

# **Observatory on the Protection of Taxpayers' Rights**



## ***2015-2017 General Report on the Protection of Taxpayers' Rights***

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## 1. Background

International consensus on freedom and dignity as justifications and boundaries of law,<sup>1</sup> and therefore of the state's power, under the concept of human rights (HR), has transformed the standpoint of approximation into the legal analysis of the formation, scope, means and justification of the state's *ius imperii*, in addition to the limitations naturally imposed on such power by the rule of law and its consistency with generally accepted legal principles.<sup>2</sup>

In this context, the HR paradigm particularly affects the legal design and application of taxes, given their specific nature as tools for the maintenance of the state's structure and services and as an indirect formula for the state to address the so-called "existential procurement" (*die Daseinvorsorge*). As a result, the use of taxes as concrete techniques of the redistribution, allocation and stabilization functions conferred upon the state in the context of the "Financial Constitution" (*die Finanzverfassung*) as a model for the equitable distribution of wealth characteristic of the social and democratic rule of law is currently predominant in western legal systems.

Therefore, there is a *new* perspective that allows the identification of a bundle of tax legal institutions that are influenced by the HR concept. This is in addition to the traditional standpoint, according to which there is a constitutional catalogue of (i) fundamental general rules also applicable to taxes, known as "constitutional tax principles";<sup>3</sup> and (ii) tax rules, which must be enshrined in the Constitution, since they are essential to the modern concept of tax in the democratic rule of law, qualified by scholars as "constitutionalized tax principles".<sup>4</sup> Both of these principles embody an authentic "taxpayer statute".<sup>5</sup> Also, there is a series of situations in which the concept of HR directly prevents a government from creating taxes that could adversely impact on them, both individually and collectively.<sup>6</sup>

### 1.1. State of the art

Hence, today, the relationship between HR and taxation is undeniable, and so is the influence of the former on the different facets of the tax relationship, both materially and formally. From the first point of view, HR affects the settings of fair taxation within limits that allow the effective enjoyment of the fundamental rights of the people, under the conditions of freedom and dignity (education, health, work, etc.), balanced with the adequate financing of state activity aimed at the procurement of essential public services. From a formal standpoint, HR allows the recognition of taxpayers' positions vis-à-vis tax claims, and therefore their right to

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<sup>1</sup> H.L.A. Hart, *¿Existen los Derechos Naturales?*, Estudios Públicos 37 (1990), pp. 45-61, available at <http://bit.ly/29Ss7wZ> (last access 24 April 2018).

<sup>2</sup> R. Dworkin, *Taking Rights Seriously*, pp. 29-32 (Harvard U. Press 1978); and R. Alexy, *A Theory of Constitutional Rights*, p. 80 et seq. (Oxford U. Press 2009).

<sup>3</sup> Namely, the principles of legal certainty, *ubi ius ibi remedium*, legality, etc. See P. Pistone, *Problemáticas actuales y nuevas fronteras de los medios de impugnación nacionales e internacionales*, in *Memorias de las XXIX Jornadas Latinoamericanas de Derecho Tributario*, pp. 35-38 Instituto Boliviano de Estudios Tributarios – Instituto Latinoamericano de Derecho Tributario pp. 35-38 (2016).

<sup>4</sup> Namely the constitutional principles of tax legality, ability to pay, tax collection efficiency, tax fairness, tax reasonableness, etc. See E. González García, *Principios Constitucionales Tributarios: La capacidad contributiva: su recepción en el hecho imponible, la base y el tipo*, Instituto Guatemalteco de Derecho Tributario, available at <http://bit.ly/2a785zV>.

<sup>5</sup> J.J. Ferreiro Lapatza, *El Estatuto del Contribuyente*, in *Revista del Instituto Peruano de Derecho Tributario* 26 (1994), pp.105-117, available at <http://bit.ly/29SyTWw>.

<sup>6</sup> This is the case, for instance, of the principle of "causal distribution of public spending", which serves firstly as grounds of dues and special levies, and secondly for the non-fiscal function of certain taxes, i.e. the basis of "green" taxes, economic zones with special customs regimes, etc.

participation and defence in administrative and judicial proceedings related to the assessment of the tax liability. HR also defines the relationships between tax administrations and individuals.

Currently, as a factor of further complexity, the growing phenomenon of the internationalization of tax law will be added to the analysis. Following the line of two tendencies, namely that of (i) the avoidance of international multiple taxation as a formula of rationalization of the tax burden of the taxpayer involved in cross-border situations, an essential problem of current tax systems due to the globalization of the economy; and (ii) the fight against international tax avoidance, tax evasion and tax fraud, a tangled network of hard and soft law regulations has been developed. These are good reasons for growth in international tax coordination among tax authorities for countering undesirable phenomenon of some taxpayers (including, in particular, multinational enterprises and persons active cross-border) not paying taxes in any country. By contrast, there has been no corresponding growth in the effectiveness of protection of the fundamental rights, which remains confined within national boundaries. Consequently, sometimes taxpayers have to seek justice in two countries, which is often inadequate for finding solutions that bind all countries involved in order to solve the problem in a way that is satisfactory for the taxpayer and is easy to handle. In this regard, the consideration of HR is unquestionably necessary for granting both human freedom and dignity in tax collection.

## 2. The IBFD Observatory on the Protection of Taxpayers' Rights

Given the current tendencies regarding the growing expansion of the investigative powers of tax administrations, aimed at tackling tax avoidance and evasion, the so-called “aggressive tax planning”<sup>7</sup> and the necessity for providing timely and effective protection of taxpayer’s rights, it is possible to (i) set forth a series of principles, minimum standards and best practices that ensure the enjoyment of HR under the execution of such investigative powers; and (ii) implement a system of surveillance on the compliance of such principles, standards and practices in order to help enforce HR in the context of taxation.

Consequently, IBFD created the Observatory on the Protection of Taxpayers’ Rights (OPTR) as a timely and relevant action for the continuous monitoring of the observance of minimum standards and the adoption of best practices around the world with regard to the guaranteeing and protecting HR pertaining to tax matters, namely those identified by Prof. Dr Pasquale Pistone and Prof. Dr Philip Baker at the 2015 IFA Congress on The Practical Protection of Taxpayers’ Fundamental Rights.<sup>8</sup>

The OPTR is a non-judgmental, opportune, significant and enduring action for the impartial and academic research on the relationship between HR and taxation that also may have an impact on determining how to best protect taxpayers’ rights in practice through identifying

<sup>7</sup> From an international standpoint, aggressive tax planning arises when unintended tax benefits are obtained from the exploitation of cross-border tax disparities in a way that generally does not circumvent national provisions and may create base-eroding effects. See P. Pistone, *The Meaning of Tax Avoidance and Aggressive Tax Planning in European Union Tax Law: Some Thoughts in Connection with the Reaction to Such Practices by the European Union*, in A.P. Dourado (ed.), *Tax Avoidance Revisited in the EU BEPS Context*, pp. 94-97 (IBFD 2016).

<sup>8</sup> P. Pistone & P. Baker, *General Report*, in *The Practical Protection of Taxpayers’ Fundamental Rights*, p. 35 (IBFD 2015), Online Books IBFD, available at [https://online.ibfd.org/linkresolver/static/ifacahier\\_2015\\_volume2\\_general\\_report?WT.z\\_nav=crosslinks](https://online.ibfd.org/linkresolver/static/ifacahier_2015_volume2_general_report?WT.z_nav=crosslinks) (last access 24 April 2018). In this regard, several works have been prepared, e.g. the 2011 Group for Research on European and International Taxation (GREIT) publication on the topic: see G.W. Kofler, M. Poiarses Maduro & P. Pistone (eds.), *Human Rights and Taxation in Europe and the World* (IBFD 2011), Online Books IBFD.

common minimum standards (namely the 2015 IFA standards), proposing best practices in the area and monitoring their practical implementation. Indeed, *all* HR<sup>9</sup> have become paramount general criteria for the protection of human beings, and therefore of taxpayers,<sup>10</sup> in lieu of the current broadening of tax administrations' assessment powers, the multilateral efforts being performed by states in addressing and tackling tax avoidance and tax evasion and the also aggressive tax designing and collection policy thereof.

