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The character and implications of risk in the context of economically motivated crime

The subject of this podium leaves open a wide field of interpretations and questions.

Let me start with a simple question: Who wants to commit an economically motivated crime. Nobody, except very few very crazy people. The economic motivation is gain, not crime. I believe that the most famous quotation of Adam Smith, the grandfather of economic theory, about the invisible hand gives a very good description of human motivation:

"He [the individual] generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. […] he intends only **his own security**; […] he intends only **his own gain,** and he is in this, as in many other cases, led by an invisible hand to promote and end which was no part of his intention." [1]

He intends his **own gain**. Sometimes, he may not achieve the intended gain with legal methods, so he might consider illegal ones, crimes. But because he also intends his **own security**, he tries to avoid committing a crime. A thief who's only real talent is stealing or burglary may not have many options to avoid crime. His way of achieving security is to avoid being caught and convicted.

But most others have other options and another understanding of "I intend my own security". Let us look more closely at the concept of "security" as we try to achieve it.

Wikipedia defines security as a measure for the degree of protection against danger, damage, loss, and crime (passive (being victim) and active (being criminal). It is thus a measure of risk against unexpected financial and other losses.

So much for the economic theory.

Now let me be specific and look at the tricky issues around **taxes** and **Swiss banking** which make prominent headlines these days. How can an individual achieve his own security and still

[1] Adam Smith, Wealth of Nations (1776), Book IV, Chapter 2

have the possibility to intend his own gain, e.g. by reducing taxes legally? This becomes a risky decision. How should he proceed?

1. He must follow the rules.
2. He must know the rules. What is legal, what is illegal? In *a national context* this should be relatively easy. The laws and court practices should be known and reliable. If not, he can ask the tax authority for an official (and hopefully binding) ruling before he structures structure his affairs.
3. In *a globalized world*, with many different countries and political and legal systems, this may be a very difficult if not impossible task. What is legal in one country is illegal in the other, and vice versa. This is not only a problem for the tax payer, but also for his bank. In the international context, clients and banks cannot get binding rulings in other jurisdictions. So they depend on expert opinions which are expensive and not really useful if they face problems with tax authorities later.
4. In order to achieve security for the tax payer and his bank some legal principles should be observed by all parties:
   - „Pacta sunt servanda“. Treaties must be kept; in private law and public law. Or they must be cancelled or amended.
   - A key principle of international private law is the "territoriality of law". The United States has shown a growing tendency to disregard this principle.
   - A similar principle in tax legislation is "taxation at the domicile" of the taxpayer. The US concept follows another principle.
   - Changes in laws and rules must "not be applied retroactively".
   - Etc.
5. Especially since the financial crisis governments tend to collect as much taxes as possible. They do that rather opportunistically and without much respect for the established international and national principles. Thus, states have become very unpredictable for individuals and for banks.
6. Today, banks cannot leave the responsibility for correct taxation to their clients. They have become agents of the tax departments of their own or of other countries. From the bible we know that "No one can serve two masters; for either he will hate the one and love the other, or he will be devoted to one and despise the other." Serving two masters is not a good base for serving clients.
7. These developments lead to strange consequences, e.g. for American, Swiss and German clients of banks in Switzerland:

- *Americans* working in Switzerland find it increasingly difficult to open a bank account in Switzerland. Having an American client is not worth the trouble for a bank.
- *Swiss* citizens with a house and a mortgage in Switzerland and working in the US find it difficult to maintain their mortgage in Switzerland. Banks don't want to deal with the troubles of maintaining an account for a person with a US green card.
- Today, *German* clients of a bank in Switzerland are unable to withdraw money from their accounts because the banks are afraid of being held responsible for supporting tax evasion.
- The recently drafted *Swiss agreements with Germany and the UK* seam to serve all parties involved: The clients who can maintain the secret accounts with banks in Switzerland legally, German and British tax authorities for whom banks in Switzerland will collect billions of Euro and Pounds of retroactive and future taxes. Finally the banks, who can continue to offer banking secrecy and get better access to the German and British markets. Whether the expectations of all parties involved will be satisfied remains to be seen. If we test these treaties against the established international rules which we described, we may be rather skeptical.

I hope that in the future the invisible hand of the market will still let the individual intend his own security and his own gain. Not only nationally, but also globally. Let us be optimistic, even though we do not know why.