

TAX POLICY AND FINANCIAL MARKETS: THE DILEMMA BETWEEN TRANSPARENCY AND PRIVACY

**Keynote Speech by Paolo Bernasconi
at the Liechtenstein Dialogue 2004, Vaduz,**

"TAX COMPETITION IN THE GLOBAL MARKETPLACE: RULES FOR A SUSTAINABLE FRAMEWORK"

I n t r o d u c t i o n

A former European statesman said: *"Taxes are like the shadow of a man, because it is following him from his birth to his death"*. In order to try to escape from their shadow, billions of private persons and corporations are seeking shelter in favour of their privacy as well as financial centers providing the protection of privacy against their domestic fiscal authorities.

The aim of a Keynote Speech is to give the input to a constructive panel discussion and therefore I will try to present a neutral picture as complete as possible in order to permit a broad and deep discussion to the panelists. Thanks to some posters you will get the picture of the "working in progress" concerning the permanent dilemma between transparency and privacy which is one of the consequences of the dialectic relationship between individuals on one hand and, on the other hand, organized public communities, i.e. States and international organizations. One of several possible approaches begins from the globalization of the market which was followed by the globalization of the rules and therefore by the globalization of the transparency. Through a quick analysis of the following posters we will get the inventory of several criteria to answer the question "how much privacy, how much transparency is necessary"?

Poster 1 Transparency versus privacy

Poster 2 Integration of a domestic banking system into globalised prudential rules

Poster 3 Extraterritorial initiatives on fiscal matters

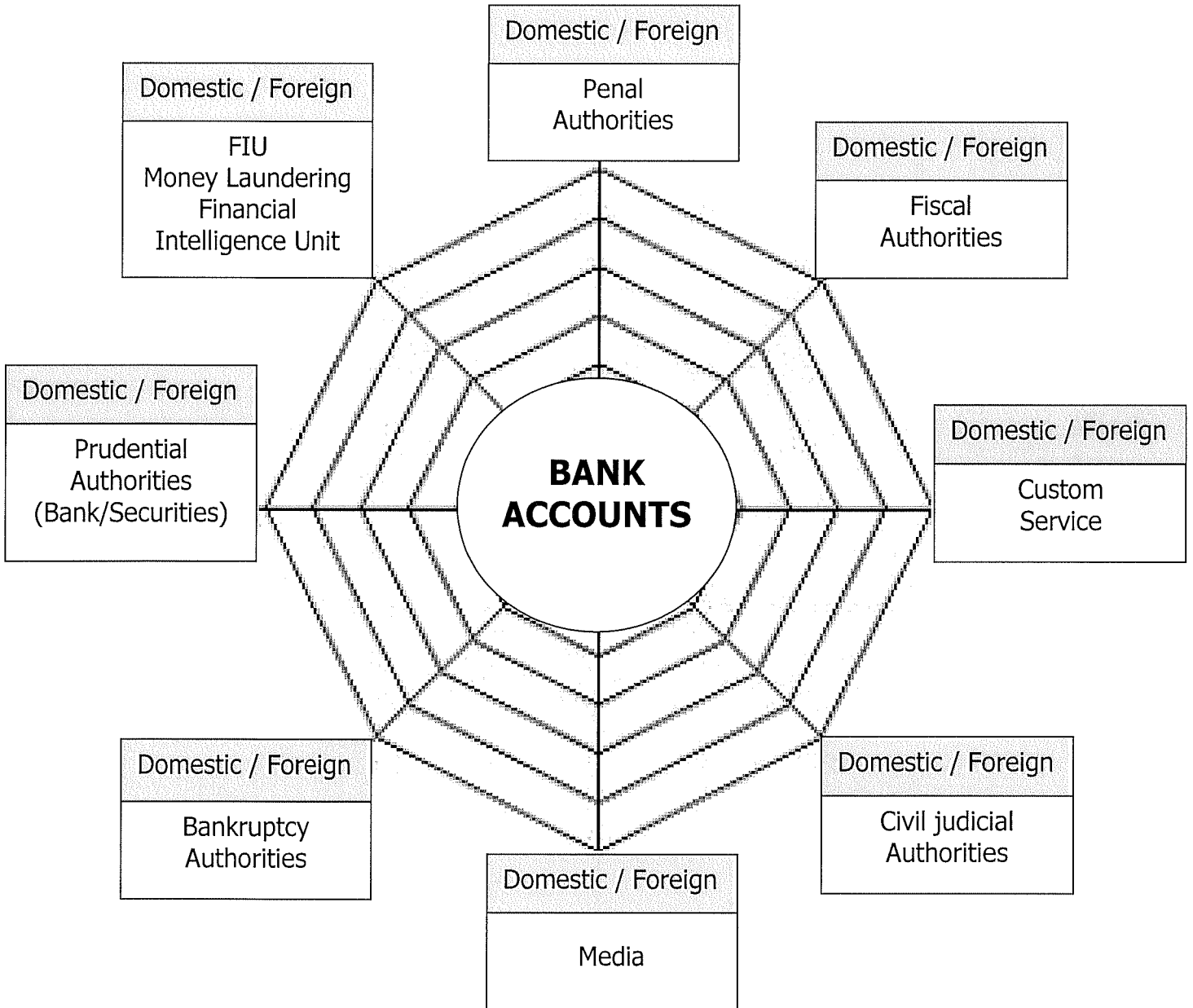
Poster 4 Some factors undermining privacy