## 2.1. Goals

The OPTR will help identify principles, minimum standards and best practices for the effective protection of taxpayers' rights in the scope of tax relationships. It will also permanently monitor the real accomplishment of said parameters, as well as their amendments and developments in different regions of the world, defining whether they should qualify as universal or regional standards.

The OPTR aims to disseminate a constructive culture in the relations between taxpayers and tax authorities, which should contribute to properly addressing the existing problems. We support the view that there are two approaches to the protection of taxpayers' rights. First, good tax governance of tax authorities should take into account the protection of the fundamental rights of taxpayers among its qualitative indicators. Second, in line with the *ubi ius, ibi remedium* principle, each legal system should include proper rules that give taxpayers access to effective judicial remedies that could be activated when they feel that their fundamental rights are being negatively affected by the actions of the tax authorities.

Accordingly, the OPTR may help detect sensitive areas and potential movements away from the human rights deriving from law amendments or administrative and judicial practices, raising public awareness about specific HR phenomena in the field of taxation, attesting threats to and deviations from HR in tax situations through many means. Therefore, the OPTR will:

- carry on awareness-raising actions on the clear link between HR and taxation;
- create a database on the minimum standards for the protection of taxpayers' rights, as well as the status of the legal framework and case law on the matter;
- promote a culture of synergy between tax authorities and taxpayers for the effective protection of taxpayers' rights;
- organize seminars and conferences addressing the technical issues that are required in order to avoid potential threats to the effective protection of the fundamental rights of

<sup>9</sup> Fully identifiable with those set forth in the International Conventions of Human Rights, e.g. the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights and the African Convention on Human and People's Rights. All human rights (HR) are straightforwardly linked to taxation, since, "[a]lthough taxation is about the raising of revenue to fund the state budget, tax law is much more than that: it is also about the rights of taxpayers to have taxes levied in compliance with the rule of law and the principle of legality, without having such rights sacrificed on the altar of the Revenue interest to levy taxes and carry out an effective fiscal supervision", so that "a modern theory of tax law can reconcile such traditional interest of taxation within a legal framework that ensures a likewise modern view of human rights, i.e. one that also includes the economic dimension of the fundamental rights of individuals and other persons. Accordingly, fundamental rights of mankind should remain so in face of the Revenue, which should pursue its goals in compliance with the basic rules of all legal systems"; see G.W. Kofler et al., *Preface in Human Rights and Taxation in Europe and the World* (G.W. Kofler, M. Poiares Maduro & P. Pistone eds., IBFD 2011), Online Books IBFD. Hence, all HR are relevant in order to set forth a series of principles, minimum standards and best practices that ensure their enjoyment in the taxation framework, and also to implement a system of surveillance on the compliance of such principles, standards and practices to help enforce them in such context.

<sup>10</sup> Given that "all taxpayers are persons, and all persons are holders of rights. As holders of rights, taxpayers are entitled to a timely and effective protection of these rights in their dealings with tax authorities". See Pistone & Baker, *supra* n. 8, at p. 21.

- taxpayers and, within such framework, to create proposals for contributing to possible solutions to such threads;
- elaborate documents to contribute to the knowledge, expansion and awareness of the connection between HR and taxation;
  - assist international HR organizations, especially by contributing information on how taxation may adversely affect the guarantee of HR; and
  - assist government authorities in HR/taxation matters, providing training and tools for their personnel for the implementation of best practices and the domestic monitoring of the minimum standards for the protection of taxpayers' rights as an instrument for the achievement of an efficient public administration.

Such work on HR is relevant for governments, taxpayers and different international organizations, focusing on the link between HR and taxation and raising awareness on the potential impact of excessive tax burdens or the execution of administrative or judicial processes without respecting the mentioned rights.

## 2.2. Supervisory Council

Given the importance of ensuring the impartiality and high quality of the OPTR's efforts on raising awareness, a counselling body has been established to provide an oversight of the activities of the OPTR in terms of monitoring the consistency of its work with its object and purpose, reviewing and providing useful comments on the documents submitted and giving advice on long-term goals to be pursued.

To fulfil these particular goals, IBFD summoned a group of well-known authorities, broadly experienced in the practical protection of taxpayers' rights as prominent tax ombudsmen and members of the academia, judiciary and legal practice:

- Prof. Dr Juliane Kokott, LL.M. (American University); S.J.D. (Harvard Law School); Advocate General at the Court of Justice of the European Union; tenured professor of Public International Law, International Business Law and European Law; Director of the Institute of European and International Business Law; Deputy Director of the Masters' Programme of Law and Economics at the University of St. Gallen, Switzerland (2000-2003); tenured professor at the Universities of Augsburg and Heidelberg (1993-1995), Düsseldorf (1995-1999) and visiting professor at the University of Berkeley, California (1991); member and Deputy Chairman of the German Advisory Council on Global Change (WBGU) (1996-2003); "Saarland-Ambassador" (from 2006); Chair of the International Law Association Study Group on the Protection of Taxpayers' Rights (from 2016); and member of the Scientific Advisory Board of the German Association of Tax Lawyers (DStJG) (from 2017).
- Robert Attard, Partner and Tax Policy Leader, EY, Central and Southeast Europe; tenured senior lecturer at the University of Malta; and member of the European Association of Tax Law Professors. He has served as Visiting Professor at the University of Ferrara, paying lecturing/speaking visits at Queen Mary (University of London), CTL (University of Cambridge), Salerno (with *Wirtschaftsuniversität Wien* and Naples II), the

University of Amsterdam and the University of Palermo. The Maltese Court of Appeal has described him as a leading commentator on tax law, referring to his publications in its judgments. Robert has developed detailed knowledge of tax aspects of the European Convention on Human Rights, drafting submissions in cases filed against Bulgaria, France, Malta, the Netherlands and Slovenia. Robert is a published author on tax law, having published articles in *European Taxation*, *EC Tax Review* and the *British Tax Review*. He has contributed to several publications, including a book published by Hart Publishing, three books published by IBFD and several books published by the Malta Institute of Management. Robert has argued most of Malta's leading tax cases, including landmark judgments *John Geranzi v. PM* (on the right to justice within a reasonable time), *Zahra v. PM (non bis in idem)*, *Farrugia v. PM* (on taxation as a violation of the right to property) and Case 160 of 2012 (on the right to information).

- Dennis Davis, President of the South African Competition Appeal Court and Judge of the High Court; member of the Commission of Enquiry into Tax Structure of South Africa; technical advisor to the Constitutional Assembly, where the negotiations for South Africa's interim and final constitutions were formulated and concluded; tenured professor at the University of Cape Town and the University of the Witwatersrand; And former Director of the Centre for Applied Legal Studies of the University of the Witwatersrand.
- Porus Kaka, designated senior advocate at the High Court in India; Honorary President and former worldwide President of the International Fiscal Association (IFA), the Netherlands; and India's representative on the Permanent Scientific Committee of the IFA from 2004 to 2011; recently appointed as an expert witness on Indian tax law in international arbitration in London; LL.M from Harvard Law School in the United States as an Inlaks Scholar; And member of the IBFD Board of Trustees. He has received numerous awards and is consistently rated and regarded as one of India's leading senior tax advocates.

