Highlights and Trends in Global Taxpayers’ Rights 2020

Primarily supported by case law, this article summarizes and analyses three trends in the practical protection of taxpayers’ rights in 2020 arising from IBFD’s Observatory for the Protection of Taxpayers’ Rights, relating to (i) confidentiality, (ii) more intensive audits and criminal and administrative sanctions and (iii) cross-border situations.

1. Introduction

Since at least 2015, the systematic study of taxpayers’ rights has become increasingly important. The International Conferences on Taxpayers’ Rights have been held annually since that year. The annual conference of the International Fiscal Association (IFA) in 2015 was devoted to the practical protection of taxpayers’ rights, where Baker and Pistone (2015) identified a set of minimum standards and best practices that serve as a basis for the documentation of the global developments of such protection by IBFD, through its Observatory for the Protection of Taxpayers’ Rights (OPTR).

Momentum has continued since then. In 2016, the Commission drafted guidance for a European Model Taxpayer Code, and the Confédération Fiscale Européenne (CFE), the Asia-Oceania Tax Consultants Association (AOTCA) and the Society of Trust and Estate Practitioners (STEP) published their model taxpayer bill of rights. In 2018, the OPTR published the first of its reports on taxpayers’ rights worldwide, based on the Baker and Pistone minimum standards and best practices. In addition, the study group of the International Law Association (ILA) on international tax law began its work, intending to investigate human rights challenges in times of global tax transparency, and the Latin American Institute of Tax Law (ILADT) approved its Model Taxpayers’ Rights Charter. Finally, in 2019, the European Association of Tax Law Professors (EATLP) dedicated its annual congress to studying the topic, and the OPTR published its second annual report.

Despite – or perhaps, because of – the global challenges arising from the outbreak of the COVID-19 pandemic, work on taxpayers’ rights has not had a rest. In the last year, the ILA’s study group on international tax law issued the final report of the first phase of its mandate, and the...
OPTR issued its third¹⁴ and fourth¹⁵ annual reports on the practical protection of taxpayers’ rights in more than 40 countries around the world. In addition, the fifth International Conference on Taxpayer Rights, on quality tax audits and the protection of taxpayers’ rights, took place online between 26 and 28 May 2021, and the sixth conference, on taxpayer rights, human rights and issues for developing countries, will be held in Pretoria, South Africa, on 6 and 7 October 2021.¹⁶ Against this background, it is valid to state, along with Barmentlo and Kraan (2019), that the discussion on the practical scope of taxpayers’ rights is currently at a high point.¹⁷

Following this trend, and primarily based on case law, this article summarizes and analyses three trends in the practical protection of taxpayers’ rights that stand out from the 2020 IBFD Yearbook on Taxpayers’ Rights. These trends relate to: (i) confidentiality; (ii) more intensive audits and criminal and administrative sanctions; and (iii) cross-border situations.

After a brief description of the OPTR, its purpose and methodology (see section 2.), the article considers some of the case law developments in 2020 regarding the limits to the confidentiality of information to which the tax administration has access for tax purposes (see section 3.). It will do so by studying its interaction with the right to freedom of information (see section 3.2.), the rational limits to so-called ‘naming and shaming’ (see section 3.3.), and the provision of information to third parties for political purposes or where political interests are involved (see section 3.4.).

Next, the article analyses some examples of judicial intervention to reduce – or not – excesses in the conduct of intensive audits and the application of criminal and administrative sanctions (see section 4.). To this end, the article reviews the limits on ‘fishing expeditions’ in house searches (see section 4.2.), the attribution of criminal liability in the context of judicial proceedings for the attribution of civil liability arising from wrongdoing (see section 4.3.) and the proportionality and non bis in idem in the joint application of criminal and administrative sanctions for the commission of a tax offence (see section 4.4.).

The article then examines some examples of the faltering protection of taxpayers’ rights in cross-border situations, with a primary focus on the exchange of information between tax administrations (see section 5.). The first part, focusing on Council Directive (EU) 2011/16 on Administrative Cooperation in the Field of Taxation (DAC)¹⁸ (see section 5.2.), first compares the performance of the system of automatic exchange of information provided for in the audit of the European Court of Auditors (see section 5.2.2.) and then the problematization of its interaction, via Council Directive (EU) 2018/822 (DAC-6),¹⁹ with the right to privacy of communications between the taxpayer and his advisors, in the context of mandatory reporting of potentially aggressive tax schemes (see section 5.2.3.). The article next comments on the jurisprudential trend of the Court of Justice of the European Union (ECJ) concerning the taxpayer’s right to participate in the cross-border exchange between tax administrations of the information held by third parties, and more specifically, the (lack of) standing to challenge tax administrations in the requested state (see section 5.3.). Finally, section 6. presents some conclusions.

2. About the OPTR

The IBFD OPTR is a neutral platform for impartial academic research on the relationship between human rights and taxation by determining minimum standards and best practices in protecting taxpayers’ rights monitoring their practical implementation worldwide. To this end, the OPTR is responsible for the creation and management of a database documenting global trends in the protection of taxpayers’ rights, based on the level of compliance with the 87 practical benchmarks identified by Baker and Pistone at the 2015 IFA Congress, divided into 57 minimum standards and 44 best practices.²⁰ In addition, through an annual survey, answered by national teams of experts from more than 40 countries around the world, the OPTR seeks to record the performance of the various jurisdictions surveyed to identify and document global developments and trends in the practical protection of taxpayers’ rights from a dynamic perspective.

This action seeks to raise awareness of the relationship between human rights and taxation, disseminate the results and contribute to academic knowledge on the subject, promote a constructive dialogue between tax administrations and taxpayers for the adequate protection of taxpayers’ rights, and generate proposals to contribute with possible solutions to the practical problems faced by the safeguarding of taxpayers’ rights around the world.²¹

In order to maintain the impartiality and high quality of its work, to serve as a control mechanism of its activity and to generate recommendations for the optimization of its work and results, the OPTR has a Supervisory Board, constituted by five relevant personalities from academia, judicial practice and professional advice on taxpayers’ rights. The OPTR Supervisory Board is composed of Professor Robert Attard, lead partner of Ernst & Young’s global tax policy, Judge Dennis Davis, judge president of the Canadian Bar Association and Judge Dennis Davis, judge president of the Canadian Bar Association and Justice of the High Court of the Commonwealth of Australia.

Highlights and Trends in Global Taxpayers’ Rights 2020


15. OPR The IBFD Yearbook on Taxpayers’ Rights 2020 (IBFD 2021).
16. See Center for Taxpayer Rights, International Conference on Taxpayer Rights, supra n. 2.
petition Appeal Court and judge of the South Africa Supreme Court of Appeal, Mr Purus Kaka, honorary President of IFA global and senior advocate of the High Court (HC) of India, Professor Dr Juliane Kokott, Advocate General of the ECJ, and Ms Nina E. Olson, Executive Director of the Center for Taxpayer Rights and former US Taxpayer Advocate.

The OPTR obtains information relevant to monitoring trends in protecting taxpayers’ rights through tax expert groups in each country. To the greatest extent possible, the expert groups are composed of tax advisors, taxpayers, tax administrators, members of the judiciary, academics, and members of the ombudsman’s office, which allows all of the parties linked to the tax phenomenon to have a place. In order to maintain the impartial nature of the work, those members of the national teams who are judges, academics or part of the taxpayers’ rights ombudsman are considered to be neutral sources of information. In contrast, tax advisors, taxpayers and tax administrators are considered to be non-neutral sources. This plurality of parties implies the possibility of multiple reports per country, with a contradictory assessment of the level of compliance with minimum standards or best practices, which are duly reported and statistically recorded as fractions of the opinion of such jurisdiction, to maintain parity of statistical representation among jurisdictions and neutrality in the treatment of information.21

Similarly, regional groups have been formed to monitor trends in the jurisprudence issued by supranational courts at the regional level with jurisdiction over taxpayers’ rights. At the time of writing this article, two regional groups have been established to monitor jurisprudential developments in (i) Europe, specifically the ECJ and the European Court of Human Rights (ECtHR) and (ii) the Americas, the Inter-American Court of Human Rights (IACHR).22

For 2020, the OPTR obtained information relevant to the practical protection of taxpayers’ rights through 50 reports of 78 national reporters23 from 42 countries around the world, divided as follows: Africa (2);24 Americas (13);25 Asia-Pacific (5);26 and Europe (22).27 All information compiled by the OPTR is freely available on the IBFD website.28

3. Testing Boundaries: Confidentiality

3.1. In general

In a context in which self-assessment is the default means for compliance with tax law, there is an unquestionable need for the tax administration to have ample access to the information necessary to be aware of the realization of the taxable event and the elements to know with certainty the amount of the tax liability thereby created.29 As long as it is exercised within the legal channels and is oriented to that end, the tax assessment function is a legitimate interference in the taxpayer’s privacy, which is necessary for the country’s economic welfare in a democratic society.30 As one of the most sensitive forms of personal information,31 taxpayer information must be adequately protected, as it is subject to significant risks.

