayer have the right to appeal and does an appeal have suspensive effect?**

The answer to this question is the same as the answer to question 4 above.

3.12.4.4. **Legal protection in general**

8. **Did this kind of legal protection focused on above exist before Council Directive 77/799/EEC was implemented or has it been developed as a consequence of the implementation? Did Council Directive 2004/56/EC make any amendments in the domestic law on this topic?**

This kind of legal protection did not exist before Council Directive 77/799/EEC was implemented in Spain. Neither the General Tax Act of 1963 nor the administrative regulations at that time (basically, the Juridical Regime of the State Administration Act of 26 July 1957 and the Administrative Procedure Act of 17 July 1958) provided protection to the taxpayers regarding mutual assistance procedures.

On the contrary, this type of legal protection was developed as a consequence of the implementation of the aforementioned Directive. In particular, Royal Decree 1326/1987 of 1 September established the proceedings related to the application of the provisions of the Directive as far as Spain is concerned. Articles 8, 9 and 10 of the Royal Decree are of particular importance in achieving a proper balance between the need to make mutual administrative assistance in tax matters effective and the need to provide safeguards for the taxpayers. Article 8 regulates the limits to the use of the information; Article 9 envisages the limits to the exchange of information; and Article 10 focuses on notifications.

Furthermore, Article 3, h) of Tax Act 1/1998 of 26 February also referred to the competent authorities' obligation to observe secrecy in respect of information obtained by the Tax Administration. This provision moreover prohibits the use of that information for purposes other than the application of taxes and the communication of this information to a third party. Besides, Article 8 of Act 1/1998 regulated the disclosure of certain secret information supplied to the Tax Administration. At present, the rights set out in Act 1/1998 are embodied in the Spanish General Tax Act 58/2003 of 17 December. Royal Decree 1065/2007 of 27 July also includes some taxpayers' rights with regard to the application of taxes. In any case, it should be taken into account that none of these provisions concern the mutual assistance procedures in particular but tax law proceedings in general.

From a more general perspective, Act 15/1999 of 13 December on the protection of personal information also provides legal protection concerning the fundamental
Rights and freedoms of the individuals concerned. Needless to say, although not explicitly referred to in the Spanish regulations, it is implicitly assumed that the rights and safeguards of persons under national laws and as regards administrative practices are not reduced in any way by implementation of the directive.

Finally, it may be said that Council Directive 2004/56/EC did not introduce any relevant amendments in domestic law regarding this topic. This Directive was implemented in Spain by Royal Decree 1408/2004, of 11 June and Royal Decree 161/2005, of 11 February, which introduced some changes in Article 8 (paragraphs 1 and 2), Article 9 and Article 10 of Royal Decree 1326/1987, which will be commented on in the following.

9. If the information can be obtained from a third person or institution (e.g. insurance company, business partner), does that person or institution have any specific rights?

According to Spanish domestic law, there are no specific rights envisaged in the case that the information is obtained from a third person or institution.

10. Is the taxpayer also protected by human rights treaties? If so, please describe this protection.

The Spanish taxpayer is protected by the European Convention on Human Rights of 1950, whose Article 8 establishes the right to privacy. Likewise, the Bill of Fundamental Rights of the European Union regulates in Article 8 the protection of personal information.

11. What legal protection does the taxpayer have when the Member States cooperate to collect the tax? What are the limits to the obligation to provide assistance in your country?

With regard to the legal protection of the taxpayer in the mutual assistance for the recovery of tax claims, the limits to the obligation to provide assistance in Spain are currently contained in the four Spanish tax treaties to avoid international double taxation that include a specific clause on assistance in the collection of taxes (those with Belgium, France, Algeria and Colombia), inasmuch as Royal Decree 704/2002 of 19 July, which implements the European directive (Directive 2008/55/EC; please note the recent Proposal for a Council Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, COM/2009/0028 final – CNS 2009/0007) on this matter, does not establish any provision on this question at all).

Double tax treaties signed by Spain observe the wording of Article 27 of the OECD Model, which sets out that in no case may these provisions be construed so as to impose on a Contracting State the obligation: a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State; b) to carry out measures which would be contrary to public policy; c) to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice; d) to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State.

On the other hand, it should be pointed out that Spain has not yet signed the Council of Europe/OECD Convention on mutual administrative assistance in tax matters of 1988 and, therefore, the limitations envisaged in this Convention concerning protection of persons in the field of assistance in recovery are not applicable in Spain.

On balance, it can be concluded that limits to the obligation to provide assistance in tax collection by Spain derive basically from the double tax treaties, and also from the directives on exchange of information which, once implemented in the domestic law, prohibit any obligation to provide information if the Member State is prevented by its
laws or administrative practices from collecting or using this information for its own purposes. The provision of information – often used in tax collection – may also be refused where it would lead to the disclosure of a commercial, industrial or professional secret, or of information whose disclosure would be contrary to public policy.