### 2.3. Working standards and procedure

In the setting of the working standards and procedures followed by the OPTR, IBFD has followed the minimum standards set by other HR observatories that are efficiently operating worldwide, having achieved a broad experience on monitoring and creating databases on the status of protection and guarantee of HR around the world.<sup>11</sup> These observatories all have a general common working standard, which is fully applicable to the monitoring of the level of protection of taxpayers' rights, and therefore to the OPTR work procedures. These standards are:

- the appointment of regional and country reporters to submit specific information on matters of relevance within a specific timeframe;

<sup>11</sup> Namely, the Office of the High Commissioner on Human Rights of the United Nations (see <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>), the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (see <http://www.osce.org/odihr>), the Office of the Commissioner for Human Rights of the Council of Europe (see <http://www.coe.int/en/web/commissioner>), the European Ombudsman (see <http://www.ombudsman.europa.eu/en/home.faces>), the African Commission of Human and People's Rights (see <http://www.achpr.org>), the Asian Human Rights Commission (see <http://www.humanrights.asia/>), Amnesty International (see <http://www.amnesty.org>), HR Action Center (see <http://www.humanrightSACTIONcenter.org>), Human Rights Watch (see <https://www.hrw.org/about-our-research>) and the HR Observatory of the University of Valladolid (see <http://odh.uva.es/quienes-somos/>).



- the collection of information through questionnaires, analysis of legislation and jurisprudence and interviews with local experts; and
- the use of the information to draft periodic reports (quarterly and annual), as well as input for proposals, handbooks, etc. on improving HR protection.

In this regard, the OPTR goals are achieved through the information supplied by appointed national groups of experts from a number of surveyed countries. National groups are formed by practitioners, tax authorities, academics and the judiciary of each surveyed country in order to obtain a neutral, balanced report on the situation of taxpayers' rights in the surveyed countries.

### **3. This report**

After setting its Rules of Procedure (RoP), the OPTR conducted an investigation on the status of the protection of taxpayers' rights as of 31 December 2017 in order to create a database on the minimum standards for the protection of taxpayers' rights and assess the status of the legal framework and the case law on the matter as a contribution to the knowledge, expansion and awareness of the connection between HR and taxation.

#### **3.1. Scope of the research**

This report summarizes the monitored developments concerning the effective protection of taxpayers' fundamental rights in 25 countries as of 31 December 2017, compared to the status of compliance of a set of minimum standards and best practices recorded for those countries on 12 fundamental taxpayer rights identified by Prof. Dr Pasquale Pistone and Prof. Dr Philip Baker at the 2015 IFA Congress on The Practical Protection of Taxpayers' Rights in the following situations:

- identification of taxpayers, issuance of tax returns and communication with taxpayers;
- the issue of tax assessments;
- confidentiality;
- normal audits;
- more intensive audits;
- review and appeal;
- criminal and administrative sanctions;
- enforcement of taxes;
- cross-border procedures;
- legislation;
- revenue practice and guidance; and
- the institutional framework for protecting taxpayers' rights.

This report sets up freely accessible unbiased information on the effective protection of taxpayers' rights as a step to establish a block of technically reliable information that can be used to support a constructive dialogue between taxpayers and tax authorities in such countries, as well as elsewhere in the world. This dialogue should take place in a legal context that includes the protection of rights pertaining to the values that determine good tax governance within a

given legal system, and should also achieve timely and effective justice in the case that something goes wrong.

### 3.2. Tasks and structure of countries' groups of experts

To conduct the research, the OPTR selected the countries whose status on the protection of taxpayers' rights regarding the scope of the research<sup>12</sup> was recorded at the 2015 IFA Congress,<sup>13</sup> as well as other countries that are of interest in the context of international taxation.<sup>14</sup> In this regard, 2015 IFA branch reporters were invited, as well as other relevant actors (tax practitioners, tax administrations, judiciary, tax ombudsmen and practitioners), to join the OPTR as country reporters in order to establish a comprehensive and balanced information network. Following the responses, the OPTR narrowed the scope of the study to countries from which at least one invitee agreed to participate in the project.<sup>15</sup>

Groups of experts in each country were created to inform the OPTR of any developments regarding the minimum standards and best practices on the practical protection of taxpayers' rights that took place in each country between the 2015 IFA Congress and 31 December 2017. These groups are formed, to the fullest extent possible, by practitioners, tax authorities, academics, tax ombudsmen and the judiciary of each surveyed country in order to obtain a neutral, balanced report on the situation of taxpayers' rights in each country. To fulfil this goal, the judiciary, academic and tax ombudsmen members of each country group of experts are considered neutral, whereas the tax practitioners and tax administration members are not considered neutral.<sup>16</sup> The groups of experts for 2017 are structured as follows:

Country	Position	Name
Argentina	Practitioner	Alberto Tarsitano
Australia	Ombudsman	Ali Noroozi
		Duy Dam
	Academic	John Bevacqua
Brazil	Practitioner	Dalton Dallazem
		Paulo Ayres Barreto
	Judiciary	Bianor Arruda

<sup>12</sup> See sec. 3.1.

<sup>13</sup> Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Chinese Taipei, Colombia, Denmark, the Dominican Republic, Estonia, Finland, France, Germany, Greece, India, Italy, Japan, South Korea, Liechtenstein, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, the United States, Uruguay and Venezuela.

<sup>14</sup> Such as Serbia, which is not covered in the 2015 IFA General Report.

<sup>15</sup> Argentina, Australia, Brazil, Canada, China, Colombia, Denmark, Finland, Germany, Greece, India, Italy, Japan, Luxembourg, Mexico, New Zealand, Poland, Portugal, Serbia, South Africa, Spain, Sweden, Switzerland, Turkey and Venezuela.

<sup>16</sup> Therefore, in any case, there is either a tax administration or a tax practitioner member of a given group of experts, and efforts are to be made to the highest level attainable so that there is a representative on the opposite side in order to keep the balance in said group.

<b>Canada</b>	Practitioner	Salvatore Mirandola
<b>China</b>	Tax Administrator	Zhiyong Zhang
	Academic	Shi Zhengwen
<b>Colombia</b>	Practitioner	Natalia Quiñones
<b>Denmark</b>	Practitioner	Henrik Peytz
	Tax Administrator	Henrik Klitz
<b>Finland</b>	Practitioner	Kristiina Äimä
	Academic	Eero Männistö
<b>Germany</b>	Practitioner	Martin Bartelt
	Tax Administrator	Eva Oertel
	Academic	Daniel Dürrschmidt
<b>Greece</b>	Tax Administrator	Katerina Perrou
		Lydia Sofrona
	Academic	Andreas Tsouroufflis
<b>India</b>	Tax Administrator	Dikshit Sengupta
<b>Italy</b>	Practitioner	Pietro Mastellone
<b>Japan</b>	Academic	Masato Ohno
<b>Luxembourg</b>	Academic	Aikaterini Pantazatou
<b>Mexico</b>	Academic	Carlos Espinosa Berecochea
		César Alejandro Ruiz
	Judiciary	Manuel Hallivis
		Paula Nava
<b>New Zealand</b>	Practitioner	Mike Lennard

		Mark Keating
<b>Poland</b>	Academic	Michał Wilk
		Małgorzata Sęk
<b>Portugal</b>	Practitioner	Rui Camacho Palma
	Tax Administrator	Jesuino Martins
<b>Serbia</b>	Academic	Svetislav V. Kostić
		Lidija Živković
		Dejan Stojanović
<b>South Africa</b>	Practitioner	Beric Croome
	Ombudsman	Eric Mkhawhane
	Academic	Jennifer Roeleveld
<b>Spain</b>	Ombudsman	Javier Martín Fernández
	Judiciary	Felipe Alonso Murillo
	Academic	Yolanda Martínez
		Elizabeth Gil
<b>Sweden</b>	Academic	Eleonor Kristoffersson
<b>Switzerland</b>	Judiciary/Academic	Michael Beusch
<b>Turkey</b>	Academic	Billur Yalti
<b>Venezuela</b>	Academic	Melissa Elechiguerra

### 3.3. Data collection

A thematic questionnaire, based on the minimum standards and best practices identified by Prof. Dr Pistone and Prof. Dr Baker in the 2015 IFA Congress General Report, was sent to the country reporters to be completed in order to collect relevant data. Country reporters were asked to:

- report only on issues in which there was either a shift towards or shift away in the level of compliance of the relevant standard/best practice;
- give a summarized account of facts (legislation enacted, administrative rulings, circulars, case law, tax administration practices, etc.), in a balanced, non-judgmental way. They were also asked to specify whether some content was no longer applicable due to other developments; and
- back up assertions with the relevant documentary materials, if possible.