To this end, Baker and Pistone identified fourteen minimum standards and seven best practices that, as a whole, entail the comprehensive protection of taxpayer privacy in their relationship with the tax administration.32 One part of these minimum standards and best practices is linked to practices for protecting confidentiality, i.e.: encryption, limiting access to information to officials involved in the ex officio assessment and auditing such access and the anonymization of documents and professional secrecy. Another part relates to the minimum desirable reaction to breaches of taxpayer confidentiality. Yet another part relates to exceptions to confidentiality, potentially justifiable in the public interest, compromised in the country’s economic well-being, the collaboration between different organs or entities of the state and freedom of expression and information.

During 2020, several court decisions tested the limits of taxpayer confidentiality, representing practical developments of interest in guaranteeing the commented fundamental right. This section comments on three such decisions, timely reported in IBFD’s 2020 Yearbook of Taxpayers’ Rights.33 First, section 3.2, deals with the limits to the possibility of the tax administration to disclose taxpayer information for purposes other than the assessment of the tax, under conditions that, through potentially exposing the taxpayer to public scorn (in other words, “naming and shaming”), seek to indirectly coerce the taxpayer into paying the allegedly unpaid tax liability. Second, drawing on a judgment of the ECtHR, section 3.3, discusses proportionality in the use of unpaid tax liability. Finally, section 3.4, presents a case in which the Baker and Pistone minimum standard concerning the prohibition of disclosure of information between government agencies was put into practice, when, in addition to...
3.2. And the Emmy goes to...

The first of the cases to be discussed tested several of Baker and Pistone’s minimum standards for taxpayer confidentiality.35 The initiation of a corporate income tax and value-added tax (VAT) audit at the home of a trading company engaged in the cultivation and marketing of potatoes was recorded in full by the tax authorities. The officers visibly wore body cameras throughout the procedure, allegedly for personal security reasons. The footage was used to produce a “real TV” programme showing the work of the tax administration by following ten officials in their work for one year, called De Fiscus.36 The procedure resulted in a difference of tax due and unpaid, which the taxpayer expressly accepted on 6 December 2016. The taxpayer formally requested the tax administration and public television that the recordings should not be disclosed publicly.

Against this background, and despite the taxpayer’s request to the contrary, the inspection at the taxpayer’s home was part of the De Fiscus broadcast the following day, 7 December 2016. The programme had an audience of 982,421 viewers. On the same date, the taxpayer received a letter from the public broadcaster, stating – among other things – that all images had been anonymized to protect the privacy of those involved.

In response, the taxpayer decided to challenge the ex officio tax assessment resulting from the audit. The tax administration had violated professional secrecy by disclosing the images corresponding to the tax visit described previously, which, it should be noted, were imperfectly anonymized. Added to the nullity, the taxpayer demanded compensation for damages and a public apology in the press, where the tax administration acknowledged its wrongdoing.

These facts raise several questions considering Baker-Pistone’s minimum standards and best practices:

(1) Does obtaining footage of the tax audit for public broadcast on television, under conditions likely to expose the taxpayer to public scorn, fall within the scope of the tax administration’s legitimate interference with the taxpayer’s right to privacy to safeguard the economic welfare of the country?

(2) If so, what is the rational justification for it?

- Suspicion (subsequently confirmed) of tax evasion?
- Transparency in the exercise of the public service?
- The right to freedom of information?

(3) Does the conduct described in (1) and (2) affect the validity of the tax assessment resulting from the audit?

The Hof van Beroep/Cour d’Appel (Court of Appeal, HvB/CA) Ghent agreed that the disclosure of the tax assessment violated the confidentiality of the taxpayer’s information under the conditions in which it was made. According to the HvB/CA, tax secrecy applies to all information relating to taxpayers, regardless of how it is obtained.37 This statement is substantially in line with the general rule underlying the minimum standards and best practices identified by Baker and Pistone concerning confidentiality and, in particular, the minimum standard limiting access to tax information by third parties to strict safeguards, for example, judicial authorization, subject to the prior hearing – or authorization – of the interested parties, being both the taxpayer and third parties in economic relations with the taxpayer whose information may thereby be disclosed.

The HvB/CA considered that the tax administration had breached its duty of confidentiality during the audit by informing the production company in advance of the taxpayer’s identity and address and the reasons for the audit, i.e. the suspicion of tax fraud. Furthermore, the inspectors informed the managers of the television production company about the procedure. Finally, the inspectors took the director and some technicians to the taxpayer’s premises, which entails disclosing to third parties the taxpayer’s identity subject to investigation for suspected fraud.38 Similarly, the tax administration had violated the taxpayer’s confidentiality by making available to the production company the audio and video recordings made during the inspection without first anonymizing them, without informing the taxpayer of the true purpose of the recording and without seeking the taxpayer’s consent to the broadcast.39 In the author’s opinion, this statement is in line with the Baker-Pistone minimum standard according to which state actions in tax matters referring to specific taxpayers should not contain any data that would allow their identification, as well as the minimum standard requiring strict safeguards in case of disclosure of tax information to third parties.

The HvB/CA also found that confidentiality had been violated after the audit was completed by allowing information regarding the reasons for the audit, the findings on the alleged commission of the offence of tax fraud and the payment of penalties to be disclosed in a form recognizable to persons who were in some way familiar with the taxpayer’s business, having visited the taxpayer’s premises regularly.40

The author agrees with the view of the HvB/CA on this point. The right to the confidentiality of the taxpayer’s information necessarily implies discretion concerning the


38. Id.

39. Id.

40. Id.
taxpayer’s identity and data, privacy that also covers the reasonable doubt that the tax administration may have concerning the sincerity of the self-assessment – which, as such, is the basis for the initiation of an audit – and the outcome of the tax investigation.

This position is, in essence, the meaning of the minimum standards and best practices identified by Baker and Pistone in this area. Remarkably, the minimum standard that limits access to tax information by third parties to strict safeguards, for example, judicial authorization, after hearing – or authorization – of the interested parties, both the taxpayer and third parties that maintain economic relations with the taxpayer whose information, for this reason, may be disclosed, stands.41 Likewise, the decision coincides with the Baker-Pistone minimum standard, according to which state actions in tax matters referring to specific taxpayers that are made public must not contain any data that would allow them to be identified.

However, the taxpayer’s manager being associated with the findings is merely a consequence of the organization of the taxpayer’s business, in the court’s view. Accordingly, the recording only has an impact on the manager’s professional, not personal, life. Consequently, neither the manager’s personal life nor his participation in the fraudulent practice was recorded,42 which, in the author’s view, unduly restricts the right to privacy of the manager, whose professional life also falls within the scope of protection of the right to privacy.43

Furthermore, the HvB/CA considered that the use of body cameras by the auditors to capture the images and their subsequent broadcast on television were not sufficient grounds to declare the ex officio assessment null and void, even if the knowledge that the recording would be published would have prompted the taxpayer – as it did – to accept the tax objection. The filming, according to the HvB/CA, does not change the underlying facts: the audit assessed differences in income tax and VAT caused and not paid by the taxpayer, in respect of which no evidence to the contrary was produced, and for the verification of which the evidence potentially contained in the audio-visual material was not essential. In a sentence, the result of the audit would not have been altered by the filming.