Poster 5 Who considers fiscal violations as predicated offence of money laundering?

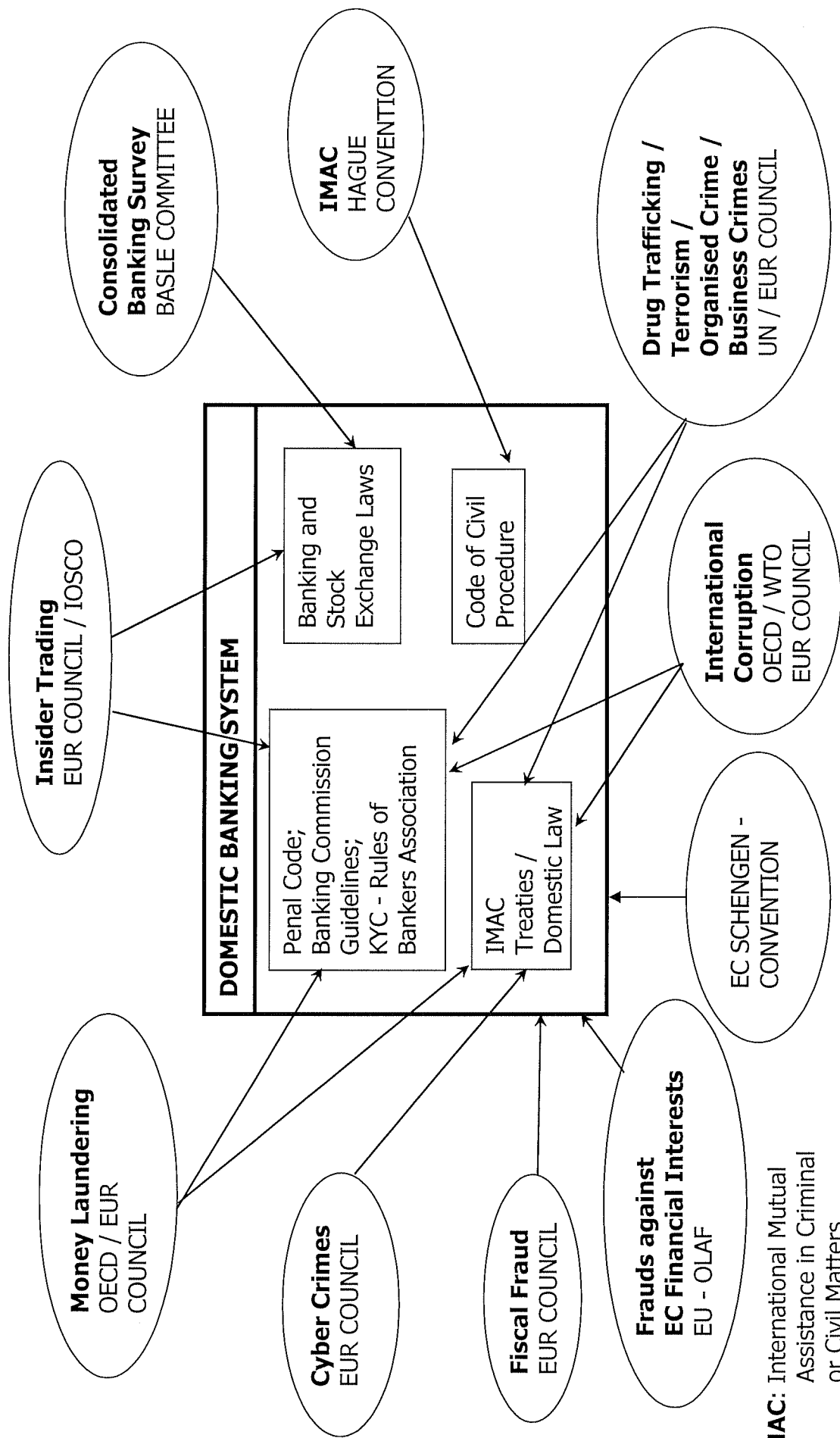
Poster 6 Cooperation by Swiss Authorities in favour of foreign proceedings concerning illicit activities against public financial interests

