

BRIEF CONSIDERATIONS ABOUT CURRENT
PROTECTION OF TAXPAYERS' RIGHTS
IN EUROPE: UNDER THE EXCHANGE
OF INFORMATION PERSPECTIVE*

*Breves consideraciones sobre la actual protección
de los derechos de los contribuyentes en Europa
desde la perspectiva del intercambio de información*

Melissa Carolina Elechiguerra Labarca

Profesora de Postgrados
Universidad Central de Venezuela
melechiguerra@elechiguerralabarca.com

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Resumen

Este artículo se centra en el reconocimiento de los derechos de los contribuyentes a nivel global y europeo, especialmente desde la perspectiva del intercambio de información, a la luz de las iniciativas de la UE. Aunque las regulaciones juegan un papel importante, también es necesario considerar todos los mecanismos para proteger a los contribuyentes que sufren directamente las consecuencias de estas acciones.

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Palabras clave

Derechos de los Contribuyentes; Intercambio de información fiscal; Unión Europea; Derechos Fundamentales; Interés General.

Abstract

This article focuses on the recognition of taxpayers' rights at a global and European level, especially from the Exchange of Information perspective, in light of the EU initiatives. Although regulations play a major role, it is also important to look at all the mechanisms to protect the taxpayers who suffer the consequences of these actions directly.

Keywords

Taxpayers' Rights; Exchange of tax information; European Union; Fundamental Rights; General Interest.

SUMMARY: I. INTRODUCTION. II. CURRENT SITUATION. III. CURRENT SITUATION OF TAXPAYERS' RIGHTS. IV. EUROPEAN PERSPECTIVE. V. DO EU TAXPAYERS HAVE PRIVACY PROTECTION IN THE FATCA EXCHANGE WITH THIRD COUNTRIES LIKE THE U.S., BECAUSE OF THESE EXCHANGES TAKING PLACE OUTSIDE EU LAW UNDER IGA AGREEMENTS? VI. BRIEF CONSIDERATIONS OF THE ROLE PLAYED BY THE ECtHR AND THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU) IN RELATION TO THE PROTECTION OF FUNDAMENTAL TAXPAYERS' RIGHTS. SPECIAL REFERENCE TO THE EXCHANGE OF INFORMATION. VII. CONCLUSIONS. BIBLIOGRAPHY.

I. INTRODUCTION

In many countries, taxes are established as mere correction instruments of other previous government policies that have not achieved their initial objectives. Considering the obvious differences between societies, the main consequence is that these tax measures respond to particular circumstances and, at the same time, do not take into account complex dynamics that lead to ineffective tax policies, which far from responding to the principles of fairness, proportionality and non-confiscatory tax justice, end up turning against the interests of most of the population and ultimately cause a greater number of inequalities and injustices that they were intended to solve.

Important and innovative measures have been taken recently in the international tax field, a salient example being the Action Plan on Base Erosion and Profit Shifting (BEPS)¹, as well as other measures to reinforce the exchange of information. However, the implementation of those measures could affect taxpayers' rights. For instance, the Organization for Economic Cooperation and Development (OECD) focuses on how to implement the BEPS' fifteen actions aiming to reinforce the exchange of information and eliminate tax evasion. Nonetheless, one question arises: How are the taxpayers' rights being protected from the tax administration's proactivity?

This article focuses on the recognition of taxpayers' rights at a global and European level, especially from the Exchange of Information perspective, in light of the EU initiatives. Although regulations play a major role, it is also

¹ "Base erosion and profit shifting (BEPS) is a global problem which requires global solutions. BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid. BEPS is of major significance for developing countries due to their heavy reliance on corporate income tax, particularly from multinational enterprises (MNEs)", OECD, *About Base Erosion and Profit Shifting* (BEPS), last consulted 20 February 2016, <http://www.oecd.org/tax/beps-about.htm>.

important to look at all the mechanisms to protect the taxpayers who suffer the consequences of these actions directly².

II. CURRENT SITUATION

It is important to lay ground for this article by making reference to the Aggressive Tax Planning and Abuse from the OECD and EU perspective³.

Frequent changes, from OECD and UE perspective, force compliant national systems to constantly adapt their legislation to keep up with the new implementation. Take the BEPS Project, carried out by the OECD, which “refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations”⁴. The EU has held a similar stand: from an EU perspective “Aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. Aggressive tax planning can take a multitude of forms. Its consequences include double deductions (e.g. the same loss is deducted both in the state of source and residence) and double non-taxation (e.g. income which is not taxed in the source state is exempt in the state of residence)”⁵.