In this regard, the file contains the statement of a tax administration official, interviewed by the press, who acknowledges that the use of cameras for audit purposes has the following advantages, from the point of view of the auditing officials: (i) higher levels of cooperation and, correlative, lower levels of aggressiveness, on the part of

the audited taxpayers; (ii) the recordings avoid discussions in court regarding the content of the parties’ statements during the audit; and (iii) the review of the audio-visual material reveals subsequent evidence.44 Accordingly, the author respectfully considers that the HvB/CA’s assertion that filming did not have the purpose, albeit secondary, of obtaining evidence – and even if influencing the taxpayer’s attitude towards the audit, making him more inclined to accept the results of the procedure – is candid, to say the least. That is the case even more so when the HvB/CA pointed to the statement of the officials involved to the effect that the cameras were intended exclusively for their security, which turned out to be untrue.45

The author also finds it striking that the HvB/CA found no evidence to support a reasonable suspicion of coercion arising from using audio-visual means during the audit and, above all, from the potential broadcasting of these recordings on television. It is curious, to say the least, that the admission of the charges contained in the final audit report took place the day before the television broadcast of the images, something to which the HvB/CA does not attribute any effect, not even by the lessons of experience. Moreover, the decision itself relates to how the television report revealed that the officials suggested that the taxpayer regularize her situation. Again, however, the HvB/CA was emphatic in stating that “there is nothing to show that coercion was used”.46

On the contrary, the HvB/CA concluded from the lessons of experience that, if the taxpayer sought to cooperate instead of attacking the result of the audit, following the statements of the officials involved attributing fraud to her, it was because the taxpayer was aware that she did not have the means of proof that would allow her to challenge the ex officio assessment. As a result, the HvB/CA concluded that the taxpayer’s allegations that its consent to the audit was flawed are irrelevant.47

As a consequence of the violation of the taxpayer’s confidentiality, the moral prejudice caused by the processing of the relevant data and the dishonesty of the tax administration in concealing from him the reason for the recording, the HvB/CA agreed to compensate the taxpayer for the amount initially claimed by the taxpayer, i.e. one euro. The HvB/CA also ordered the publication of a notice by the tax administration in the country’s leading media, i.e. press and television, acknowledging the breach of confidentiality in the broadcast of De Fiscus corresponding to the taxpayer’s audit, once the judgment had become formally res judicata.48 However, the tax administration decided not to appeal before cassation and proceeded with the publication of the notice admitting its liability as soon as the deadline for announcing the appeal had expired, although it expressly stated its disagreement.49

41. However, A-M. Hambre suggests otherwise. In her opinion, transparency should drive tax authorities to balancing confidentiality and transparency on a case-by-case basis. This position means that all of the requested information may be subject to possible disclosure, thereby limiting the information decided beforehand to be confidential, thereby widening the scope of transparency and the right to information. See A-M. Hambre, Tax Confidentiality: A Legislative Proposal at National Level, 9 World Tax J 1 (2017), Journal Articles & Opinion Pieces IBFD.

42. 2018/AR/1037 (2020), supra n. 35, at sec. 4.2.2.


44. 2018/AR/1037 (2020), supra n. 35, at sec. 4.1.1.

45. Id., at sec. 4.1.2.

46. Id., at sec. 4.1.3.

47. Id.

48. Id., at sec. 4.2.3.

3.3. The walk of (tax) shame

The second of the decisions commented refers precisely to the limits of naming and shaming. In the case of L.B. v. Hungary (2021), the ECtHR ruled on the balance between the public interest in protecting the economic well-being of a country and the taxpayer’s right to privacy concerning his domestic home.

The facts of the case are as follows. The taxpayer owed a sum more than HUF 10 million in overdue taxes for more than 180 days. As a result, the taxpayer’s personal information, including his full name, residence address and tax identification number (TIN), was included in lists of “tax defaulters” and “major tax evaders” and published on the tax administration website according to operation of Hungarian tax law. Based on this information, an online media outlet included the taxpayer on an interactive map entitled “the national map of defaulters”, on which the place of residence is marked in red, and clicking on it displays the taxpayer’s information, including his or her address. This data was publicly available to anyone with internet access.

As the basis of these facts, the case raises the issue of the rational limits to the use of “naming and shaming” as a form of coercion to achieve compliance with tax arrears or, in other words, the limits that should be imposed on this type of activity based on respect for the taxpayer’s right to privacy.

In order to decide the case, the ECtHR – first – negatively clarified the subject matter of the controversy. The subsequent dissemination of the information by third parties, either by publication or by search engine results, is not part of the controversy, but only the original publication of the taxpayer’s data by the tax administration. Such a situation was criticized in the dissenting opinion of Judges Ravarani and Schukking, an opinion with which the author agrees. The use of the taxpayer’s data by third parties in conditions that favour its full disclosure is a part of the controversy, but only the original publication of the taxpayer’s data by the tax administration.

In this regard, the ECtHR understood that the use of “naming and shaming” is legitimate, rational and proportionate in the framework of a democratic society to (i) improve tax discipline; (ii) protect the economic well-being of a country; and (iii) protect the interest of third parties regarding the tax situation of potential business partners, insofar as it was within the margin of appreciation enjoyed by the state in the exercise of its tax collection powers, and in balance with the limits imposed on that margin by the taxpayer’s right to privacy.

In the specific case in question, this balance was determined by the size of the outstanding debt, which the ECtHR considered to be significant, and by the time elapsed without the taxpayer satisfying the obligation, being more than 180 days. In terms that the author shares, the dissenting vote was categorical in rejecting this possibility, i.e. it was believed to be a “modern pillory”.

For its part, the ECtHR considered that the publication of the taxpayer’s home address was a crucial indicator to guarantee the effectiveness of the system, as it reduced the possibilities of error in the identification of the delinquent taxpayer, especially when the names were common in the place where the publication was effected. However, the taxpayer, which, as such, should be part of the *thema decidendum*.

Next, the ECtHR stated that the information subject to disclosure constituted personal data, as expressed by the Court in the case of Satakunnan Markkinapörssit Oy and Satamedia Oy v. Finland (2017). That case dealt with personal information about which its holders could have legitimate expectations that it would not be published without their consent, and which required adequate protection against potentially excessive state interference, being a fundamental part of the protection of the right to privacy, as expressed by the ECtHR in the case of G.S.B. v. Switzerland (2015).

As the taxpayer has argued, the issue is the axiological rationality (*Wertrationalität*). It also concerned proportionality in relation to the publication of the taxpayer’s data, in particular, the taxpayer’s home address, regarding the interest of the tax authorities in enforcing the payment of taxes on time, as well as the alleged interest of third parties in indirectly knowing the taxpayer’s financial situation and reliability in doing business.

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dissenting opinion, with which the author again agrees on this point, considered this measure excessive, while other less invasive measures would have allowed the complete identification of the taxpayer, for example, the TIN. Accordingly, the publication of the home address did not fit in with the principle of data minimization.\(^{62}\)

Nor was the proportionality of the measure affected, in the view of the ECtHR, by the publication of the taxpayer’s personal information on the Internet, an environment in which the dissemination of this information is exponential,\(^{63}\) and where – in the author’s view – the right to be forgotten is practically non-existent.\(^{64}\) According to the ECtHR, this situation deprived the public of the right to accessible information easily, regardless of their place of residence, in a location – the tax administration’s website – where only interested parties would seek such information, thereby safeguarding – according to the court – the proportionality of the measure.\(^{65}\) The dissenting opinion expressed the indeterminacy of the concept of “interested parties” used by the ECtHR as a basis for the measure and questions – correctly, in the author’s opinion – the need for a publication with such an indeterminate scope.\(^{66}\)

Beyond the serious objections that can be made to the use of “naming and shaming” as an accessory sanction to those applicable for failure to pay taxes on time, insofar as – the author considers – it constitutes an infamous penalty that violates the person’s dignity,\(^{67}\) nothing, in this case, is in line with the minimum standards and best practices of Baker and Pistone with regard to this measure, insofar as the ECtHR accepts the application of “naming and shaming” without any judicial intervention whatsoever. This statement, the author respectfully submits, is reprehensible.\(^{68}\)

### 3.4. Not for you, ma’am

As noted in section 3., in general, and section 3.1., in particular, the minimum standards and best practices identified by Baker and Pistone are based on discretion as the rule to be followed in the treatment of taxpayer information held by the tax administration. Accordingly, the disclosure of this information is only exceptionally possible, based on precise instructions of the law subject to restrictive interpretation and judicial authorization, only for reasons of general interest that, on weighing, are preponderant and reasonable within limits imposed on the activity of the state in a democratic society. Consequently, the disclosure of taxpayer information for overt or potential political purposes should be prohibited.

A notable example of the practical application of these minimum standards and best practices is the case of Com-
In any event, the best practice for obtaining this information for legitimate purposes, including criminal investigations, is prior judicial authorization as a minimum guarantee of protection of the privilege, or, instead, the express consent of the taxpayer to allow disclosure, which cannot be inferred from a publication on social networks, such as Twitter, according to the court. Without these minimum conditions, as the HC GiP rightly stated, the tax administration’s duty of confidentiality trumps the duty to provide information to the Public Prosecutor’s Office in the course of a criminal investigation.

This situation contrasts significantly with the treatment given to the publicity of taxpayer information if it is considered newsworthy, as in the cases of “naming and shaming”, as discussed in section 3.3., and of companies where this information is part of ordinary news traffic, as analysed by the ECtHR in Satakunnan Markkinapörsssi Oy and Satamedia Oy v. Finland. A very recent example is provided by the seven cases decided by the Helsingin Hallinto-oikeus (Helsinki District Administrative Court, HHo) on 20 April 2021, in which the HHo decided that the tax administration could not refuse to provide the media with information about taxpayers who have requested that their tax information be kept secret under Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection, Processing and Free Movement of Personal Data (General Data Protection Regulation, GDPR).