P e r s p e c t i v e s

TRANSPARENCY VERSUS PRIVACY

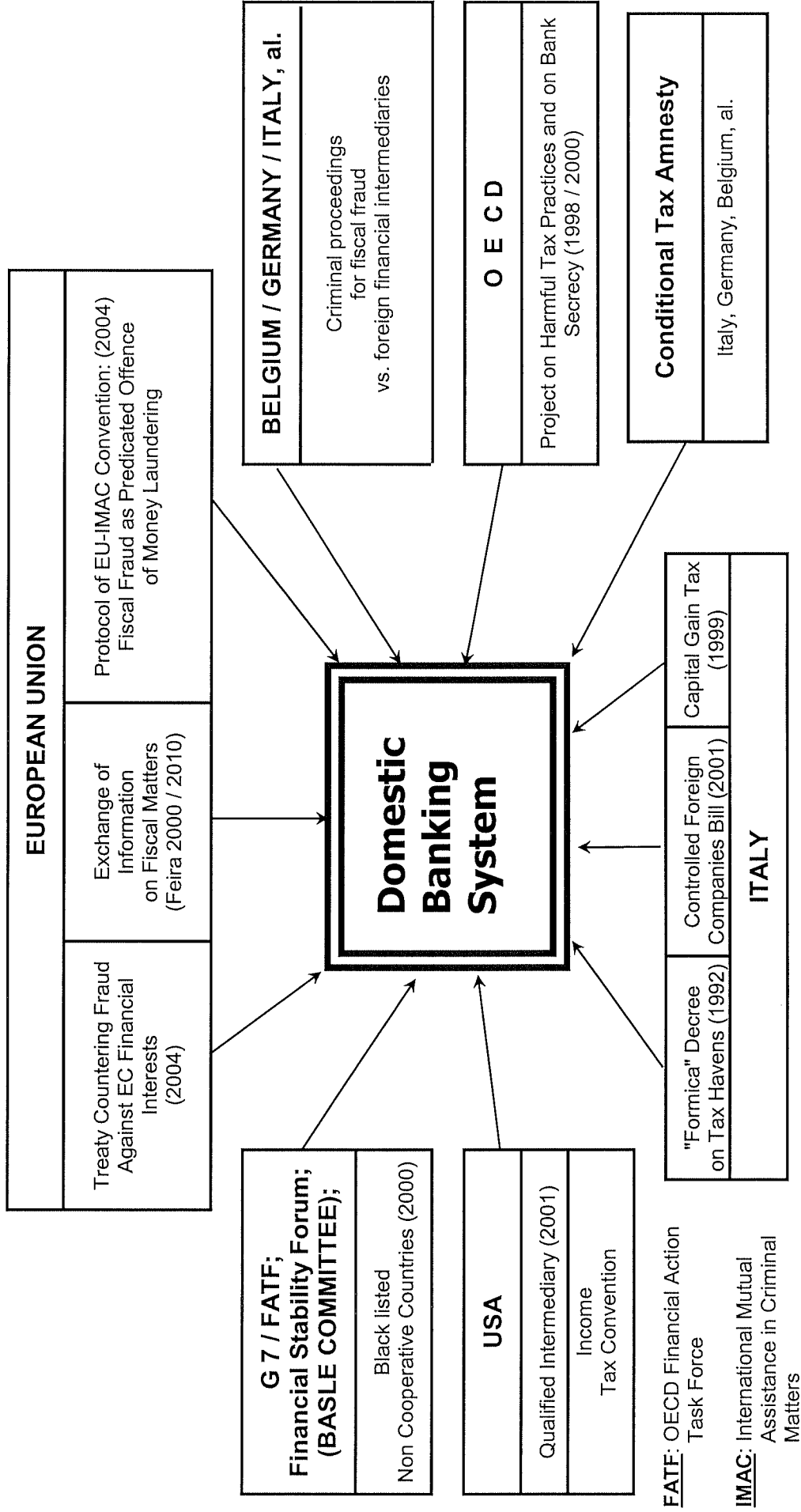


INTEGRATION OF A DOMESTIC BANKING SYSTEM INTO GLOBALISED PRUDENTIAL RULES

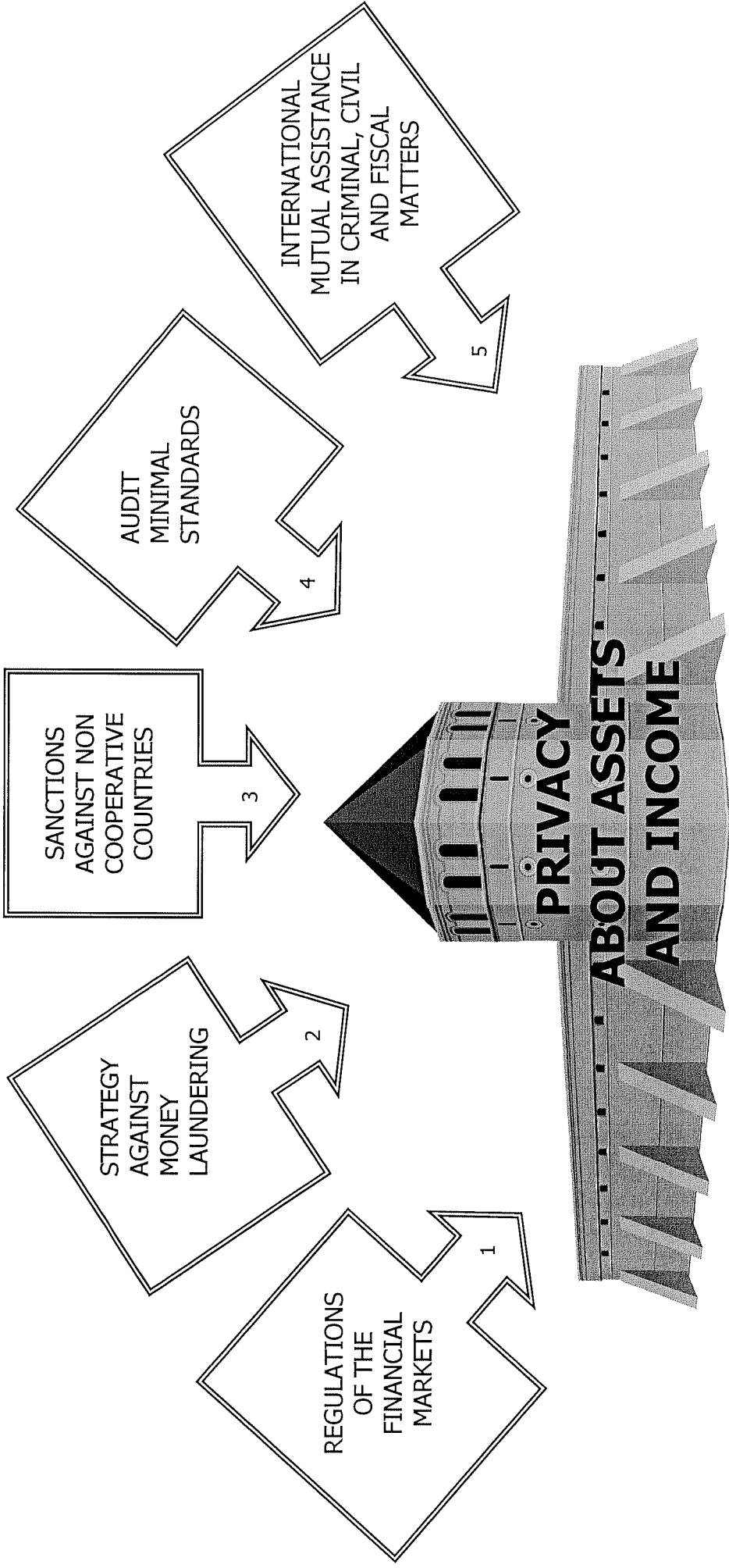


IMAC: International Mutual Assistance in Criminal or Civil Matters

EXTRATERRITORIAL INITIATIVES ON FISCAL MATTERS



SOME FACTORS UNDERMINING PRIVACY



1. Disclosure of the names of bank stock holders, of the names of investors suspected of insider trading, etc.
2. Know Your Customer (and the B.O.), ban of anonymous accounts, mention of the names of the beneficiary of bank payments, etc.
3. Economic sanctions against shelter companies incorporated in offshore countries because they are recognised as the favorite instrument of criminal activities
4. Legal duty to report to the authorities; "piercing the veil" strategy, etc.