² “(...) the protection of taxpayers' rights is neither organized systematically nor clearly defended as a policy within the international organizations, by contrast to the EU fundamental rights of citizen, on the sole basis of which taxpayers may obtain remedy. However, a few provisions of the ECHR are associated with tax matters and have generated some case law at the ECtHR, granting remedy to taxpayers on the basis of human rights: Art. 6 (right to fair trial), Art. 8 (right to respect of private family life), Art. 14 (prohibition of discrimination) and Art. 1 of the Protocol No.1 (protection of property)”. Cécile Brokelind, “The Role of the EU in the International Tax Policy and Human Rights: Does the EU need a policy on taxation and human rights”, in *Human Rights and Taxation in Europe and the World*, ed. by George Kofler, Miguel Poaires and Pasquale Pistone (Amsterdam: IBFD, 2011): 114-115.

³ “In contrast to the principle of abuse, aggressive tax planning also covers the existence of legal gaps or mismatches exploited in transnational situations. Legal gaps have to be dealt in transnational situations. Legal gaps have to be dealt by law, due to the principles of no taxation without representation and of separation of powers in tax law. Thus, legal gaps cannot be overcome by GAARs, since these rules do not operate automatically and universally but require demonstration of abuse of (existing) law (or rules on a case-by-case basis”. Ana Paula Dourado, “The Base Erosion and Profit Shifting BEPS Initiative Under Analysis”, *Intertax BEPS: A special issue on the Base Erosion and Profit Shifting Initiative*, Volume 43.Issue 1, January: 48 (2015).

⁴ OECD, *Base Erosion and Profit Shifting*, last consulted 26 September 2017, <http://www.oecd.org/tax/beps/>.

⁵ Commission Recommendation of 6.12.2012 on aggressive tax planning. 2012, last consulted 10 February 2016, https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/c_2012_8806_en.pdf.

The OECD and EU are taken initiatives which are attractive for multiple tax jurisdictions around the world in order to reduce and eliminate the aggressive and abusive tax planning. However, the position of taxpayers' rights in regards to these new tax challenges is a point to be further considered, as it has been remarked by many scholars, international institutions and organizations⁶. As Pistone stated "The basic rights of taxpayers should be protected domestically and cross-border for the simple reason that taxpayers are human beings and, therefore, entitled to the protection of their human rights"⁷.

The protection of taxpayers' fundamental rights is a highly important subject considered all over the world, for instance it should be mentioned the work developed by the *Confederation Fiscale Europeenne*⁸ in order to adopt a Taxpayer Charter, the European Commission⁹ is planning the publication of a "European Taxpayer's Code" and the International Fiscal Association¹⁰ determined the best practices and minimum standards regarding Taxpayer's Rights. In this vein, it is important to mention some relevant consequences of the initiatives taken by the EU in relation to Taxpayers' Rights: the taxpayers' liability is reinforced when they have to deliver information to tax administrations. On the other hand, another important issue is related to the confidentiality and proper use of taxpayers' information.

⁶ See Philip Baker, "The BEPS Project: Disclosure of Aggressive Tax Planning Schemes", *Intertax BEPS: A Special Issue on the Base Erosion and Profit Shifting Initiative*, Volume 43, Issue 1 (2015): 85-90; Philip Baker, Pasquale Pistone, "The Practical protection of taxpayers' fundamental rights". *Cahiers de Droit Fiscal International*. IFA. Volume 100b. (The Hague: Sdu Uitgevers, 2015), 21-68; Niels Diepvens & Filip Debelva, "The evolution of the Exchange of the Information in Direct Tax Matters: The Taxpayer's Rights under Pressure", *ec Tax Review*. N 4 (2015): 210-219; Irma Mosquera, "Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism", *World Tax Journal*. Volume 7, No. 3, Published online: 6 October 2015.

⁷ Pasquale Pistone, "Exchange of Information and Rubik Agreements: The Perspective for an EU Academic", *Bulletin for International Taxation*. April/May (2013): 217.

⁸ Confederation Fiscale Europeenne. 2016, 8th CFE PAC Conference: "Big Data - a threat to taxpayer rights?", "The CFE, together with AOTCA, the Asia-Oceania Tax Consultants' Association, and STEP, the Society of Trust and Estate Practitioners, presented a draft Model Taxpayer Charter of rights and responsibilities of taxpayers", last consulted 22 February 2016, <http://www.cfe-eutax.org/node/4740>.

⁹ The European Commission is planning the publication of a "European Taxpayers' Code", last consulted 27 April 2017,

¹⁰ https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines_for_a_model_for_a_european_taxpayers_code_en.pdf.