In a context where taxpayer information is accessible to the public, following specific rules, information regarding the identity of taxpayers who exercised their right to object to the processing of their data is not confidential, and therefore, should be disclosed. Here, it should be noted that the Finish tax administration announced on 7 May 2021 that it would not appeal against these decisions.


4.1. In general

It seems obvious to state that the joint exercise of tax investigation and punitive powers, both criminal in the strict sense and administrative, entails significant risks for taxpayers’ rights. The greater degree of invasion of the taxpayers’ legal sphere that occurs in this context implies strict limits to the greater powers conferred to the tax administration for the investigation and punishment of tax offences and crimes. Here, proportionality plays a key role. The powers of the tax administration in audits in which there are indications of the possible commission of these acts must be limited to what is strictly necessary to ensure an adequate reaction to non-compliance, based on the criterion of necessity (minimum intervention) that is inherent to the punitive power of the state. Similarly, the taxpayer’s right to be informed that the state intends to exercise its punitive power over him or her demands unrestricted respect for the guarantee of non-self-incrimination (nemo tenetur se ipsum accusare) and greater judicial control over the tax administration’s investigative activity through authorizations. The proportionality of the sanction is also an insurmountable limit for criminal and administrative sanctions in tax matters.

As was the case in 2019, tax law and punitive law interaction led to significant developments in 2020. This section comments on three relevant court decisions in this regard, also reported in the IBFD 2020 Yearbook on Taxpayers’ Rights. Section 4.2. reviews the treatment of judicial authorizations for house searches in terms of procedural conditions and minimum requirements for their practice. Section 4.3. examines the procedural interaction between criminal liability and civil liability arising from tax offences in the case of the imputation of managers or directors of companies. Finally, through a decision of the Inter-American Commission on Human Rights (IACHR), section 4.4. analyses the presumption of innocence and the proportionality of tax penalties in the case of their link with penalties consisting of the loss of benefits derived from special administrative relationships, such as public service concessions.

4.2. No fishing

The decision of the Spanish Tribunal Supremo (Supreme Court, TS) of 1 October 2020 addressed several of the most critical issues surrounding the requirements for

83. Baker & Pistone, supra n. 3, at Summary of minimum standards and best practices. See also C. E. Welle H., Overview of Global Trends in the Protection of Taxpayers’ Rights by 2019, according to the IBFD Observatorio on the Protection of Taxpayers’ Rights (Part 2), 131 Técnica Tributaria sec. 4.2. (2020) and supra n. 81, at sec. 1.1.3.
84. The six Baker Pistone minimum standards and two best practices regarding more intensive audits refer to judicial authorizations. See Baker & Pistone, supra n. 3, at Summary of minimum standards and best practices.
85. All of the Baker Pistone minimum standards and best practices regarding criminal and administrative sanctions refer to some form of proportionality. See Baker & Pistone, supra n. 3, at Summary of minimum standards and best practices. See also Welle H., supra n. 81, at sec. 1.1.3.
86. See OPTR, supra n. 12, at sec. II.5.2 and Welle H., supra n. 83, at sec. 4.
87. OPTR, supra n. 14, at secs. II.5 and II.7.
administrative home searches. These issues were the proportionality and specificity of the description of the object of administrative requests for home searches, the need or not for the existence of an ongoing assessment procedure, duly notified to the taxpayer, within which the search is carried out, and the basis of tax suspicions regarding the possible commission of a tax offence as a criterion for determining the relevance of the search.89

The decision dealt with essential questions to delimit the object and scope of the special investigative powers of the tax administration in the framework of intensive audits. It also addressed the conditions that must be met to obtain judicial authorization for them, in conditions that allow the interest of the investigation to be adequately weighed against the fundamental rights – domestic home, privacy – as affected by a measure of this type. According to the enumeration of the TS,90 these questions were as follows:

- Is a presumption of tax fraud sufficient to grant a house search inaudita parte, without formally opening a tax investigation?
- How specific must administrative requests for house searches be? And how far does the judicial review of such requests extend?
- What requirements must be imposed on administrative requests for house searches for them to be proportionate?
- Can a house search be authorized solely because the taxpayer does not pay the average tax for his business sector?

In this regard, the TS had established, initially, that the tax administration first requires a procedure, of the initiation of which the taxpayer had been notified, expressly aimed at determining the tax situation of the taxpayer for the proper exercise of its audit powers and, in particular, for the house search to be carried out validly.90 In the presence of possible indications of tax fraud, and presumably knowing the perpetrator, it was necessary to have a procedure that formally channels that purpose, duly notified to the taxpayer to safeguard his right to be informed – and, in that way, his right to defend himself – and within which an incidence was verified through which the house search takes place, with a specific and clearly delimited purpose so that the tax administration could exercise validly its punitive tax claim against the taxpayer.91 This behaviour fitted the minimum standard requiring prior notification to the taxpayer of the actions directly aimed at limiting his rights, in a manner equivalent to that applicable in criminal proceedings, insofar as the tax investigation was oriented, by default, from the author to the facts.92

as it requires the secrecy that guarantees its results, the procedural issue opened for the judicial authorization of the search – not the main procedure – might be solved inaudita parte.93

In order to guarantee the adequate protection of the taxpayer’s rights, the judge of guarantees had to analyse critically the elements of conviction placed at his disposal by the tax administration in its request to determine whether the house search was a suitable, necessary and, in a word, proportionate measure for the evidentiary purpose pursued. Accordingly, in order to properly weigh up the rights at stake, the judge could not rely blindly on the generic assertions of the tax administration, nor reduce the judicial authorization to a mere formality. Instead, the judge had to ascertain the existence of precise, sufficiently concordant and reasonably plausible indications that justified the practice of the measure,94 thereby evidencing the specific risk of destruction or disappearance of the evidence.95

In other words, the presumption of tax fraud was only susceptible to support a house search through an administrative procedure with all the formalities instrumented to serve as a formal channel for administrative activity and to safeguard the taxpayer’s fundamental rights. This statement is in line with the requirement of the Baker-Pistone minimum standard on the matter, according to which a house search should only be authorized in exceptional circumstances.96

It follows that entry into the constitutionally protected home was prohibited for prospective, statistical or undefined purposes, without identifying precisely what specific information is to be obtained or the impossibility of obtaining it by other, less invasive means.97 Accordingly, the essential requirements of a request for a home search were: (i) the express indication of the purpose of the entry; (ii) the justification and proof of its necessity; (iii) the reasoned list of the concrete, precise and objective indications of the possible commission of tax fraud; (iv) with an indication of the elements that make it possible to know its seriousness; (v) advancing the amount of the fraud or the tax debt evaded; (vi) explaining why this home search is the only effective instrument for its establishment; and (vii) motivating why other possible less burdensome alternative means or measures have been or could be unsuccessful.98

This judicial declaration contradicted, as it should, the possibility of using house searches for “fishing expeditions”, speculative searches for information with no apparent link to an open procedure and without a minimum individualization of either the subject or the object of the

89. Taberna La Montillana, S.L. v. Agencia Estatal de Administración Tributaria (2020), supra n. 88, at third factual background.
90. Id., at first legal basis.
91. Id., at third legal basis.
92. Weffe H., supra n. 83, at sec. 4.2.
94. Id., at second legal basis.
96. Id.
98. Id.
investigation, through vague and unsubstantiated references. In short, an inquisitio generalis is required. In the author’s view, it is clear that there is a distinction between “fishing expeditions”, rightly prohibited by the decision under discussion, and the set of fundamental legal positions that are essential to the right of defence.99

Consequently, the request for a house search could not be based, in the opinion of the TS, with which the author agrees, on suspicion of tax fraud based on the comparison with the hypothetical average profitability of the relevant market in which the taxpayer participates. Instead, the tax administration should provide evidence of the source of the statistical information, or the parameters that serve as a basis for identifying the relevant market, information that could not be accepted uncritically or not considered in terms of its proportionality with the aims pursued by the measure.100 As the TS noted, the opposite was to presume that every taxpayer was a potential fraudster.101 In the author’s opinion, this presumption of guilt would contradict the good faith that should govern all of the actions of the tax administration and the presumption of innocence, and highlight the stigmatization of taxpayers, which had served as a basis for expanding the punitive power of the tax administration.102