### 3.4. Data processing

Once the reports were received, the information collected was processed and analysed in order to identify the status of the protection of taxpayers' rights in the surveyed countries as of 31 December 2017, with regard to the following:

- assessing whether there was a shift towards or shift away in the level of compliance with a given minimum standard of the practical protection of taxpayers' rights;
- considering whether there was identifiable minimum common standards and/or best practices for the protection of taxpayers' rights in the countries reported to the OPTR different from those identified in the 2015 IFA General Report;
- ascertaining the current status of the protection of taxpayers' rights in such jurisdictions according to the available data;
- identifying the innovations on the practical protection of taxpayers' rights since 2015 (if any);
- determining sensitive topics to be addressed in future endeavours; and
- providing recommendations on the improvement of the protection of taxpayers' rights, pursuant to the relevant data.

## 4. The practical protection of taxpayers' rights (2015-2017)

The issue at hand in this report is the determination of how taxpayers' rights are protected in practice, referring to all of the minimum standards and best practices identified by Prof. Dr Pistone and Prof. Dr Baker in the 2015 IFA General Report.<sup>17</sup> Assuming that states wish to protect the rights of their taxpayers and having categorized a number of practices they may implement in order to do so, this report investigates the practical experiences of a number of jurisdictions compared to what they had achieved in this regard until 2015, so it is possible to summarize and draw conclusions from such data.

### 4.1. Identifying taxpayers, issuing tax returns and communicating with taxpayers

All rights and obligations coming from legal relations take place between subjects, excluding third parties. In tax matters, this has paramount significance, given its public nature: it is important to identify taxpayers properly, allowing them to exercise *habeas data* over all information about them that has been collected by the tax authorities, even when collected from third parties, to maintain confidentiality of such information and establish fluent communication

<sup>17</sup> Pistone & Baker, *supra* n. 8, at p. 74 et seq.



In the case of **Germany**, in order to protect taxpayers, the law explicitly states that third parties obliged to withhold church tax must not use information related to the membership of a religious group for purposes other than withholding tax.<sup>23</sup> Since 2015, banks and other third parties have been obliged to withhold church tax on capital income. The law provides for additional specific mechanisms for the protection of taxpayers' rights. First, upon taxpayer application, the tax authorities must not provide banks and other third parties obliged to withhold tax on capital income with information on the membership of a religious group (the so-called "lock flag", "*Sperrvermerk*"). In such case, if banks and other third parties comply with their obligation to request information relevant for church tax, the tax authorities must provide the third parties with a "neutral value" (*neutraler Wert*), the so-called "zero value" ("*Nullwert*"), which does not contain any information as to whether the taxpayer is a member of a religious group. Further, the third party has to delete data related to the membership of a religious group.

Also regarding religious sensitivities, in **Colombia**, Protestant movements filed several constitutional claims in 2017, demanding special protection from the new exempt and not-for-profit regime approved in December 2016. They succeeded in being treated as exempt in spite of not complying with the requirements established for every other non-profit entity. There is currently no system for obtaining tailored taxpayer IDs for members of restrictive religious movements, and there is no way of associating an individual tax ID with a specific religion or cult. Religious movements, however, are now entitled to constitutionally protected exemption status, regardless of whether they fulfil the requirements established for every other non-profit entity.<sup>24</sup>

#### 4.1.2. Information supplied by third parties and withholding obligations

##### *Recent Relevant European Case Law*

##### **Court of Justice of the European Union**

- *See Berlioz - C-682/15 (16 May 2017) infra*, at section 4.1.3.

Currently, several tax administrations rely on withholding taxes as means of tax collection. This imposes on both tax administrations and withholding agents obligations of confidentiality as minimum standards.<sup>25</sup>

A good example of this minimum standard is the case law issued by the Administrative Court of Helsinki on 29 August 2017, ruling that the tax administration cannot force a broadcaster (the **Finnish** Broadcasting Company, YLE) to hand over documents leaked from the

<sup>23</sup> DE: Income Tax Act (*Einkommensteuergesetz*, EstG), sec. 39(e)(1), National Legislation IBFD, available at [https://online.ibfd.org/kbase/#topic=doc&url=%252Fcollections%252Fwt%252Fhtml%252FTOFTLEU-452333\\_1.html&WT.z\\_nav=outline&hash=wtl\\_de\\_ita\\_39e](https://online.ibfd.org/kbase/#topic=doc&url=%252Fcollections%252Fwt%252Fhtml%252FTOFTLEU-452333_1.html&WT.z_nav=outline&hash=wtl_de_ita_39e), (last access 24 April 2018); DE: Bavaria State Church Tax Act (*Kirchensteuergesetz des Bundeslandes Bayern, BayKiStG*) rt. 13(1)(2) (withholding tax on wages); sec. 51a(2c)(8) EstG, available at <https://www.steuertipps.de/gesetze/estg/51a-festsetzung-und-erhebung-von-zuschlagsteuern> (last access 24 April 2018); and DE: Bavaria State Church Tax Act (*Kirchensteuergesetz des Bundeslandes Bayern, BayKiStG*) art. 13a(2) (withholding tax on capital income).

<sup>24</sup> See Colombia (National Report).

<sup>25</sup> Pistone & Baker, *supra* n. 8, p. 24.

Panamanian law firm Mossack Fonseca in 2016. In the decision, the Court declared that the media's opportunities to gain access to necessary material could be endangered if authorities are allowed to order such a handover against the wishes of the media and the source of the material.<sup>26</sup> In this regard, the protection of confidentiality of information should be balanced with the legal obligation of citizens to provide information to the tax administration, which may be necessary for a proper tax assessment.<sup>27</sup> Nonetheless, the third-party obligation to submit information should not be limitless in a constitutional state. In this regard, the **Finnish** Supreme Administrative Court ruled in decision KHO 2016:127 that a tax consultancy company was under no obligation to submit a tax memorandum that can be used as for tax assessment) upon request by the tax administration.<sup>28</sup> However, rather surprisingly, in 2016, the Supreme Administrative Court ruled in KHO 2016:100 that data (originally stolen) from the Liechtenstein LGT Bank that was received via exchange of information could be used as a basis for tax assessment. The Court stated that the data could be used despite "possible" criminal actions in the chain of information exchange preceding the **Finnish** tax administration.<sup>29</sup>

It is also interesting to consider the case of **Switzerland**, in which the Customs and Excise Act includes a new provision<sup>30</sup> stating that those only transporting goods on a cross-border basis or solely acting as reporters without being able to know which goods are transported (e.g. because they were not duly informed or were even lied to by the principal) are not liable to the taxes due (article 70(4) and 4bis).

Moreover, if tax is withheld by a third party, the taxpayer shall be discharged from the liability to pay tax in order to avoid the improper enrichment of the state through the double collection of taxes. Possibly diverting from said assertion, the **Italian** Supreme Court<sup>31</sup> has indicated that the definition of a "tax substitute" (*sostituto d'imposta*) contained in article 64(1) of Presidential Decree no. 600/1973 is the subject that is obliged to pay taxes (also partially) in place of others through the withholding and does not exclude that the substituted taxpayer is also *ab origine* (and not only in the phase of tax collection) obliged to pay the tax jointly with the substitute.<sup>32</sup>

In the case of **Germany**, in 2016, the law covering third-party obligations to gather information for tax purposes and transmit it to the tax authorities electronically was amended. According to these amendments, health insurance companies must provide information on contributions paid by taxpayers. However, the protection of taxpayers' rights was improved, including that (i) third parties may use information gathered solely for transmission to the tax authorities only for this purpose, unless the law provides otherwise; (ii) employers obliged to

<sup>26</sup> See Finland (National Report). More information is available at [https://yle.fi/uutiset/osasto/news/court\\_defends\\_yle\\_in\\_panama\\_papers\\_tax\\_case/9805195](https://yle.fi/uutiset/osasto/news/court_defends_yle_in_panama_papers_tax_case/9805195) (last access 24 April 2018).