12. **May the information exchanged under Council Directive 77/799/EEC be used in a criminal trial? Is the requesting State's tax administration obliged to ask the requested State for permission to use this information in criminal trials? Does the tax administration of the Member State that has obtained the information need a specific authorization by the national courts?**

In accordance with Article 8 of Royal Decree 1326/1987 of 11 September (which implemented Directive 77/799/EEC in Spain), all information supplied to a Member State may be made known only in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or relating to, the making or reviewing of the tax assessment and only to persons who are directly involved in such proceedings; such information may be disclosed during public hearings or in judgments if the competent authority of the Member State supplying the information raises no objection.

However, this last point was modified by Article 8 of Royal Decree 161/2005 of 11 February, which implemented Directive 2004/56/EC in Spain. As expressed in this directive, "it is inappropriate, if the fight against tax fraud is to be effective, that a Member State which has received information from another Member State should subsequently have to request permission to disclose the information in public hearings or judgments". For that reason, Article 8 of Royal Decree 161/2005 of 11 February specifies that such information may be disclosed during public hearings or in judgments, provided that the competent authority of the Member State supplying it raises no objection "at the time when it first supplies the information". Finally, no specific authorization is needed by the national court in order to use such information in criminal trials.

13. **From a more general point of view, what is the relationship between criminal and tax proceedings and judgments in your country? How do they influence each other? Are there any national reforms expected to facilitate the use of bank or financial information as evidence in tax law cases?**

Concerning the relationship between criminal and tax proceedings in Spain, it should be noted that Article 180 of the General Tax Act obliges the Tax Administration to suspend the procedure and to send the case to the criminal court or to the prosecuting counsel if the Tax Administration considers that it may not only be a tax contravention – set out in the General Tax Act – but a tax fraud regulated in the Criminal Code. This legal provision is developed by Article 32 of Royal Decree 2063/2004 of 15 October.

In other words, the administrative proceedings must be suspended, as the above-mentioned article contains the principle of non-concurrence of sanctions, which means that a case cannot be sanctioned by both a criminal court and the Tax Administration. Nevertheless, if the criminal court does not consider that a tax offence exists, the tax authorities will continue the administrative proceedings on the basis of the facts that the criminal court considered to have been proved.

With regard to bank or financial information as evidence in tax law cases, there are no national reforms in Spain to facilitate the use of this type of information.

14. **May a taxpayer claim damages if a state discloses his commercial, industrial or professional secrets by giving information to another Member State? If so, please concretize.**
If the exchange of information involves the disclosure of a commercial secret to another State, the taxable person can sue the Tax Administration for damages from this disclosure. In accordance with Article 139 of Act 30/1992, the person concerned can sue the Administration in cases of an illegal transfer of information. Provided that certain conditions are met – in particular: the damage should derive from the administrative proceedings, be real and effective, and have an economic value –, the procedure to claim this type of damages is detailed in Royal Decree 429/1993.

15. Is the taxpayer informed when information concerning him is exchanged on the basis of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments? Does legal protection exist in these cases? If so, please describe this legal protection.

By virtue of Article 9 of Directive 2003/48/EC, the provisions of Directive 77/799/EEC apply to the exchange of information under this directive, provided that these provisions do not derogate therefrom. However, Article 8 of Directive 77/799/EEC does not apply to the information to be provided pursuant to Chapter II of Directive 2003/48/EC. Apart from the provision of this article, which extends the general legal protection of the exchange of information system to the scope of the taxation of savings income in the form of interest payments, there is no other legal protection in this case.

16. If the tax authorities make errors and/or infringe the taxpayer's rights during a tax examination in State A (at the request of State B) is the taxpayer able to contest this and the following tax assessment by State B's tax authority?

This topic is a disputed question in Spain because, while some authors (García Prats, F.A.: ?Asistencia mutua internacional en materia de recaudación tributaria?, en: Cordon Ezquerra, T. (Dir.): ?Manual de Fiscalidad internacional?, Instituto de Estudios Fiscales, Madrid, 2004, p.33; De Francisco Garrido, R.: ?La cooperación multilateral en el ámbito de la OCDE?, Cuadernos de formación del Instituto de Estudios Fiscales, volumen 3/2007, p.93) consider that the taxpayer is able to contest this infringement by State A's authorities (the requested State), another group of scholars (see, for instance: Grau Ruiz, M.A.: ?La cooperación internacional para la recaudación de tributos: el procedimiento de asistencia mutua?, La Ley, Madrid, 2000, pp.254-266, concerning assistance in tax recovery) defend the possibility of contesting it in both State A and State B (the applicant State), depending on each particular case.

In principle, the general rule would be that all decisions concerning the carrying out of tax examinations must be made by the requested State, so on this basis, we consider that the taxpayer's appeal against that infringement should be submitted to State B's tax authorities.

17. Have problems involving a potential infringement of the right to privacy deriving from the mutual assistance occurred in your country?

No such problems have occurred in Spain so far.