4.3. Close, but no cigar

The ECtHR case of Agapov v. Russia (2020)103 tested the presumption of innocence as a minimum standard of state action in the prosecution and punishment of tax offences and crimes, and the interaction of this presumption with the rules of distribution of the burden of proof for the determination of civil liability arising from the alleged commission of tax fraud.104 This determination made it possible to prove proportionality – under the form of necessity – in applying criminal and administrative sanctions in the sense of the minimum standards and best practices of Baker and Pistone in the matter.105

The facts of the case were that a limited liability company (LLC) managed by Mr Agapov was found guilty of VAT fraud. Due to its (adverse) financial situation, the LLC filed for bankruptcy and was deregistered before paying its tax debt. In parallel, the Public Prosecutor’s Office initiated a criminal investigation against Mr Agapov, in his capacity as manager, in respect of the tax fraud committed by the LLC. This procedure ended with a report by the prosecutor in charge of the case, in which he determined that, although there were sufficient elements of conviction to presumptively attribute the authorship of tax fraud to Mr Agapov (possibly due to his role as guarantor as manager of the company),106 it was not possible to bring him to trial as the criminal action was already time-barred.107

Given this scenario, the tax administration decided to sue Mr Agapov for civil liability in respect of the tax offence against the LLC. Later, the Russian civil court in charge of the case decided in favour of the tax administration, on the basis that – in the opinion of that court – Mr Agapov was criminally liable for the commission of the tax fraud, based on the dismissal report issued by the prosecutor in charge of the criminal investigation. In other words, the civil court declared Mr Agapov’s civil liability on the basis of his criminal guilt, solely based on the prosecutor’s report dismissing the case.108

On this basis, the thema decidendum was limited to determining whether a civil court could find Mr Agapov criminally guilty of tax evasion without a prior final conviction by a criminal court. Such a position would have to be determined in light of the presumption of innocence that was part of the conventional due process clause, based on the lifting of the corporate veil.109

Given these facts, the ECtHR decided – adopting a criterion that the author shares – that it was impossible to declare the taxpayer’s criminal guilt in civil proceedings to determine civil liability without violating the presumption of innocence.110 Moreover, there was no definitive judicial declaration of Mr Agapov’s guilt, as the criminal proceedings against him were dismissed. In the court’s words, “the applicant was never tried and convicted for that offence by a court competent to determine questions of guilt under criminal law.”111 Accordingly, it was not admissible to use the lack of acquittal in the criminal proceedings – the case was dismissed due to time-barring – as an automatic and sufficient basis for liability for the damage arising from the non-payment of VAT by the LLC.112 This circumstance was also insufficient to prove civil liability without evidence of the conduct constituting the damage and the causal relationship between the damage and Mr Agapov’s having been debated in a trial with all the guarantees.113

The standards of determination and proof of civil liability arising from a wrongful act differ substantially from those applicable to the establishment of criminal liability. For the former, it is essential to determine the causal link between the conduct – the failure to pay the tax obligation...
– and the financial damage suffered by the state. For the latter, it is necessary, in addition to these requirements, to prove culpability (mens rea), understood as the reprochability of the offence committed by a person capable of understanding and willing, and aware of the unlawful nature of the act, under standard conditions of volition.\footnote{114}

In any case, the civil court was forbidden from ruling on the criminal guilt of the taxpayer. In doing so,\footnote{115} it had violated the presumption of innocence, especially when the taxpayer, because of the dismissal, had no opportunity to defend himself against that accusation in criminal proceedings.\footnote{116} Nor is there any administrative practice that allows the corporate veil to be lifted to attribute the non-payment of VAT attributable to the LLC to Mr Agapov, as director of that company.\footnote{117}

Consequently, the ECtHR held that the improper extension of tax liability to Mr Agapov in this way constituted an undue interference with the peaceful enjoyment of his property within the meaning of article 1 of protocol No. 1 to the European Convention on Human Rights (ECHR), as it had no legal basis.\footnote{118} The author fully agrees with the view of the ECtHR in this regard, which is in line with the minimum standards and best practices of Baker and Pistone on the issue.\footnote{119}

### 4.4. Keep them on the rocks

The proportionality of criminal and administrative sanctions and the substantive part of non bis in idem – Baker and Pistone's first two minimum standards on the matter\footnote{20} – was the subject of an interesting pronouncement by the IACHR, albeit indirectly.\footnote{121} The taxpayers were concessionaires of four radio frequencies operating in Montevideo and other cities in the country. Following a tax audit, the tax administration determined that the taxpayers had manipulated the balance of VAT tax credits attributable to the exercise of their activities, fraudulently transferring credits attributable to the Montevideo radio station to the remaining stations of the radio circuit, which – in addition – allowed them to obtain undue tax exemptions on business tax. For this reason, the tax administration imposed fines on the taxpayers, and referred the proceedings to the Public Prosecutor's Office in respect of criminal proceedings for tax fraud. The administrative court confirmed the tax assessment.\footnote{122}

During the criminal proceedings, two types of actions were allegedly verified. On the one hand, the head of the tax administration allegedly launched a media campaign naming and shaming the taxpayers, publicly stating that they would be criminally prosecuted and convicted. At the same time, the President of the Republic revoked the radio frequency concessions granted to the taxpayers, based on the tax fines and the initiation of criminal proceedings for this reason, which would have meant the loss of the specific moral solvency requirements for the operation of radio broadcasting frequencies. Following legal proceedings seeking the nullity of these acts, the radio stations owned by the taxpayers ceased transmissions before the criminal proceedings were decided. In the end, two of the three taxpayers were convicted of tax fraud. The four broadcasting licences remained cancelled. Although the criminal judgment became final, sometime later, the court of the first instance reversed the judgment, ordering that the offence be deemed to have been extinguished. Despite this, the convicted taxpayers served a quarter (approximately six months) of their sentences in prison.\footnote{123}

Based on these facts, the taxpayers complained of violations of the rights to personal integrity and freedom of thought and expression, equality before the law, protection of honour, personal reputation and private and family life, work and fair pay, property, protection against arbitrary detention and due process.\footnote{124} As is evident from the foregoing facts described, in addition to the criminal and administrative sanctions applicable in the strict sense to tax fraud, fines and imprisonment, administrative authorizations to operate broadcasting frequencies were revoked, apparently for the same reason.

However, surprisingly for the author, the IACHR held the taxpayers’ complaint to be inadmissible. The IACHR found no evidence of exhaustion of domestic remedies against “naming and shaming”, conduct which, as the author deduces from the reading of the decision, constituted a de facto act rather than the result of a formal administrative procedure, thereby reducing the possibility of pursuing effective procedural remedies. The IACHR also found no evidence to the effect that the criminal proceedings were decisive in revoking the broadcasting licences, nor did it find any violation of the rights whose violation was denounced.

In the author's view, the revocation of the licence constituted an “indirect penalty”\footnote{125} in respect of tax fraud which, when added to the other sanctions applied, punished the same act multiple times (non bis in idem) without multiple legal interests requiring punitive protection.\footnote{126} Furthermore, indirect penalties denied proportionality in respect of sanctions, given the intimate connection in space and time between the different proceedings, without any of them being taken into account to measure the sanction applicable in any other cases, as suggested by ECtHR case law.\footnote{127} Also, in the author’s opinion, the fact that the

\footnotesize{\begin{tabular}{l}
114. Weffe H., \textit{ supra} n. 104, at pp. 180-182 and 249-250.  \\
115. Agapov v. Russia, (2020), \textit{ supra} n. 103, at para. 41.  \\
116. Id., at paras. 44-45.  \\
117. Id., at para. 61.  \\
118. Id., at para. 58.  \\
120. Baker & Pistone, \textit{ supra} n. 3, at Summary of minimum standards and best practices. \textit{See also} OPTR, \textit{ supra} n. 14, at sec. II.7.1.  \\
122. Id., at paras. 2-4.  \\
123. Id., at paras. 3-5-6 and 10.  \\
124. Id., at p. 1.  \\
125. See Weffe H., \textit{ supra} n. 81, at sec. 2.3.  \\
126. Id., at sec. 1.3.2.  \\
broadcasting licences were revoked without a final conviction in criminal proceedings appeared to contradict the presumption of innocence as stated in section 4.2.132 and non bis in idem, contrary to the minimum standards of Baker and Pistone.128

5. Courts Stepping In: Cross-Border Situations

5.1. In general

Cross-border situations have always posed a unique problem for the adequate protection of taxpayers’ rights. The international taxation system, which is structured on reciprocal state concessions on the limits of taxing powers, has not – yet – become fully aware of taxpayers’ right to participate fully in inter-jurisdictional assessment procedures, even though they are directly affected by tax treaty measures (or lack thereof). In a sentence, taxpayers continue to be treated as mere objects of the exercise of state sovereignty in tax matters.129