<sup>27</sup> According to the Finnish Tax Assessment Act, every person must, upon the request of the tax administration, provide information that may be necessary for processing taxation matters and appeals of other taxpayers and is detailed in documents in the person's possession or is otherwise known to the person, unless he is entitled to refuse to act as a witness in the matter. Finland (National Report).

<sup>28</sup> See Finland (National Report). More information is available at <http://www.kho.fi/index/maatoksia/vuosikirjapaatokset/vuosikirjapaatos/1472124006066.html>

<sup>29</sup> See Finland (National Report). More information is available at <http://www.kho.fi/index/maatoksia/vuosikirjapaatokset/vuosikirjapaatos/1466678548415.html> (last access 24 April 2018). Also see infra n. 86

<sup>30</sup> CH: *Zollgesetz/Loi sur les douanes* (Customs and Excise Act), SR/RS 631.0, effective as of 1 August 2016. See Switzerland (National Report).

<sup>31</sup> IT: ISC, Sixth Chamber, 14 May 2015, Order No. 9933. More information is available at <http://www.economiaediritto.it/profil-critici-della-responsabilita-solidale-per-le-ritenute-a-titolo-di-acconto-operate-ma-non-versate-dal-sostituto-dimposta-alla-luce-della-recentissima-ordinanza-del-14-maggio2015/> (last access 24 April 2018)

<sup>32</sup> See Italy (National Report). More information is available at <http://def.finanze.it/DocTribFrontend/getAttoNormativoDetail.do?ACTION=getArticolo&id={178F0CBC-1969-49F3-974E-7C0E87B9A568}&codiceOrdinamento=200006400000000&articolo=Articolo 64> (last access 24 April 2018).



withhold taxes – which may include church tax – on wages may use information on the membership of a religious group only for withholding tax purposes, and the same holds true for banks and other third parties obliged to withhold taxes on capital income; (iii) in any case, third parties have to inform taxpayers about the information transmitted to the tax authorities; and (iv) third parties shall not transmit information if they realize that they were obliged to transmit information as early as 7 years after the end of the fiscal year.<sup>33</sup>

However, in **Colombia**, the implementation of the Common Reporting Standard now requires third-party financial withholding agents to reveal taxpayer information that was not required before, including the nationalities and beneficial owners of legal entities, although there are no resources for – and many times, no access to – reported information.<sup>34</sup>

#### 4.1.3. The right to access (and correct) information held by tax authorities

##### *Recent Relevant European Case Law*

##### **Court of Justice of the European Union**

- ***Berlioz - C-682/15 (16 May 2017)***: In the context of an exchange between national tax administrations pursuant to Directive 2011/16 on administrative cooperation in the field of taxation, the relevant person does not have the right to access the entirety of that request for information, which is to remain a secret document in accordance with article 16 of Directive 2011/16. In order for that person to be given a full hearing (as guaranteed by article 47 European Union Charter of Fundamental Rights (EUCFR) of his case in relation to the lack of any foreseeable relevance of the requested information, it is sufficient, in principle, that he is in possession of the key information referred to in article 20(2) of said directive (namely the identity of the taxpayer concerned and the tax purpose for which the information is sought). The court may provide that person with certain other information if it considers that the key information is not sufficient. According to the same article 47 of the EUCFR, however, in the context of a judicial review by a court of the requested Member State, that court must have access to the request for information addressed to the requested Member State by the requesting Member State.
- ***See also Puškár - C-73/17 (27 September 2017) infra***, at section 4.3.5.

The collection of information by tax authorities entails a correlative taxpayers' right to access such information and correct its inaccuracies, along with an obligation for tax authorities to protect its confidentiality to the fullest extent possible from any form of misuse, either by tax administration officials or by third parties. Naturally, a best practice in this matter is publishing guidance on these taxpayers' rights.

<sup>33</sup> See Germany (National Report). More information is available at [https://www.gesetze-im-internet.de/ao\\_1977/\\_93c.html](https://www.gesetze-im-internet.de/ao_1977/_93c.html), para. 7 (last access 24 April 2018); [https://www.gesetze-im-internet.de/estg/\\_39a.html](https://www.gesetze-im-internet.de/estg/_39a.html), para. 8 (last access 24 April 2018); [https://www.gesetze-im-internet.de/estg/\\_51a.html](https://www.gesetze-im-internet.de/estg/_51a.html), para. 8 (last access 24 April 2018); and [https://www.gesetze-im-internet.de/ao\\_1977/\\_93c.html](https://www.gesetze-im-internet.de/ao_1977/_93c.html), para. 3(1) (last access 24 April 2018).

<sup>34</sup> See Colombia (National Report).

In this regard, the widespread use of withholding tax by third parties and the supply of information by third parties to the revenue authorities is at the heart of the systems of prepopulated tax returns. It is an obvious safeguard that the prepopulated return be sent to the taxpayer concerned so that he has the opportunity to correct errors.<sup>35</sup>

The opportunity for taxpayers to correct errors in prepopulated tax returns has been granted in **Italy** by law:<sup>36</sup> taxpayers may file an integrative tax return in their favour, allowing them to correct mistakes and/or omissions regarding a number of taxes.<sup>37</sup>

Moreover, the law provides for the reopening of the terms for applying to the voluntary disclosure programme; in fact, from 24 October 2016 until 31 July 2017, it was possible to apply with the aim of correcting the violations committed up until 30 September 2016.<sup>38</sup> Also, the general **Danish** tax and administrative law and the Act on Personal Data have incorporated the EU Directive on Data Protection (95/46/EC), so the new EU General Data Protection Regulation (EU 2016/679) will increase awareness of these rules in **Denmark**.<sup>39</sup>

In **Brazil**, the 2011 legislation on the topic (Law 12,527/11) has been used by taxpayers and tax academics to obtain access to information not previously published. The best practice, however, is not met, since there is no further guidance on how to correct inaccuracies. In addition, since 2015, the **Brazilian** tax administration (the Federal Revenue Service) has accepted digital certification for the transmission of tax returns.

The **Mexican** revenue service developed a website where taxpayers enter their username and password. Once inside, they have access to prefilled returns that can be easily modified or accepted. Since all tax notes are elaborated electronically, all of the possible deductions are already included in the proposed return. Moreover, the system allows the online payment of the tax and, if this is the case, the return of the tax paid in excess in less than 30 days.<sup>40</sup>

Also in Latin America, the **Argentinean** Tax Administration (AFIP) grants access to taxpayers' personal information via the AFIP website and allows them to electronically request the correction of inaccuracies. The AFIP performs an analysis of the taxpayers' positions by means of certain indicators and classifies them into categories using the risk profile system, SIPER. By General Resolution 3985-E, a new system that is considered more efficient was implemented.

Even though **China** does not use prepopulated tax returns in the national system, Chongqing, one of the experimental cities of the real estate tax, requires that the tax authorities notify the taxpayers of the tax amount payable and the deadline of the tax return in advance, and then the taxpayers must file the tax returns before the deadline so that the tax authorities may

<sup>35</sup> Pistone & Baker, *supra* n. 8, at p. 25.

<sup>36</sup> IT: Law Decree No. 193 of 22 October 2016 (*Legge di Stabilità 2017*), available at <http://www.gazzettaufficiale.it/eli/id/2016/10/24/16G00209/sg> (last access 24 April 2018).

<sup>37</sup> Income taxes, regional business tax, VAT and payments made by withholding agents may be filed within the term specified by the Italian tax authority for challenging the tax return.

<sup>38</sup> See Italy (National Report). More information is available at <https://www.senato.it/service/PDF/PDFServer/BGT/00993525.pdf>, p. 423 (last access 24 April 2018).

<sup>39</sup> See Denmark (National Report). More information is available at [https://uk.practicallaw.thomsonreuters.com/6-619-2165?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-619-2165?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (last access 24 April 2018).