¹⁰ Subject II in the Annual Congress of IFA 2015 in Basel was "The practical protection of taxpayers' fundamental rights".

III. CURRENT SITUATION OF TAXPAYERS' RIGHTS

Having considered the general purpose of the OECD and EU with the new changes in the field of international taxation, it is also reasonable to analyze their incidence on taxpayers' fundamental rights. Then, a very basic question emerges: What is the current position of taxpayers' rights?

The recognition of fundamental taxpayers' rights should not be treated as a way to evade taxes and avoid the obligations imposed on taxpayers, but the taxpayers need protection in circumstances in which they may be considered as defenseless when there is an interaction between the taxpayer and the administration to avoid possible injuries caused by the circumstances.

On their discussions about BEPS, the OECD is focusing on the purpose of reducing the practice of shifting profits across borders to take advantage of tax rates that are lower in other countries than the one where the profit is made¹¹. Regardless of this, the balance between the BEPS actions and the protection of fundamental taxpayers' protection remains ignored.

The EU has adopted instruments in order to align the legislation with the OCDE, for instance the Commission presented on 18 March 2015 the Tax Transparency Package in order to introduce the automatic exchange of information between Member States on their tax rulings and also "contains measures to prevent aggressive tax planning, boost tax transparency and create a level playing field for all businesses in the EU"¹².

Although the development of those measures both at an EU and at a global level is still developing, it can be said that the factual mechanism of exchange of information could create legal uncertainty because there are some issues related to the protection of taxpayers' rights which are still not clear. As it was remarked by Poelmann: "(...) the tax transparency package of the Commission (COM (2015) 135) and tax rulings raise the question of the level of detail, as it seems that there is no limitation on information that can be demanded of companies and shared by governments, trying not to ignore taxpayers' rights"¹³.

Nowadays, the real link between tax authorities and taxpayers could be reduced to a set of rules which the State, in exercising their powers, makes mandatory, and taxpayers must follow to avoid sanctions.

¹¹ OECD, *What is BEPS and how can you stop it?*, last consulted 20 February 2016, <http://oecdinsights.org/2013/07/19/what-is-beps-how-can-you-stop-it/>.

¹² Anti Tax Avoidance Package. 2012, last consulted 30th May 2016, http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm.

¹³ Session held by Eric Poelmann, "The Contribution of EU Law to the Fundamental Rights of Taxpayers", in the 10th GREIT Annual Conference on EU BEPS; Fiscal Transparency, Protection of Taxpayer Rights and State Aid and 7th GREIT Summer Course on Tax Evasion, Tax Avoidance & Aggressive Tax Planning. Amsterdam. September (2015): p. 80.

This reality is given by the adaptation of public policy at a given time rather than on the actual needs of taxpayers, which results in a complete separation between the activity of the administration and the behavior of taxpayers. Firstly we must remember that fundamental rights must be respected at all times; however, in the exercise of the right to punish, the Administration may violate some fundamental rights with its actions¹⁴.

The increasing mobility of citizens and businesses, as well as increased internationalization and transnational legal relations, definitively contribute to the establishment of an international charter for the protection of the taxpayer.

The management activity of the Administration is justified by the State's power to punish and sanction; however, when we speak of the right against self-incrimination in tax matters, we refer to the identity of the damages that taxpayers could eventually suffer.

Moreover, it should be kept in mind that the meaning of tax justice in Europe is not yet enveloped within a unique definition. Each Member State has its own concept and constitutional principles about it, which are very similar but certainly not harmonized. Baker¹⁵ makes reference to the fact that three different levels of taxpayers' rights are enshrined in Europe:

- 1) National level: Bills of rights are contained in national constitutions and these rights are applicable to protect taxpayers' rights.
- 2) EU level: some of these rights can be found in Treaties and in the General Principles of the EU law, which assure their application in Member States.
- 3) European Convention on Human Rights (ECHR).

IV. EUROPEAN PERSPECTIVE

On December 2015, the Council Directive (EU) 2015/2376 amending Directive 2011/16/EU was published in Europe, dealing with mandatory automatic exchange of information in the field of taxation. The basis of this Directive is a consequence of the conclusions of the European Council of 18 December 2014 “ (...) underlined the urgent need to advance efforts in the fight against tax avoidance and aggressive tax planning, both at global and Union levels. Stressing the importance of transparency, the European Council welcomed the Commission's intention to submit a proposal on the

¹⁴ ECtHR, Case *Saunders c. United Kingdom*, Application n° 19187/91, 17 December 1996.