The non-state character of taxpayers does not preclude the recognition of rights. On the contrary, as Kokott, Pistone, and Miller (2020) rightly point out, the recognition of rights of non-state actors in public international law necessarily includes the fundamental rights of taxpayers. These rights are human rights that must be effectively protected, even in the face of the general community interest in tax collection.130

The pressing need for the effective protection of taxpayers’ rights in cross-border situations is maximized in the context of the search for the documentary, procedural and decision-making transparency necessary for the correct assessment of taxes with foreign elements, especially in the exchange of information between tax administrations. This situation is also governed by the extremes of proportionality that are required of any state measure. Accordingly, the exchange of information – especially the automatic exchange of information – is rationally justified to the extent that the information thereby obtained effectively serves as evidence for tax assessment purposes, so serving to increase compliance rates. If, on the other hand, the information subject to the (automatic) exchange is not effectively used, the legality of the measure and the reasonableness of the use of vast resources of the tax administrations – mainly foreign – to collect and exchange all of this data may be questioned. Also, the risks of loss, theft, leakage and inaccuracy of the data, and the use of this information for purposes other than tax assessment,131 as already noted in section 3, and other taxpayers’ rights, such as professional secrecy play an important role. These issues are dealt with in section 5.2.

For its part, despite the fundamental nature of taxpayers’ rights, practice has revealed the reluctance of states to ensure the full participation of taxpayers in the exchange of information, which has forced the courts, albeit timidly, to intervene. This problem is considered in section 5.3.

5.2. DAC under review

5.2.1. Opening comments

The year 2020 was full of developments regarding administrative cooperation in tax matters at the European level, specifically concerning the exchange of information between tax administrations. Accordingly, this section is devoted to the exchange of information,132 both in terms of analysing its effectiveness in practice (see section 5.2.2.), and the risks posed by mandatory reporting rules for tax secrecy schemes (see section 5.2.3.).

5.2.2. Crack’d DAC

In 2021, the European Court of Auditors issued its Special Report No. 3 to assess the tax information exchange system within the European Union.133 The report covered the period from 2014 to 2019. In addition to the legislative framework underpinning the exchange, the Court of Auditors audited the performance of the information exchange system by visiting five Member States, i.e. Cyprus, Italy, the Netherlands, Poland and Spain, to assess their use of the information exchanged, and how the effectiveness of the system should be measured.

With regard to this article, the point of the report which – for the author – is of most interest in the context of the practical protection of taxpayers’ rights, in the sense of the Baker and Pistone minimum standards and best practices,134 is that of the effective use of information subject to automatic exchange through the mechanisms of the DAC. In this respect, the report is categorical. Member States make limited use of the information obtained through this mechanism. According to the Court of Auditors, the automatic exchange has shortcomings regarding timeliness, accuracy and the completeness of the information provided. The information received is incomplete, as data are not obtained for all revenue categories, and sometimes late.135 Furthermore, only one Member State carried out manual and limited checks on the quality of the information received, which were not applied as a systematic process.136

In addition, the identification of taxpayers in respect of the cross-checking of data subject to automatic exchange proved problematic. Member States rarely link the information they send to a TIN issued by the taxpayer’s country of residence. In the three years from 2015 to 2017, only 2% of the taxpayers concerned by the automatic exchange of

128 Baker & Pistone, supra n. 3, at Summary of minimum standards and best practices.
129 Kokott, Pistone & Miller, supra n. 13, at sec. II.
130 Id.
131 Wöhrer, supra n. 32, at secs. 5.2. to 5.5.
132 OPTR, supra n. 15, at sec. II.9.
134 OPTR, P. Baker & P. Pistone, supra n. 7, at pp. 80-81.
135 European Court of Auditors, Special Report No. 3, supra n. 133, at para. 45.
136 Id., at para. 46.
information were linked to a TIN issued by the receiving country,\textsuperscript{137} a figure that rises to 70% for Directive 2014/107 (DAC-2).\textsuperscript{138} With regard to DAC-2, the report concluded that the Member States carry out few checks on the quality of data reported by financial institutions, and sanctions for such events are – according to the Court of Auditors – not sufficiently dissuasive to ensure compliance. Feedback on the quality, completeness and timeliness of data is very weak, and is non-existent in other respects.\textsuperscript{139}

Based on the (low) match rates between domestic information and that received through the exchange, the Court of Auditors found that the Member States typically under-use the vast amount of information they receive through administrative cooperation mechanisms. Moreover, the information is not used in a “rigorous” way. Accordingly, one Member State indicated specific data fields in tax returns but without pre-entering the amounts. At the same time, another Member State notified taxpayers that the information is available, and that they must fill in the corresponding fields, thereby blinding taxpayers to the type, veracity and quality of the data held by the tax administration in respect of the pre-completion of their tax returns, solely because of the deterrent effect that – according to the tax administrations involved – such behaviour has on taxpayers.\textsuperscript{140}

On the other hand, the minimum standards and best practices of Baker and Pistone point out, regarding previously completed tax returns, that these must allow the taxpayer the possibility of correcting errors, starting – obviously – from guaranteeing the taxpayer’s right to access and correct in advance the personal information that the tax administration has about them (habeas data).\textsuperscript{141} On this basis, the author is surprised by conduct, such as that described previously. There is no justification for such behaviour in an environment where the aim is to favour voluntary compliance through cooperation between the tax administration and the taxpayer,\textsuperscript{142} and transparency has become the buzzword to justify the expansive tendency towards the powers of tax administrations, rather than the two-way process that it should be.\textsuperscript{143}

The European Court of Auditors concluded on this point by noting the significant under-use of information obtained through the automatic exchange for tax purposes. Accordingly, for example, less than a third of the information received under DAC and DAC-2, only 4% of the information received under Directive 2015/2376 (DAC-3)\textsuperscript{144} and Directive 2016/881 (DAC-4)\textsuperscript{145} led to new tax-related actions.\textsuperscript{146} In contrast, the exchange of information on request – i.e. targeted in a specific tax audit framework and referring to specific facts – works well, according to the Court of Auditors.\textsuperscript{147}

In the author’s view, this situation calls into question the rationality of the new paradigm of automatic exchange of information. On the basis that administrative activity interfering with taxpayers’ rights must be subject to strict limits, derived from necessity and relevance, an automatic exchange scheme where very large amounts of taxpayers’ data are collected, not aimed at a process of determining tax obligations but at feeding the tax administration’s databases vaguely and indiscriminately, thereby waiting for some data to appear that motivates a specific action, is unnecessary with regard to the public interest it claims to safeguard, excessive in respect of the sphere of rights of the taxpayers affected, and dangerously similar in its effects to the fishing expeditions discussed in section 4.2., not to mention, as noted in this section, the risks of loss, theft, leakage and inaccuracy of the data, as well as the use of this information for purposes other than tax assessment.\textsuperscript{148}

\subsection*{5.2.3. Early warning on DAC-6}

The mandatory reporting of potentially “aggressive” tax schemes, a system that aims at the early warning of the risks of “aggressive” tax planning through the collection and cross-border exchange of information on tax schemes to be marketed by tax advice professionals or implemented by taxpayers, poses significant challenges to the professional activities of tax intermediaries and the adequate protection of taxpayers’ rights. Indeed, because of the indirect means, i.e. hallmarks, through which it determines its material scope of application, the mandatory reporting of tax schemes has an indiscriminate deterrent effect on the tax planning market, whether “aggressive” or not, which negatively affects the economic freedom of intermediaries. This situation is radicalized in “generic” distinguishing features, primarily structured around the objective risk of the operations of tax intermediaries. Moreover, the lack of involvement of the advisor in the administrative pre-qualification of the scheme as “aggressive”, and, therefore, its publication in “blacklists” or its use for an indirect form of “naming and shaming”, implies risks for the protection of the confidentiality of the taxpayer’s information, from the advisor’s perspective. In weakened institutional frameworks, the system can go so far as to become a form of “indirect authorization” for tax planning. Accordingly, the mandatory reporting of tax schemes can become

\begin{itemize}
  \item 137. Id., at para. 46.
  \item 139. European Court of Auditors, Special Report No. 3, supra n. 133, at paras. 51-56.
  \item 140. Id., at paras. 57 and 63-64.\textsuperscript{141}
  \item 141. O’FTR, Baker & Pistone, supra n. 7, at p. 74.
  \item 142. J. Hey, General Report – The Notion and Concept of Tax Transparency, in Tax Transparency, secs. 1.1-1.2.1. (F. Başaran Yavaşlar & J. Hey eds., IBFD 2020), Books IBFD.
  \item 143. J. Hey, General Report – The Notion and Concept of Tax Transparency, in Tax Transparency, secs. 1.1-1.2.1. (F. Başaran Yavaşlar & J. Hey eds., IBFD 2020), Books IBFD.
  \item 146. European Court of Auditors, Special Report No. 3, supra n. 133, at paras. 68, 70, 78 and 83.
  \item 147. Id., at paras. 84-91.
  \item 148. Wöhrer, supra n. 32, at secs. 5.2. to 5.5.
\end{itemize}
a state barrier to entry into the market for the supply of tax advice, whether “aggressive” or not, which depending on its scope, can tend to the extreme of eliminating that market.\textsuperscript{149}