<sup>40</sup> See Mexico (National Report).

review the amounts submitted (however, the provisions of Chongqing do not explicitly indicate that taxpayers can correct the errors contained in the notification).<sup>41</sup>

Moreover, **Chinese** law stipulates that taxpayers have the right to inquire about their own tax-related information and apply for verification when they have any objections. In this regard, China has enacted specific guidance documents.<sup>42</sup>

In the case of **Serbia**, taxpayers have the right to access personal information held about them.<sup>43</sup> The law also prescribes the right of the taxpayer to request revisions, amendments, updates, deletions and cessations or temporary suspensions of data processing in cases in which the taxpayer disputes the accuracy, completeness or currency of the relevant data until the dispute is settled.<sup>44</sup> In tax matters specifically, **Serbian** law provides the right for taxpayers to access information on assessments and payment of tax related to them held by the tax administration, as well as the right to request revisions of incorrect and incomplete information.<sup>45</sup> Additionally, a recent amendment to the law prescribes, for the first time, the principle of protection of secret and personal data in the administrative procedure.<sup>46</sup>

However, according to the **Colombian** report, the Common Reporting Standard has created new opportunities for mistaken information that taxpayers may not see or correct.<sup>47</sup>

Best practice on this matter suggests publishing guidance on taxpayers' rights to access information and correct inaccuracies. In the case of **Serbia**, this is fulfilled by publishing the official Guidance on the Law on the Protection of Personal Information on the website of the Commissioner for Information of Public Importance and Personal Data Protection.<sup>48</sup> The Law on the Protection of Personal Information is currently under an amendment procedure.

Following the path of the European General Data Protection Regulation EU 2016/679, **Luxembourg** has introduced a bill that limits the taxpayers' right to information when processing their data in order to safeguard the state's financial interests, including in taxation matters. In this regard, **Luxembourg** taxpayers cannot rely on the General Tax Act to request access to their tax files as confirmed by the judiciary, since such a right should be interpreted by virtue of the right to defence guaranteed under section 205 of the General Tax Act, as recently confirmed by the *Tribunal Administratif* (first instance tribunal in direct tax matters; see LU: Tribunal Administratif, 30 June 2017, No. 37931 and 38551, p. 17) In the absence of any express provisions, the Tribunal ruled that such a right should be interpreted by virtue of the right to defence guaranteed under section 205 of the General Tax Act.<sup>49</sup>

<sup>41</sup> See China (National Report).

<sup>42</sup> Id.

<sup>43</sup> RS: Law on the Protection of Personal Information, art. 20(1) available at [https://www.paragraf.rs/propisi/zakon\\_o\\_zastiti\\_podataka\\_o\\_licnosti.html](https://www.paragraf.rs/propisi/zakon_o_zastiti_podataka_o_licnosti.html) (last access 24 April 2018).

<sup>44</sup> Id., at art. 22(1) and (2).

<sup>45</sup> Id., at article 24(1)(6).

<sup>46</sup> RS: Law on General Administrative Procedure, art. 15(2), available at <http://www.parlament.gov.rs/upload/archive/files/lat/pdf/zakoni/2016/266-16-lat.pdf> (last access 24 April 2018).

<sup>47</sup> See Colombia (National Report).

<sup>48</sup> See Serbia (National Report). More information is available at [https://uk.practicallaw.thomsonreuters.com/9-618-8826?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/9-618-8826?transitionType=Default&contextData=(sc.Default)) (last access 24 April 2018).

<sup>49</sup> See Luxembourg (National Report).

#### 4.1.4. Communication with taxpayers

Regarding the facilitation of communication with taxpayers, in 2016, the **Turkish**<sup>50</sup> Ministry of Finance introduced an electronic application for income and corporate taxpayers for tax refunds, where all communication, inspection, analysis and reporting is conducted online. In addition, electronic notifications and a taxpayers' satisfaction management system with regard to VAT refunds have been launched, where applications and surveillance can be made online as well. These systems are protected by a firewall, and the intrusion tests are conducted four times a year in order to prevent any breaches of information.

Moreover, the **Mexican** Tax Administration is the only entity authorized to indicate which taxpayers' e-mail addresses are considered verified and valid for the exchange of data between tax officers and taxpayers.<sup>51</sup>

In the case of **Brazil**, the ancillary duty called “*e-financeira*” (electronic financial report),<sup>52</sup> which must be filled by entities selling pension plans and entities managing individual retirement funds, was amended. Executive Act no. 33/2017 introduced the Manual of Data Compression and Encryption for the electronic financial report.<sup>53</sup>

In addition, in **Colombia**, the tax administration (*Dirección de Impuestos y Aduanas Nacionales*, DIAN) now has a free online system to verify if any communication received by the taxpayer was truly initiated by the tax administration.<sup>54</sup>

In the case of **Serbia**, the Electronic Signature Law presupposes that the electronic signature, which may be used in the course of communication between the administrative authorities and interested parties in administrative procedures, is the so-called “qualified” electronic signature. In order to be regarded as qualified, the electronic signature is required to fulfil numerous conditions that are intended to prevent impersonation or interception of the party.<sup>55</sup>

Also, **Luxembourg's** platform, *MyGuichet*, allows taxpayers to file online official forms, attach supporting documents and submit electronic signatures. It is a secured platform in which users have to first identify themselves through an authentication device or certificate obtained beforehand via a local provider (Luxtrust). The secured authentication aims to ensure protection of the digital identity of the user, as well as electronic data submitted on the platform. Currently, up to nine different tax filings can be done via the platform (certain tax return filings, country-by-country reporting, etc.).<sup>56</sup>

#### 4.1.5. Cooperative compliance

<sup>50</sup> See Turkey (National Report). More information is available at <http://www.mondag.com/Turkey/x/669638/tax+authorities/Turkey+Introduces+Online+System+For+Taxpayers> (last access 24 April 2018).

<sup>51</sup> See Mexico (National Report).

<sup>52</sup> Created by BR: Normative Instruction No. 1.571/2015.

<sup>53</sup> See Brazil (National Report). More information is available at <http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?idAto=82630&visao=anotado> (last access 24 April 2018).

<sup>54</sup> See Colombia (National Report).

<sup>55</sup> RS: Electronic Signature Law, art. 7, available at <https://www.paragraf.rs/propisi/zakon-o-elektronskom-dokumentu-elektronskoj-identifikaciji-i-uslugama-od-poverenja-u-elektronskom-poslovanju.html>. See also Serbia (National Report).

<sup>56</sup> See Luxembourg (National Report).

A system of broad cooperative compliance enhances the efficiency of a tax system. There are obvious cost-saving advantages and the prevention of disputes for tax administrations and taxpayers alike, which encourages the adoption of such cooperation on a non-discriminatory and voluntary basis as a minimum standard.<sup>57</sup>

In this regard, an Annex to the **Spanish** *Ley General Tributaria* (General Tax Law) was approved in November 2015, which contains 11 compliance indicators to improve transparency and legal certainty. In particular, paragraph 2 of the Annex states that companies may provide tax authorities with information about certain actions and decisions in tax matters, e.g. explanations about the presence in tax havens, the financial structure of the group, the degree of compliance with principles of the OECD BEPS Actions or the tax strategy of the group, with the purpose of having an early understanding of the tax policy and the management of tax risks of companies. With this goal, at the end of 2016, a so-called “Tax Transparency Report” was proposed. Regarding the tax behaviour of the company in the light of the BEPS Project, the company must present all transactions that may lead to double deductions of the expenditure, double access to tax benefits, double use of losses, the use of hybrid entities or instruments and double non-taxation situations, including an explanation on the justification and the degree of compliance with the principles of the BEPS Actions.