5. Sophisticated means of getting proofs abroad are also at disposal of the investigation against fiscal violations

COMMENTS TO POSTER 4

Some Factors Undermining Privacy

FIRST ARROW Transparency improving the performance of financial markets

1. The entire regulation on financial markets aims to achieve transparency as the main goal, for instance by
 - (i) improving the quality and reliability of corporate balance sheets
 - (ii) strengthening the responsibility of auditing
 - (iii) the obligation to mention the names of both the bank customers, of whom gave an order to transfer funds and also of the beneficiary of credited funds
 - (iv) conditioning the public authorisations by disclosure of the identity also of the main stock holders of banks and financial corporations
 - (v) creating a worldwide network of international exchange of information among the supervisory authorities on banking, stock exchanges, funds, etc., for instance aiming at a cross-border diffusion of the identity of customers suspected of insider trading.

2. As a result, the globalization of markets and the related globalization of information imply a global diffusion of a huge quantity of data that has traditionally been covered by secrecy in the past¹.

SECOND ARROW International initiatives extending the sophisticated means of criminal investigation also against fiscal fraud

3. Transparency to prevent money laundering as well as financing terrorism

Since the launch of the FATF on July 14, 1989, the main target has become fighting anonymity through the "Know Your Customer" Principle, the ban of anonymous bank accounts, the keeping note of the identity of the beneficial owner even of offshore shelter companies, the duty to report to the relevant authority all suspicious transactions, etc.