For its part, the mandatory reporting of tax schemes represents a possible reduction in the scope of protection of taxpayers’ rights. The deterrent effect on the tax advice market also affects the demand for these services, thereby significantly interfering with the exercise of the rights of taxpayers to legal assistance. Further, this situation affects professional advice to participating in their relevant market under competitive conditions through the optimization of the fiscal cost of their business, thereby also affecting taxpayers’ rights to economic freedom and economy of choice. As a declaration with a value equivalent to that of a tax self-assessment – by reporting potential taxable events – the reporting of tax schemes entails – in the author’s opinion – risks to \textit{nemo tenetur} and due process. This position applies insofar as the participation and control of the administrative activity of pre-qualifying schemes is deemed to be “aggressive” for the implementation of tax policy measures or the practice of audits is limited.\textsuperscript{150}

Another right that, in principle, appears to be affected seriously by the mandatory reporting of tax schemes is professional secrecy.\textsuperscript{151} According to the Baker-Pistone minimum standards and best practices, professional secrecy should extend to all forms of tax auditing, and any information known to the advisor under conditions of confidentiality should be privileged.\textsuperscript{152} The question then arises as to what happens when the professional who has invoked professional secrecy is obliged, under DAC-6, to share information with third-party advisers who must comply with the obligation in his place, where several professionals have collaborated in the design, set-up and implementation of a given tax scheme. It should be determined whether this situation is compatible with the taxpayer’s right to confidentiality, and whether – under all these conditions – taxpayers would receive appropriate tax advice without professional secrecy being adequately protected.\textsuperscript{153}

These are the questions raised by the Belgian Grondwettelijk Hof (Constitutional Court, GH) in the proceedings brought by the Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v. Vlaamse Regering (Case C-694/20).\textsuperscript{154} It can be questioned as to whether the situation described in the previous paragraph, regulated by article 8 \textit{bis ter} (5) of the DAC-6, is compatible with the rights to due process\textsuperscript{155} and respect for the privacy of taxpayers.\textsuperscript{156}

According to the applicants, an intermediary who intends to rely on professional secrecy in Belgium must, under the law transposing DAC-6 into national law, notify the other intermediaries concerned that he or she cannot comply with the obligation to disclose information based on professional secrecy. This duty to state reasons makes it impossible to comply with the legal requirement without breaching professional secrecy regarding those aspects of the services provided to the taxpayer that the taxpayer has not shared with the other advisers. However, according to the Flemish government, this situation is not a problem as long as the taxpayer is the only one obliged to report: (i) in the absence of the advisor under the duty of secrecy; or (ii) when the taxpayer has expressly or tacitly consented to the disclosure of the information to the other advisors; or (iii) when the advisor does not know the participation of other tax advisors in the design or implementation of the scheme.\textsuperscript{157}

In this context, the GH recognized the nature of the lawyer’s professional secrecy as being an essential element of the right to respect with regard to private life and the right to a fair trial. The information that lawyers must transmit about their clients to the competent authority is protected by professional secrecy if the information concerns activities falling within their specific mandate of defending or representing them before the courts and providing legal advice, including the mere fact of calling on a lawyer, according to the GH’s case law. Secrecy prevents the disclosure of information to any third party, including the identity of the client. Exceptions must be based on reasons of general interest, and the lifting of secrecy must be strictly proportionate.\textsuperscript{158}

This being the case, the question on which the ECJ has been called on to rule addresses many of the issues that cast doubt on the compatibility of mandatory reporting of tax schemes, albeit limited to a specific case. This situation is an excellent opportunity for the ECJ to establish a clear position that balances the public interest committed to the transparency necessary for the operation of the tax system. Transparency, as developed in section 5.2.2., is called into question as long as the information collected is not effectively used in the collection effort, with the effective protection of taxpayers’ rights, who are first and foremost citizens and, as such, are holders of fundamental rights that require enhanced protection.\textsuperscript{159}

\textsuperscript{149} C.E. Weffe H., Mandatory Disclosure Rules and Taxpayers’ Rights: Where Do We Stand?, Intl. Tax Stud. 1: secs. 3.3–3.5. (2021), Journal Articles & Opinion Pieces IBFD.

\textsuperscript{150} See Weffe H., supra n. 149, at sec. 4.3. See also N. Čičin-Sain, New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another “Bite” into the Rights of the Taxpayers?, 11 World Tax 1: sec. 3.2. (2019), Journal Articles & Opinion Pieces IBFD.

\textsuperscript{151} See Weffe H., supra n. 149, at sec. 4.2. See also Čičin-Sain, supra n. 150, at sec. 3.1.

\textsuperscript{152} OFTR, Baker & Pistone, supra n. 7, at p. 73.

\textsuperscript{153} See Weffe H., supra n. 149, at secs. 3.3 and 4.3.3.


\textsuperscript{155} Art. 47 Charter of Fundamental Rights of the European Union.

\textsuperscript{156} Id., at art. 7.

\textsuperscript{157} BE, ECJ, summary of the request for a preliminary ruling, 21 Dec. 2020, Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v. Vlaamse Regering, paras. 2-3.

\textsuperscript{158} Id., at para. 6.

\textsuperscript{159} Kokott, Pistone & Miller, supra n. 13, at sec. V. See also Weffe H., supra n. 82, at sec. 2.1.
5.3. Are you experienced?

One of the most sensitive aspects in protecting taxpayers’ rights in cross-border situations is undoubtedly the taxpayer’s participation in the exchange of information. As could not be otherwise, the issue has generated an intense judicial debate, considering the application of the European mechanisms of administrative cooperation in tax matters.

The exchange of information can be seen as a procedure exclusively between states, which would exclude the participation of non-state actors and, consequently, would not recognize their rights in this framework. This was the understanding of the ECJ in a first approach to the issue in the well-known case of Sabou (Case C-276/12).  

However, insofar as the enforcement of the obligations of the Member States deriving from the European Union’s legal system is involved, the guarantees deriving from the Charter of Fundamental Rights of the European Union must apply to the exchange of information produced within the framework of the DAC. This was the understanding of the ECJ in the landmark case of Berlioz (Case C-682/15). In Berlioz, the ECJ recognized the right of third parties obliged to supply information to an effective remedy against the information request and its punitive consequences, and a review by the requested state of the legal validity of the information request, in particular about its foreseeable relevance. From there, there has been a trend towards the implementation of “participation rights”. Such rights include the taxpayers’ rights: (i) to be informed of the request for information; (ii) to be heard before the information is transmitted to the requesting state; and (iii) to challenge the decision of the requested state regarding the transmission of the information. Accordingly, there appears to be a favourable trend towards the integration of taxpayers and interested third parties in the exchange of information, recognizing the rights of non-state actors in this procedure, which would align the practice with the fundamental principles, minimum standards and best practices for the protection of taxpayers’ rights in the exchange of information.

In 2020, the ECJ had an excellent opportunity to take a further step in this direction. In two joined cases, the ECJ had before it a set of facts substantially identical to those at issue in Berlioz.

Spain requested Luxembourg information concerning a taxpayer held by third parties, a commercial company and a financial institution. In compliance with the request, the Luxembourg tax authorities asked these third parties to provide the requested information consisting of the contracts concluded and having effect between the taxpayer and these third parties in the audited period, all of the invoices issued or received concerning these contracts, as well as their collection and payment, and details of the bank accounts and financial institutions in which the cash recorded on the balance sheet is held. In addition, information on the names of the account holder, the names of the persons authorized to carry out transactions, and who opened a given bank account, the account statements, the beneficial owner, and information on the existence of other accounts or financial assets held by the taxpayer under investigation were also requested.

Under Luxembourg law, all of the requests indicated that no appeal was possible against them. In this context, the third parties questioned the foreseeable relevance of the request and challenged the request for information before the Luxembourg Cour Administratif (Administrative Court, I.C.A), which favoured the third parties in the sense of Berlioz.