Moreover, since 2016, **Germany** has started a discussion on the subject of new forms of communication and enhanced cooperation between the tax authorities and taxpayers by considering taxpayers’ lack of implementation of **Germany’s** Tax Compliance Control Framework (*Innerbetriebliches Kontrollsystem*). This is a system that demands taxpayers to implement internal tax compliance controls in accordance with the **German** tax authorities in order to prevent tax fraud and tax avoidance and proportionally reduce the possibility of tax disputes in an audit as an indication against intent and recklessness for criminal law purposes.<sup>58</sup>

#### 4.1.6. Assistance with compliance obligations

In all modern democracies, a minimum standard that obliges all authorities to provide adequate assistance to those that face particular difficulties in fulfilling their obligations, namely in the area of taxes, is easily identifiable, especially including those located in remote areas and those unable or unwilling to use electronic forms of communication.

In this regard, **Spain** has enabled assistance services for people that are either unable or unwilling to use electronic means of identification/authentication for tax compliance purposes.<sup>59</sup>

In the case of **Finland**, the Parliamentary Ombudsman issued a decision that paper-based filings must be allowed alongside e-filings.<sup>60</sup>

In addition, the **Canada** Revenue Agency is improving the number of services that it can provide online. Although this does not help taxpayers who are unwilling or unable to use electronic forms of communication, it does help those located in remote areas.<sup>61</sup>

<sup>57</sup> Pistone & Baker, *supra* n. 8, at p. 26.

<sup>58</sup> See Germany (National Report). More information is available at <https://www.wts.com/de-en/insights/tax-internal-control-framework> (last access 24 April 2018).

<sup>59</sup> See Spain (National Report).

<sup>60</sup> See Finland (National Report).

In addition, **China**'s tax law requires the tax authorities to provide convenient tax services for taxpayers in order to improve efficiency and standardize procedures. However, it does not provide any special assistance for special parts of the population, such as the disabled.<sup>62</sup>

Also, the **South African** Revenue Authority (SARS) has increased the number of mobile offices to assist those who are located in remote areas in meeting their compliance obligations.<sup>63</sup>

**Mexico** has considerably increased the number of applications that must be submitted online, including appeals against the tax administration assessments, which include a request to the tax administration to provide advice to taxpayers on specific issues for the best protection of their rights.<sup>64</sup> Nevertheless, a **Mexican** federal constitutional court<sup>65</sup> ruled that the tax administration should provide additional means of communication with the taxpayer besides email. This criterion is not yet mandatory.<sup>66</sup>

**Serbian** law stipulates an obligation for the tax administration to provide basic legal assistance to non-expert taxpayers, which will enable them to fulfil their obligations with regard to filing tax returns and paying their taxes.<sup>67</sup> Moreover, the law allows individuals to file tax returns (in cases of taxes that are not related to a business activity) not only in electronic, but also in paper form, directly or via a postal service.<sup>68</sup> As of June 2017, the new **Serbian** Law on General Administrative Procedure prescribes a new obligation for tax authorities, i.e. the obligation to warn the taxpayer that, considering the facts established in the procedure, that there is a basis for him to exert some other right, and not the right that he is requesting to exert.<sup>69</sup>

However, pursuant to Decree-Law no. 93/2017 of 1 August 2017, even though **Portuguese** taxpayers are able to access electronic means of knowledge of their tax duties as well as notification of tax-related administrative acts, these electronic means of notification deem the taxpayer to have been notified 5 days after the electronic confirmation that the notification was made available in the system instead of the previous term of 25 days, counting from the day on which the notification was sent.<sup>70</sup>

## 4.2. The issuance of tax assessments

Effective means of enforcing the right to access information and the establishment of non-discriminatory forms of cooperative compliance – as stated in 4.1.– boost the possibilities of implementing a constructive dialogue between tax authorities and taxpayers, which enhances the tax self-assessment system by allowing the parties to proceed smoothly towards agreed solutions to factual and legal issues connected with the levying of taxes. In particular, such dialogue

<sup>61</sup> See Canada. More information is available at <https://www.newswire.ca/news-releases/minister-lebouthillier-announces-the-canada-revenue-agencys-return-to-yukon-642510523.html> (last access 24 April 2018).

<sup>62</sup> See China (National Report).

<sup>63</sup> See South Africa (National Report).

<sup>64</sup> See Mexico (National Report).

<sup>65</sup> , Book 40, Volume IV, Semanario Judicial de la Federación (March 2017). XVII.1o.P.A.8.A. available at <https://www.scjn.gob.mx/sites/default/files/gaceta/documentos/tomos/2017-04/libro40-4.pdf>

<sup>66</sup> See Mexico (National Report).

<sup>67</sup> RS: Law on Tax Procedure and Tax Administration, art. 24(1)(1), available at <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN015630.pdf> (last access 24 April 2018).

<sup>68</sup> Id., at art. 38(9).

<sup>69</sup> See Serbia (National Report). More information is available at [https://www.paragraf.rs/propisi/zakon\\_o\\_opstem\\_upravnom\\_postupku-2016.html](https://www.paragraf.rs/propisi/zakon_o_opstem_upravnom_postupku-2016.html) (last access 24 April 2018).

<sup>70</sup> See Portugal (National Report).

permits taxpayers to exercise timely protection of their rights from measures that are liable to adversely affect them and also enhances good tax administration by tax authorities.

Since May 2016, the **Australian** Tax Transparency Code (TTC), developed by the Board of Taxation,<sup>71</sup> may be regarded as a step towards this goal.<sup>72</sup> It is designed to encourage greater transparency within the corporate sector,<sup>73</sup> participants in which may adopt it voluntarily and on a non-discriminatory basis, in order to complement other mandated initiatives to foster tax transparency in Australia, such as reporting some tax details of certain entities. The TTC was enacted in November 2015.<sup>74</sup> In addition, during 2016, the **Australian** Tax Office (ATO) also commenced consultations to implement the government's legislative requirement for significant global entities to provide the ATO with general purpose financial statements if they do not already lodge (file) them with the Australian Securities and Investments Commission.<sup>75</sup>

Similarly, **Canadian** authorities<sup>76</sup> have started consultations on proposed changes to **Canada's** Voluntary Disclosures Program (VDP) in June 2017 as a form of "amnesty" programme that permits taxpayers to disclose unreported tax or other tax omissions, increasing collection and reducing audits.<sup>77</sup> A report on this voluntary disclosure programme was released by the Offshore Compliance Advisory Committee<sup>78</sup> in December 2016,<sup>79</sup> encouraging taxpayers to voluntarily come forward and correct previous omissions in their dealings with the **Canadian** Revenue Authority. In considering the VDP, this Committee has acknowledged that fairness is, in its own right, a fundamental principle of any tax system,<sup>80</sup> so the VDP is not intended to serve as a vehicle for intentional avoidance of legal obligations.<sup>81</sup> However, as of 21 October 2017, none of the proposed changes to the VDP has been implemented. It is understood that the Canadian Revenue Agency is reviewing various submissions made by concerned taxpayers and that changes to the VDP will be implemented later on.

On a broader basis not limited to cases of voluntary disclosure of tax liabilities, the **Italian** government has approved several legislative acts aimed at enhancing the mechanisms of dialogue between the **Italian** Tax Administration (ITA) and taxpayers in a more relaxed environment, following the guidelines drawn by the parliament.<sup>82</sup> The actual framework provides various instruments that may be used by the taxpayer in order to prevent potential litigation with

<sup>71</sup> See Australia (National Report). See also Commonwealth of Australia, Tax and Super, Budget 2016-17, available at [http://budget.gov.au/2016/17/content/glossies/tax\\_super/html/tax\\_super-01.htm](http://budget.gov.au/2016/17/content/glossies/tax_super/html/tax_super-01.htm) (last access 24 April 2018).

<sup>72</sup> See Australia (National Report). More information is available at <https://www.ato.gov.au/Business/Large-business/In-detail/Tax-transparency/Voluntary-Tax-Transparency-Code/> (last access 24 April 2018).

<sup>73</sup> Id.

<sup>74</sup> See Australia (National Report); and AU: Taxation Administration Act 1953, sec. 3C; AU: Tax and Superannuation Laws Amendment (Better Targeting the Income Tax Transparency Laws) Act 2015; and Australian Tax Office (ATO), Reporting of entity tax information (9 Dec. 2016), available at <https://www.ato.gov.au/Business/Large-business/In-detail/Tax-transparency/Tax-transparency-reporting-of-entity-tax-information> (last access 24 April 2018).