¹⁵ Philip Baker, “Taxpayers Charter and a Taxpayers' Charter for Europe”. Włodzimierz Nykiel, *Protection of Taxpayer's Rights* (Warszawa: Oficyna):132-133.

automatic exchange of information on tax rulings in the Union”¹⁶. This Directive states that it is appropriate to consider the work done by OECD’s Forum on Harmful Tax Practices “in a coordinated manner and not only in the area of the development of such a standard form for mandatory automatic exchange of information. The ultimate aim should be a global level playing field, where the Union should take a leading role by promoting that the scope of information on advance cross-border rulings and advance pricing arrangements to be exchanged automatically should be rather broad”¹⁷.

Also, it should be mentioned that Action 12 of BEPS “Mandatory disclosure rules” aims to “design a regime that fits those countries’ need to obtain early information on aggressive or abusive tax planning schemes and their users”¹⁸.

Even though Directive 2015/2376 emphasizes the respect of fundamental rights and observes the principles recognized particularly by the Charter of Fundamental Rights of the European Union (the Charter) and “ensure full respect for the right to the protection of personal data and the freedom to conduct a business”¹⁹, from the authors views there are still gaps in the Protection of Fundamental Taxpayers’ Rights which will be pointed out briefly.

The Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU is aimed to pursue a broad scope for Powers Administration in order to gather information, but on the other hand, it could reduce Taxpayers’ Rights. An essential point to highlight is the fact that the numeral (4) article 17, which was abrogated, established: “The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy”. Now, it reads as: “(b) a summary of the content of the advance cross-border ruling or advance pricing arrangement, including a description of the relevant business activities or transactions or series of transactions provided in abstract terms, without leading to the disclosure of a commercial, industrial or professional secret or of a

¹⁶ Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, last consulted 23 February 2016, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2376>.

¹⁷ *Ibidem*

¹⁸ OECD/G20, *Base Erosion and Profit Shifting Project Explanatory Statement 2015 Final Reports*, last consulted 16 February 2016, <http://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf>.

¹⁹ Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU.

commercial process, or of information whose disclosure would be contrary to public policy;²⁰.

The aim of this directive was to disable Member States from using commercial secrets as an excuse for not automatically exchanging information. That means, from the European Commission's view, that "The information will have to be transmitted between tax authorities. However, once the information has been exchanged, companies' commercial secrets and data would be protected because, under EU legislation, tax authorities are bound by official secrecy obligations and data protection provisions when information is shared between them. Therefore the commercial secrets of the company are respected, but without compromising the level of information tax authorities receive"²¹. Thus, it can be appreciated that there is not any additional possibility that a Member States refuses a provision of information because of the existence of commercial, industrial or professional secret or of a commercial process, but the information will remain safe under EU legislation.

On the other hand, it seems relevant to consider what it is established in the Regulation on protection of individuals with regard to the processing of personal data by the Community institutions and bodies, as well as on the free movement of such data²².

On this regard, Directive (EU) 2015/2376 makes reference to the exceptions established in the Regulation aforementioned²³ in relation to rights and obligation in order to safeguard "(b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters,"²⁴.

Until this brief description, there are several issues that are worthy of consideration. As a general view, it can be appreciated there is a tendency to

²⁰ Article 8a, (6) (b) of the Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

²¹ European Commission - Fact Sheet, Combatting corporate tax avoidance: Commission presents Tax Transparency, Brussels, 18 March 2015, http://europa.eu/rapid/press-release_MEMO-15-4609_en.htm, last consulted 21 April 2016.

²² Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies, and on the free movement of such data.

²³ Article 23.a Confidentiality of information "1a. Regulation (EC) No 45/2001 applies to any processing of personal data under this Directive by the Union institutions and bodies. However, for the purpose of the correct application of this Directive, the scope of the obligations and rights provided for in Article 11, Article 12(1), Articles 13 to 17 of Regulation (EC) No 45/2001 is restricted to the extent required in order to safeguard the interests referred to in point (b) of Article 20(1) of that Regulation".

²⁴ *Ibidem*.

expand the Administration's Power in order to gather taxpayers' information. That can be a controversial issue, considering that the respect for Fundamental Rights must be progressive. The wording of the Directive when it stated "(21) The existing provisions regarding confidentiality should be amended to reflect the extension of mandatory automatic exchange of information to advance cross-border rulings and advance pricing arrangements", can be considered from the author's point of view it as a very powerful (as well as potentially dangerous) tool because it has one interpretation: the exchange of information and the adaption of EU legislation is precluding Fundamental Rights as: confidentially, the opportunity for taxpayers to be informed about the investigation, the progressivity of Human Rights.