The state appealed, which led the Luxembourg Conseil d'État (Supreme Administrative Court, LCE) to request a ruling from the ECJ regarding the right to challenge directly the information request in the requested state, both of the third parties and the taxpayer regarding whom the information is requested. If the answer was in the affirmative, the ECJ was also asked to give its opinion on the scope of the powers of the court of the requested state to review the legality of the request for information received from the requesting state, in particular, with regard to the “foreseeable relevance” of the information requested.

With regard to a first point, the Grand Chamber of the ECJ upheld the doctrine established in Berlioz regarding the applicability of the Charter of Fundamental Rights of the European Union to requests for information made based on the DAC. Having declared the applicability of the Charter, and, therefore, article 47 thereof, the ECJ confirmed that this rule was a sufficient basis for the third party to directly challenge the request without the need for specific development by other provisions of EU law or by provisions of the domestic law of the relevant Member States.

162. Weffe H., supra n. 82, sec. 4.2.
164. See Kokott, Pistone & Miller, supra n. 12.
167. Luxembourg (Joined Cases C-245/19 and C-246/19), supra n. 166, at para. 26.
168. Id., at para. 36.
169. Id., at paras. 27 and 37.
170. Id., at para. 29.
171. Id., at para. 34.
172. Luxembourg (Joined Cases C-245/19 and C-246/19), supra n. 166, at para. 46 and Berlioz (Case C-682/15), supra n. 161, at paras. 34-37.
173. Luxembourg (Joined Cases C-245/19 and C-246/19), supra n. 166, at para. 69.
174. Id., at para. 54.
However, surprisingly for the author, especially in light of the Opinion of Advocate General J. Kokott, the ECJ considered that the position of the taxpayer whose data were the material subject of the procedure and whose tax obligations would be determined based on the information provided by the third party, and who, therefore, had a personal, legitimate and direct interest in the validity and results of the request, did not legitimize the taxpayer to challenge the order in the requested state. While the taxpayer was entitled to effective judicial protection against the order, insofar as it might constitute an interference with his rights to privacy and data protection, the remedy did not necessarily have to be direct, and its contestability impacted the pending determination procedure in the requesting state is sufficient. These conclusions also extended to third parties with whom the taxpayer subjected to the investigation that had given rise to the information request decisions had or might have legal, banking, financial or, in a broader sense, economic relations.

The ECJ divided its reasoning into two parts. First, the taxpayer was not the direct addressee of the request for exchange or the administrative act of the requested state seeking its enforcement, so that the taxpayer was not legally bound by them nor exposed to sanctions in case of non-compliance. Second, any right that was deductible from the content of these acts or their execution would be challengeable, in principle, before the requesting state, as long as the evidentiary material thereby obtained was integrated into the tax audit and resulted in outstanding tax debt. In addition, the information request took place in the preliminary phase of the tax investigation, a stage of the procedure in which the taxpayer’s participation would not be necessary in the court’s opinion, in the sense of Sabot.

Respectfully, the author strongly disagrees with this reasoning. Contrary to what happens, for example, in criminal investigation, tax investigation goes from the author to the facts. It starts from the taxpayer’s knowledge to investigate the taxable facts that may be attributable to him. This prior knowledge of the taxpayer requires a specific informative activity from the tax administration, prior notification of the acts potentially aimed at affecting the taxpayer’s sphere of rights, to allow the taxpayer to exercise fully his or her right to a defence and equality of arms throughout the procedure in line with the minimum requirements of the rule of law in a democratic society.

Next, the ECJ ruled on the scope of the powers of the judges of the requested state to review the “foreseeable relevance” of the request for information which was the subject of the procedure. In this regard, the ECJ ratified the Berlioz criterion. The margin of appreciation of the requesting state in assessing the foreseeable relevance of the information requested did not mean that it could request information that is irrelevant to the investigation. This position implied, also in line with Berlioz, the possibility for the requested state to control the foreseeable relevance of the information requested, based on the motivation that must accompany the request, and as a means of controlling the proportionality and reasonableness of the administrative intervention in scenarios in which, as in the present case, the request served as a basis for requiring concrete actions by third parties in the requested state, under penalty of sanction.

Finally, the ECJ partially clarified the material content of the concept of “foreseeable relevance”, which was presumed to be fulfilled — or instead, its lack was manifest — in the case that the request indicates the identity of the taxpayer under investigation, the period covered by the investigation and the identity of the person in possession of information regarding contracts, invoices and payments relating to the period and connected to the taxpayer under investigation. The LCA, which had referred the matter for a preliminary ruling, adopted the ECJU’s approach in its final decisions.

6. Conclusions

Following the account provided in this article, the author believes that the upward trend of academic and practical interest in the systematic study of taxpayers’ rights is confirmed. Furthermore, initiatives, such as the IIA’s study group on international tax law, the annual frequency of the International Conferences on Taxpayers’ Rights, with an increasing number of participants and a remarkable body of doctrine derived from their debates, and the fieldwork, data collection and processing carried out by IBFD through the OPTR, all available online in open access, indicate an increasing academic and professional attraction on the subject. However, much work remains to be done, as evidenced by the hesitant nature of several of the trends outlined throughout this article.

With regard to confidentiality (see section 3.), the author finds it valid to assert that the boundaries of taxpayer confidentiality remain blurred. While 2020 practice seems to have placed clear limits on the possibility of obtaining tax-relevant information in contexts of risk of use for


176 Luxembourg (Joined Cases C-245/19 and C-246/19), supra n. 166, at paras. 74 and 79.

177 Id., at paras. 96, 99, 102 and 105.

178 Id., at para. 80.

179 Id., at paras. 80, 83. See also OPTR, supra n. 7, at sec. 4.3.

180 Luxembourg (Joined Cases C-245/19 and C-246/19), supra n. 166, at para. 81 and Sabot (Case C-276/12), supra n. 160, at paras. 40 and 44.

181 Wefel H., supra n. 82, at sec. 4.2.

182 Berlioz (Case C-682/15), supra n. 161, at paras. 70-71.

183 Luxembourg (Joined Cases C-245/19 and C-246/19), supra n. 166, at para. 112.

184 Berlioz (Case C-682/15), supra n. 161, at paras. 76, 78, 80 and 82.

185 Luxembourg (Joined Cases C-245/19 and C-246/19), supra n. 166, at para. 115.

186 Id., at para. 124.

political purposes (see section 3.4.), the boundary between the freedom of information and the taxpayer’s right to keep his or her tax affairs private remains blurred. In the author’s view, this assertion is evidenced by the permissiveness with which case law has admitted the use of naming and shaming (see section 3.3.), and by the possibility, implicit in the case law analysed, of filming tax audits and broadcasting them on television as long as the content is anonymized, but without this activity necessarily being linked to judicial authorization or to a result detrimental to the economic well-being of the nation (see section 3.2.). Nevertheless, judicial work, albeit hesitant, remains essential in limiting excesses, as all these cases prove.

Regarding intensive audits and criminal and administrative sanctions (see section 4.), it is possible to see encouraging signs coming from the judiciary to limit the expansion of the tax administrations’ power in punitive tax matters. 188 In this area, jurisprudential practice placed a clear limit on the search of the taxpayer’s domicile as a formula for “fishing expeditions” leading to potentially incriminating evidence without the minimum procedural guarantees (see section 4.2.), and drew, correctly in the author’s opinion, the limits of the judicial determination of criminal liability, in line with the principle of guilt and the presumption of innocence that also apply to all tax penalties (see section 4.3.). However, comparatively less progress has been made on the use of indirect sanctions (see section 4.4.).

Finally, in cross-border situations (see section 5.), for the author, the year 2020 allowed to question the rationality of automatic exchange of information as a paradigm of the evidentiary activity of the tax administration in this type of scenarios. The empirical evidence appeared to prove that the indiscriminate collection of data through automatic exchange does not necessarily translate into higher collection and lower tax evasion rates. In the author’s view, only through the integrated use of this tool that rationalizes the burden on administrations and taxpayers and allows effective use of the information it will be possible: (i) to eliminate the risk that the automatic exchange of information ends up being assimilated in its effects to fishing expeditions (see section 5.2.2.); and (ii) that its implementation does not effectively diminish the taxpayer’s fundamental rights, such as those connected with professional secrecy (see section 5.2.3.).

For their part, in the absence of concrete actions by states to guarantee the right to participation of non-state actors in the cross-border exchange of information, courts have not hesitated to intervene to the benefit of taxpayers. However, such action is still timid (see section 5.3.). Moreover, this approach entails a significant risk of increasing conflict before the courts, with a negative collateral effect on legal certainty and the proper functioning of international trade.

188 See Weffe H., supra n. 81, at sec. 2.3.