¹ For more details see: BERNASCONI Paolo, *Supranational and Extraterritorial Trends in the Regulation of the Banking and Finance Markets - Measures to Stifle Corruption, Money-Laundering, Tax and Financial Offences and Unlawful Commerce Committed by Organised Crime*; *same author*: Appendix as a Concrete Example: Guidelines to Prevent the Misuses of Undercontrolled Territories for Criminal Purposes. A Proposal, in: *National Sovereignty under Challenge*, ISPI Istituto per gli Studi di Politica Internazionale, Milan 2002, p. 73; BURCKHARDT Fabian, *Nachbesserung durch den Gesetzgeber nötig: Internationale Amtshilfe der Eidgenössischen Bankenkommission für ausländische Finanzmarktaufsichtsbehörden unter dem Börsengesetz*, in *Aktuelle Rechtsprobleme des Finanz- und Börsenplatzes Schweiz*, 11/2002-2003 (Peter Nobel, Hrsg.), Bern 2004, p. 365 et seq.

4. Fighting slush funds to prevent corruption

Creation of funds outside the legal circuit of the corporations represents typical means to defraud fiscal duties. Because they have been identified also as typical means to corrupt public servants, slush funds have become also a target of audits and criminal authorities in order to neutralize the funds used for the international corporate gross corruption².

5. Offshore: only tax shelters or also shelters for criminal proceeds?

Offshore companies, on one hand, are perfect for violating fiscal duties: but, on the other hand, each case of financial crime and money laundering reveals the worldwide use of offshore companies by criminals as well.

6. Laundering of the proceeds of fiscal fraud as an instrument of fiscal proceedings

FATF aims to ensure that fiscal fraud shall be recognized worldwide as a predicated offence of money laundering. The EC has already reached this goal in the context of international cooperation with the European non-EC financial centres like Switzerland, Liechtenstein and Monaco, also in order to fight crimes against the EC financial interests.

THIRD ARROW Sanctions against non-cooperative countries

7. Shelter companies incorporated in offshore countries have been identified as typical means of money laundering and of white collar crimes³. Indeed, several international organizations having recognized the laxity of rules in those countries where such shelter companies were incorporated, have adopted sanctions of different nature, from the economic areas to the political ones (first of all through blacklisting countries), in order to reduce and neutralize the freedom of movement of such companies. The due diligence by banks compliance officers and auditors now relevantly focuses on all transactions made by shelter companies, reckoning their attractiveness⁴.

² For major details see: BERNASCONI Paolo, Off-Shore Domizilgesellschaften als Instrument der Bestechung und der Geldwäscherei - Zehn neue Empfehlungen gegen den Missbrauch von Off-Shore Domizilgesellschaften, in: Korruption im internationalen Geschäftsverkehr – Bestandesaufnahme – Bekämpfung – Prävention, Basel, 1999, 354-372; , Good Offices to Bad Governance: Towards International Rules against the Abuse of Off-shore Companies, Journal of Money Laundering Control, Vol. 2, London, 1998, 120-127.

³ Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes, OECD Paris 2001 (see: <http://www1.oecd.org/publications/e-book/2101131e.pdf>)

⁴ For more details see: Ten Recommendations against the misuse of off-shore companies as instruments of corruption and money laundering - a proposal, in Responding to Corruption. Social Defence, Corruption, and the Protection of Public Administration and the Independence of Justice, International Society of Social Defence, Naples 2000, 431 et seq.

FOURTH ARROW Minimal audit standards

8. Several domestic laws and soft laws provide as an auditor's duty to check that KYC and similar rules be respected and that cases of violations and misorganisation are reported to the board.
9. Auditors are also included as main actors within the "piercing the veil" strategy aiming to avoid the abuse of shelter companies⁵.