Then, it is important to remark the possible risk of making a holistic approach²⁵ of "juridical indeterminate concepts" as public policy, and the important economic or financial interest of a Member State, in order to adapt European legislation to international tendencies which may result in converting the established exemptions in the rule.

Contrastingly, there is a specific issue with the misinterpretation in different languages of the wording, e.g. "public policy" It was translated in the Directive into Spanish as "General interest" and in the Treaty on the Functioning of The European Union, the term "public policy", for instance, was translated from English to Spanish as "public policy"²⁶. From the author's standpoint, there is a slight difference because "public policy" can be understood as the legal order established based on what is interpreted as general interests, but that does not mean that it always corresponds to the general interest²⁷.

On this regard, Beatriz Gutiérrez-Solar Calvo stated "(...) the general interest, also designated public interest, is a juridical concept different from that of public policy. These two concepts are in a genre to species relation, integrating the second one in the first one. The notion of public interest has

²⁵ "Holistic approach" Comments received on Public Discussion draft BEPS Action 12: Mandatory Disclosure Rules: 63, last consulted 06th May 2016, <http://www.oecd.org/tax/aggressive/public-comments-beps-action-12-mandatory-disclosure-rules.pdf>.

²⁶ "The "public interest" has often been defined as a reflection of private interests within particular spheres of public policy", Peter Woll, *Public Policy*, University Press of America, Boston, 1974, p. 4. (256), "There is always disagreement about what constitutes the public interest in any given area of public policy (...) Each of us, in his heart, feel that he knows exactly what constitutes the public interest in any given policy field. (...) It is necessary to accept the fact that the public interest in reality is what is defined as such after the governmental process has taken into account and compromised divergent viewpoints", *ibidem*, p. 8.

²⁷ See Beatriz. Gutiérrez-Solar Calvo, *El desplazamiento temporal de trabajadores en la Unión Europea*. (Pamplona: Aranzadi., 2000), 112-133.

an open character that the jurisprudence community has been constructing and clear criteria have not been offered to delimit its content” (unofficial translation).

This issue could represent a problem because taxpayers find a different level of protection depending on the language version of the Council Directive (EU) 2015/2376 of 8 December 2015. Some could argue that, from the English version it can be assumed that all the information could be subject to be disclosed based on “public policy”²⁸. Adversely, in the Spanish version, it can be assumed that communication of information will be hardly disclosed because it does not fit in with the “general interest”. The European jurisprudence has established imperative exigencies of general interest without exhausting its scope²⁹.

It can be seen from the above statement that there is a serious risk of going back in the field of protection of taxpayers' rights when indeterminate juridical concepts as “public policy”, “general interests” and “important economic or financial interest of a Member States” are overriding the protection of taxpayers' rights reached so far without any substantive limit. In the end, the established exemptions will be the rule. Then, it is imperative to provide the same level of protection to taxpayers despite the language version of the Directive and it could be reached if the concepts are well defined.

On the other hand, it is worth mentioning a recent case law related to the “juridical indeterminate concepts”. In the case C682/15, the ECJEU examined the meaning of the “foreseeable relevance” of the information requested, as it is referred in Article 1(1) of Directive 2011/16, “and the scope of the review which the tax and judicial authorities of the requested State must

²⁸ Considerations about concept of public policy by de ECJ C- 30-77, *Régina v Pierre Bouchereau*, 27 October 1977, paras 33-35; ECJ C-54/99, *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister*, 14 March 2000, para 17.

²⁹ See Maria Fartunova, *La prevue dans le droit de l'Union européenne*, (Bruxelles: Bruylant, 2013), 162-168 (733); ECJ, C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, 20 February 1979; ECJ, C-353/89, *Commission v. The Netherland*, 25 July 1991; ECJ, C-71/76, *Thieffry v Conseil de l'ordre des avocats de la Cour de Paris*, 28 April 1977; ECJ, C-484/93 *Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme*, 14 November 1995.

In this sense, Maria Fartunova pointed out some views of the Court in relation to public policy, general interest and consumer protection that the Court considered “ (...) Whatever interpretation is to be given to the term “public policy”, it cannot be extended so as to include considerations of consumer protection” (ECJ, C-177/83, *Th. Kohl KG v Ringelhan & Rennett SA and Ringelhan Einrichtungs GmbH*, 6 November 1984); whereas, in another judgment, considered that Member States could invoke the general interest (CJCE, C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, 20 February 1979) (unofficial translation).

carry out in that respect without undermining the purpose of that directive”. In this case, there is an important issue to highlight because the Court determined that for a person who may be the subject of administrative measures “to be given a full hearing of his case in relation to the lack of any foreseeable relevance of the requested information, it is sufficient, in principle, that he be in possession of the information referred to in Article 20(2) of that directive”³⁰.

The above mentioned case showcases the fundamental role the European Courts must play in order to preserve and reinforce taxpayers' rights in an era where States are adapting their laws in order to comply with international rules without considering Fundamental Rights.

V. DO EU TAXPAYERS HAVE PRIVACY PROTECTION IN THE FATCA EXCHANGE WITH THIRD COUNTRIES LIKE THE U.S., BECAUSE OF THESE EXCHANGES TAKING PLACE OUTSIDE EU LAW UNDER IGA AGREEMENTS?

If we refer to exchanging information, the Foreign Account Tax Compliance Act (FATCA) is noteworthy. The Act “was enacted in 2010 by Congress to target non-compliance by U.S. taxpayers using foreign accounts. FATCA requires foreign financial institutions (FFIs) to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. Taxpayers hold a substantial ownership interest”³¹. The principal aim of FATCA is to prevent tax evasion by U.S. persons who use Foreign Financial Institutions (FFIS) to hide their identities from U.S. government.

Under FATCA, there is an obligation to proportionate personal data of U.S. taxpayers to financial institutions established in the European Union, which have to comply with the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The Protection of personal data is protected in the Treaty on the Functioning of the EU (Article 16), the Charter (article 8) and in the ECHR (article 8). Because of this, the U.S. and G-5 countries (Germany, Spain, France, Italy and UK) adopted IGAs in 2012 in order to avoid local law conflicts with FATCA.

Moreover, the aforementioned Directive 95/46/EC establishes the mechanism to transfer personal data to a third country and it opens the door for

³⁰ CJEU C-682/15, *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes*, 16 May 2017.

³¹ US Department of the Treasury, last consulted 10 October 2017, <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>.

transferring personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2), when the transfer is necessary or legally required on important public interest grounds³².

Likewise, it is important to highlight the possible risk, stated by the Spanish National Report for the European Association of Tax Law Professors (EATLP Istanbul 2014 in relation with the Proportionality Principle contained in the article 6.1 b), of a lack a safeguards to grant the quality of data and the security of its treatment, and the right to access, rectify and cancel such data. This is to comply with Directive 95/46/EC, where it is established that the data must be collected “for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes (...)”. In the same report, one question is on the stage: Is the massive transmission of financial data a necessary and proportionate measure to improve tax compliance?³³

Considering the European context, there is a conflict of interest because the rights for private and family life are protected in the ECHR³⁴ and in the Charter³⁵, and they must be respected all times; exceptions will apply only in certain cases. Otherwise, there would be an undesirable result where what should be exceptions, would be the rule and the real aim of the aforementioned right in the end would be deprived of sense in the end.

Furthermore, some pending questions remain: What about the progressivity of Human Rights if it has been recognized by the European jurisprudence that article 7 of the ECHR is applicable to tax cases? Yet, another question is that if a law has the scope of expressly limiting the right of confidentiality for the sake of the “public policy”, isn't this a regression of human rights? Then, it is necessary to balance two conflicting positions: the individual's rights

³² Article 26 (d).

³³ Nuevo intercambio de información tributaria versus medidas tributarias de efecto equivalente Informe Nacional español para el Congreso de la European Association of Tax Law Professors, (EATLP) Istanbul 2014. Luis Martínez Giner, Saturnina Moreno González, Patricia Lampreave Márquez, http://www.ief.es/documentos/recursos/publicaciones/documentos_trabajo/2014_08.pdf, pp. 21-22 (7-31) (Unofficial translation).

³⁴ “Article 8 – Right to respect for private and family life

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

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

³⁵ “Article 7 Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications”.

and the general good of allowing the State to effectively apply its tax legislation and collect the taxes due. From the author's perspective the most important is to protect taxpayers' rights in all circumstances and therefore it is essential to guarantee that the information the States will gather and exchange will not be used in any other way than the one they are intended: the effective application of the respective tax legislation of each state concerned.

VI. BRIEF CONSIDERATIONS OF THE ROLE PLAYED BY THE ECtHR AND THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU) IN RELATION TO THE PROTECTION OF FUNDAMENTAL TAXPAYERS' RIGHTS. SPECIAL REFERENCE TO THE EXCHANGE OF INFORMATION

The development of the protection of taxpayer rights in Europe is done through case law and an effective dialogue between the ECtHR and the CJEU.