FIFTH ARROW Federal Act on International Mutual Assistance in Criminal Matters (IMAC)

10. Rules and means of the IMAC are still improving, even in paper tracing and assets recovering despite of bank secrecy laws. Therefore, the principle of speciality is continuously weakening, at least de facto.
11. The possibility to get means of evidence from foreign countries is continuously extending to fiscal matters: from fiscal fraud to smuggling, to fiscal evasion, to money laundering of the proceeds of fiscal fraud and professional smuggling⁶ (see the Agreement between the EU and Switzerland of 25th June, 2004, on the cooperation against fraud and other illegal activities against EC financial interests, see Poster 5).

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⁵ Pacini/Swinger/Rogers, The OECD Convention and Bribery in international business transactions: implications for auditors, in: *Managerial Auditing Journal* 17/4 (2002), 205-215.

⁶ WALDBURGER Robert, *Heutige und zukünftige Praxis der internationalen Amts- und Rechtshilfe im Steuerbereich*, in *Aktuelle Rechtsprobleme des Finanz- und Börsenplatzes Schweiz*, 11/2002-2003 (Peter Nobel, Hrsg.), Bern 2004, p. 365 et seq.

**WHO CONSIDERS FISCAL VIOLATIONS
AS PREDICATED OFFENCE OF MONEY LAUNDERING?**

Legal Rule	Fiscal Fraud	Professional Smuggling	Tax Evasion	
			Indirect Taxes	Direct Taxes
Domestic Criminal Code of OECD Financial Centers	O	O	O	O
Int. Convention against Money Laundering of 8.11.1990 (Council of Europe Treaty ETS No. 141)	O	O	O	O
EC-Directive against Money Laundering N. 2001/97/EC of 4.12.2001 (update proposed for 2004) ¹	X	X	O	O
Forty Recommendations of the OECD-Financial Action Task Force of June 2003	X	X	O	O
Treaty on the cooperation about fraud and other illicit activities against the financial interest of the EU of 26.10.2004	X	X	O	O

¹ See: http://europa.eu.int/comm/internal_market/en/company/financialcrime/docs/com-2004-448_en.pdf

**COOPERATION BY SWISS AUTHORITIES IN FAVOUR OF FOREIGN PROCEEDINGS
CONCERNING ILLICIT ACTIVITIES AGAINST PUBLIC FINANCIAL INTERESTS**

**taking also into consideration the Treaty between the EC and Switzerland
on international cooperation about frauds and other illegal activities
against the EC financial interests of 26.10.2004 (The EC-antifraud Treaty)**

	OFFENCE PERSECUTED BY THE FOREIGN AUTHORITY	EC Countries	other Countries
1.	Fraud in order to illegally obtain financial public subsidies	X	X
2.	Money laundering of the proceeds of fraud of public subsidies	X	X
3.	Corruption of public servants	X	X
4.	Money laundering of the proceeds of corruption	X	X
5.	Tax and customs fraud		
5.1.	Direct taxes	X ¹	X ¹
5.2.	Indirect taxes	X ¹	X ¹
6.	Money laundering of tax and customs fraud		
6.1.	Direct taxes	O ²	O ²
6.2.	Indirect taxes	X ³	O
7.	Tax evasion		
7.1.	Direct taxes	O ²	O ²
7.2.	Indirect taxes	X ³	O
8.	Money laundering of the proceeds of tax evasion		
8.1.	Direct taxes	O	O
8.2.	Indirect taxes	O	O
9.	Smuggling	X ³	O
10.	Money laundering of the proceeds of professional smuggling	X ³	O

¹ According to Section 3 § 3 of the Swiss Federal Act about international cooperation on fiscal matters.

² The Treaty between the EC and Switzerland of 26th October 2004 (Section 2 § 4) excludes any cooperation concerning direct taxes.

³ New sort of cooperation provided by the Treaty between the EC and Switzerland of 26th October 2004 concerning EC financial interests.