In order to reach this approach, the ECtHR has considered the *ius puniendi* exercised by the state, which has similar characteristics to the exercise of disciplinary activity in criminal law, the activity of which could cause prejudice to the defendant and thus, directly affect the rights enshrined by the ECHR.

The interpretation given by the CJEU and the ECtHR is of great importance, since they have determined and defined the application of general principles of law at a European level, which are often abstract.

On the other hand, the CJEU has provided protection of taxpayer rights using autonomous general principles of law of the European Union to balance the conflict of interest between the authorities of the Member States and taxpayers.

One of the principles on which the CJEU rulings deal is the principle of proportionality³⁶. The CJEU has recognized from the first judgments the

³⁶ The study of the Proportionality Principle exceeds the objective of this article, however it is important some relevant statements by the ECJ: Case 8/55 *Fédération Charbonnière Belgique v. High Authority* (1955-56) ECJ 211 a 228 Proportionality "a generally accepted rule of law" and the "reaction by the High Authority to illegal action must be in proportion to the scale of that action", Case 19/61 *Mannesmann AG v. High Authority* (1962) ECJ 357 at 370-371, in which the Court states that "the aims pursued may be attained under the most favorable conditions and with the smallest possible sacrifices by the undertakings affected".

Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law*, (Leiden: Brill/ Nijhoff, 2015), p. 95 (331). The ECJ in relation to the Directive 2006/24/EC, of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic com-

importance of this principle and, through several resolutions, has developed the concept of proportionality. At present, the principle of proportionality is set out in Article 5 of the Treaty on European Union and the criteria for its application are established in Protocol No. 2 on the application of the principles of subsidiarity and proportionality³⁷.

After having said that, it is relevant to make a brief reference to some issues from the CJEU perspective, regarding the exchange of information: one is referred to the factual approach that the CJEU had in the case C276/12, *Jiří Sabou y Finanční ředitelství pro hlavní město Prahu*, 22 October 2013, and the other issue to be mentioned is how the European Commission is working towards adapting its legislation with the means of complying with the current international challenges and, at the same, with the European law.

The CJUE in the case C276/12, *Jiří Sabou y Finanční ředitelství pro hlavní město Prahu*, 22 October 2013, came to the decision that “European Union law, as it results in particular from Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (...), and the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organized by the requested Member State”³⁸.

munications services or of public communications networks: “The ECJ accepted that the Directive’s proposed interference with the fundamental rights of privacy with the aim of fighting organized crime and terrorism was legitimate, and even suitable. Nevertheless, it found that the infringements went beyond what could be considered necessary, and thus held the Directive unlawful” (Cases C-293/12 and C-594/12 *Digital Rights Ireland and Zeitlinger et al. v. Commission* /judgment 8 April 2014). Moreover, some opponents made reference to the Judgment of 4 December 2008 *S. and Marper v. UK* (App. Nos. 30562/04 and 3066/04) (Grand Chamber). “ (...) The opponents referred to, among others, *S. and Marper v. UK* and suggested that the Directive’s broad scope, the obligation and general mass storage of all citizens’ personal data regardless of any concrete investigation, would be in breach of the conventional understanding of the Court’s proportionality requirement”.

³⁷ Official Journal of the European Union C 310/207, 16.12.2004, last consulted on 08 May 2016, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:310:0207:0209:EN:PDF>.

³⁸ CJEU, Case C276/12, *Jiří Sabou y Finanční ředitelství pro hlavní město Prahu*, 22 October 2013.

Calderón Carrero and Quintas Seara³⁹ arrived to the conclusion that in the field of mutual assistance in tax matters, there is not enough Protection of Fundamental Rights because those taxpayers' rights must be respected in all cross-border mutual assistance procedures concerning previous decisions of the ECtHR and the CJEU. Also, Baker and Pistone⁴⁰ in relation to the request of information during the investigation stage, stated that it "does not mean that the taxpayer has no rights at that time. The taxpayer has the general rights to confidentiality and privacy at all stages. More specially, most provisions for EoI, based either on tax treaties or on specific intergovernmental agreements, exclude from the EoI any matter that would disclose any trade, business, industrial, commercial or professional secret or trade process or any information the disclosure of which would be contrary to public policy. How are these safeguards for the taxpayer to be enforced if the taxpayer is not made aware of the proposed exchange and given an opportunity to challenge on these grounds?"⁴¹.

Additionally, it is important to highlight the role of the CJEU in this era of international tax challenges in a holistic context: the CJEU determined in case C362/14⁴² in relation to the validity of Commission Decision 2000/520/EC of 26 July 2000, pursuant to Directive 95/46, on the adequacy of the protection provided by the Safe Harbour privacy principles and related frequently asked questions issued by the U.S. Department of Commerce (OJ 2000 L 215, p. 7) that "the mass and undifferentiated accessing of personal data is clearly contrary to the principle of proportionality and the fundamental values protected by the Irish Constitution. In order for interception of electronic communications to be regarded as consistent with the Irish Constitution, it would be necessary to demonstrate that the interception is targeted, that the surveillance of certain persons or groups of persons is objectively justified in the interests of national security or the suppression of crime and that there are appropriate and verifiable safeguards". Finally, the CJEU found that regarding the Decision 2000/520 "the Commission exceeded the power which is conferred upon it in Article 25(6) of Directive 95/46, read in the light of the Charter, and that Article 3 of the decision is therefore invalid".

As a consequence of the invalidation of the Safe Harbour Decision by the CJEU in the case above mentioned, a new political agreement was reached in

³⁹ José Calderón, Alberto Quintas, "The Taxpayer's Right of Defence in Cross-Border Exchange-of-Information Procedures", *Bulletin for International Taxation*, IBFD, Amsterdam, September (2014): 507, (498-507).

⁴⁰ Baker, Pistone..., 50.

⁴¹ *Ibidem*.

⁴² CJEU, C362/14, *Maximilian Schrems v Data Protection Commissioner*, 6th October 2015.

order to replace the previous arrangement⁴³. The new arrangement provides stronger obligations on companies in the U.S. in order to protect the personal data of Europeans and, at the same time, allow a stronger monitoring and enforcement by the U.S. Department of Commerce and Federal Trade Commission. Besides, it also increases the cooperation with European Data Protection Authorities⁴⁴. The access to personal data transferred under the new arrangement must be “subject to clear conditions, limitations and oversight, preventing generalized access”⁴⁵.

Thereupon considering that protection of taxpayers' rights in Europe rely mainly on shifting interpretation given by the CJEU and ECtHR, it can be stated that the CJEU plays a fundamental role in the protection of taxpayers' rights in this holistic approach given by the new tax international challenges. In relation to the case C276/12, *Jiří Sabou y Finanční ředitelství pro hlavní město Prahu*, it could be affirmed that this represents a diminishment of taxpayers' fundamental rights because in this decision, the CJEU undermines the importance of the recognition of taxpayers' rights during the cross-border mutual assistance procedures, and on the other hand, in the case C362/14, it can be appreciated how the CJEU serves as a catalyst to preserve fundamental rights in the era of massive exchange of information, where the borderline between the allowed and prohibited ongoing procedures by national authorities is developing and must be built abiding fundamental rights already established on the ECHR and in the Charter.

VII. CONCLUSIONS

After analyzing the challenges posed by the international taxation at different instances, it is necessary to consider the Protection of Taxpayers' Fundamental Rights. Some actions have been taken without counterbalancing fundamental taxpayers' rights. As a result, it is appreciable how some of those actions will harm taxpayers' rights in the near future. A situation can be witnessed where the legislation is adapting its norms to a convenient Project in order to prevent Tax Erosion and Profit Shifting by minimizing Fundamental Rights, which are considered as “boundaries” in order to gather all the possible information.

⁴³ EU Commission and United States agree on a new framework for transatlantic data flows: EU-US Privacy Shield Strasbourg, 2 February 2016, The European Commission and the United States have agreed on a new framework for transatlantic data flows: the EU-US Privacy Shield, last consulted 08 April 2016, http://europa.eu/rapid/press-release_IP-16-216_en.htm?locale=en.

⁴⁴ *Ibidem*.

⁴⁵ *Ibidem*.

The indeterminate concepts are not a safe barrier for protecting Taxpayers' Human Rights, as the right of confidentiality and the opportunity for taxpayers to be informed about the investigation. Then, its use must be restricted otherwise the exceptions already established will turn into rule representing a serious barrier to bring an effective protection to taxpayers'.

The main risk which are facing taxpayers' is that from a global perspective there is currently a situation in which an individual's obligation to contribute to the state is imposed in order to sustain public expenditure, but in practical terms, taxpayers do not have any direct involvement in the decision on the distribution of their contributions, with the logical consequence of the impairment of the measures taken by the state and its rejection by citizens.

Then, it seems essential to reinforce the protection of taxpayers' rights at a national level, as well as considering better practices in other latitudes. The participation of all interested parties in the development of fiscal policies that fit the interests of all will become essential in order to have greater acceptance.

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