<sup>75</sup> See Australia (National Report); and ATO, Provision of general purpose financial statements by significant global entities (5 Aug. 2016), available at <https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/International/Provision-of-general-purpose-financial-statements-by-significant-global-entities/> (last access 24 April 2018).

<sup>76</sup> Canada Revenue Agency and Canada's Minister of National Revenue.

<sup>77</sup> See Canada (National Report). More information is available at <https://www.newswire.ca/news-releases/minister-lebouthillier-announces-consultations-on-changes-to-the-voluntary-disclosures-program-to-ensure-a-fairer-tax-system-for-all-canadians-627530343.html> (last access 24 April 2018).

<sup>78</sup> The Offshore Compliance Advisory Committee was established by Canada's Minister of National Revenue in April 2016 to provide advice to the Minister and the Canada Revenue Agency on administrative strategies to deal with offshore tax compliance (limited access to voluntary disclosures for repeat users, less general relief in certain circumstances and the disclosure of advisers who assisted with non-compliance). More information is available at <https://www.canada.ca/content/dam/cra-arc/migration/cra-arc/qncy/ocac-ccoe/rprt-eng.pdf> (last access 24 April 2018).

<sup>79</sup> See [http://publications.gc.ca/collections/collection\\_2016/arc-cra/Rv4-20-2016-eng.pdf](http://publications.gc.ca/collections/collection_2016/arc-cra/Rv4-20-2016-eng.pdf) (last access 24 April 2018).

<sup>80</sup> Offshore Compliance Advisory Committee, *Report on the Voluntary Disclosures Program*, p. 3 (2016), available at [http://publications.gc.ca/collections/collection\\_2016/arc-cra/Rv4-20-2016-eng.pdf](http://publications.gc.ca/collections/collection_2016/arc-cra/Rv4-20-2016-eng.pdf) (last access 24 April 2018).

<sup>81</sup> Id. at p. 2.

<sup>82</sup> IT: Law No. 23 of 11 March 2014, available at <http://www.gazzettaufficiale.it/eli/id/2014/03/12/14G00030/sg> (last access 24 April 2018).

the ITA, especially for complex situations and for taxpayers producing cross-border income.<sup>83</sup> In 2017, the Chief of the ITA indicated that tax administrations are a “public good” that should always act in a fair and balanced manner with taxpayers’ rights. Based on this idea, the Chief of the ITA sent a letter to all of the **Italian** tax inspectors, aimed at swaying them towards a more cooperative approach. Although these developments have no legal effectiveness, the **Italian** report indicated that it is already possible to notice an increase in pre-assessment invitations for taxpayers (*inviti a comparire*) to clarify certain doubts and, eventually, avoid the issuance of a notice of assessment.<sup>84</sup>

Additionally, the new **Argentinean** Law 27,430 of 2017 allows the tax administration to seek agreement with the taxpayers in certain cases when estimations, measurements or assessments of certain information or data is necessary to determine the tax obligation or when such agreement is recommended due to the complexities, novelty or importance of the taxpayer’s situation. In addition, the Tax Procedure Law has been modified to allow the taxpayer to modify the tax return once presented for miscalculations or material errors. If the new tax return is presented within 5 days of the first one and the amount rectified does not exceed 5% of the original tax base declared, the new tax return substitutes the original one presented.

In **Brazil**’s federal administrative procedures, the appeals of a taxpayer are examined by a body composed of Federal Revenue Service representatives and taxpayer representatives. However, in the case of a tie, the President of the body, who is always a representative of the tax authorities, votes twice. Since 2017, taxpayers have been questioning this procedure via judicial actions and some of them have been granted, albeit with no *erga omnes* effect. Hence, one cannot say that the best practice is met.

**Colombian** tax authorities have now chosen to send special summons writs (first administrative stage of an assessment) by email without even bothering to visit the taxpayer’s office or interrogating the taxpayer. Many of these audits are based on a misunderstanding of the taxpayer’s business that could be avoided with an auditing visit, which was usually performed before issuing the special summons.<sup>85</sup>

The **Luxembourg**’s *Cour Administrative d’ Appel* (CAA) ruled on 6 December 2016 that the tax authorities have a positive obligation to communicate to the taxpayer the elements on the basis of which they decided not to follow his tax return/assessment. If the taxpayer is not heard, the consequence is, according to the CAA, that it is not possible for the tax authorities to assess the tax situation of the taxpayer. However, if the disparity lies, according to the taxpayer, on the question of the application of the law, which falls under the competence of the tax authorities, the taxpayer does not have the right to be heard before the tax assessment notice is made.<sup>86</sup>

**Polish** legislation may need to be confronted with the indicated minimum standard. On 15 July 2016, the **Polish** General Anti-Avoidance Rule (GAAR) came into force, allowing the tax administration to overrule taxpayers’ requests for private rulings on factual situations or future events that may fall under the GAAR or constitute an abuse of law in the area of VAT.

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<sup>83</sup> See Italy (National Report).

<sup>84</sup> Id.

<sup>85</sup> See Colombia (National Report).

<sup>86</sup> See Luxembourg (National Report).



Instead, taxpayers may request a “protective opinion” (*opinia zabezpieczająca*), which is more expensive and takes longer to receive, only if the question at hand is not related to VAT issues. In addition, pursuant to **Polish** law, general and private rulings and tax explanations do not provide any protection if a decision is issued on the basis of the GAAR or VAT abuse-of-law clause, strongly decreasing the level of protection enjoyed by taxpayers.

**Venezuela** has followed a similar path. Since the enactment of a new Tax Code,<sup>87</sup> a number of measures that may not contribute to a constructive dialogue between taxpayers and the tax administration have been endorsed: (i) the extension of the statute of limitations for tax obligations; (ii) an increase in all sanctions, both criminal and administrative; (iii) the broadening of the collecting powers of the tax administration; (iv) the creation of an expeditious tax collection procedure for all tax debts, without judicial review of the proceedings of the tax administration regarding this matter; and (v) the elimination of the suspensive effects of the tax audit subject to a hierarchical appeal.<sup>88</sup>

A particular – and popular – way of enhancing a constructive dialogue between tax administrations and taxpayers is by the e-filing of tax returns. It increases the speed of reaction to factual or legal mismatches, facilitates the supply of further information, enhances the review of tax audits and smoothes mutual agreement in such matters.<sup>89</sup> On a regular basis, these principles apply to any exchange of information between the parties, as well as in any tax procedures, including tax assessments.

This is the **German** approach,<sup>90</sup> which underwent a fundamental reform of its procedural law in 2016.<sup>91</sup> The new *Abgabenordnung* (AO) aims at modernizing the procedure for tax assessments, providing the legal basis for the automatization of workflows and internal reorganization by the broad use of e-technology for the filing of tax returns and for communication with the tax administration. Many amendments to the law focus on the goal that tax assessments are done automatically to speed up assessments; even the new section 88 of the AO, which stipulates the principle of official investigation in tax matters (*Untersuchungsgrundsatz*), allows for an exception if investigations are economically unreasonable or inefficient. If problems occur, taxes are assessed by tax inspectors. Moreover, the **German** deadline for the declaration of taxes was generally extended, i.e. to 14 months if taxpayers are represented by a tax adviser and 7 months in other cases.<sup>92</sup>

Similarly, connecting e-technology with the broader issue of tax audits, **Turkey**<sup>93</sup> launched a Taxpayer Portal in July 2016, where taxpayers may receive information about the inspections initiated in respect of themselves and the current stage of the inspections, and may also submit their demands, opinions or conciliation applications online. Likewise, the electronic

<sup>87</sup> VE: *Código Orgánico Tributario* (Organic Tax Code), published in the Official Gazette of the Bolivarian Republic of Venezuela (Special No. 6,152), effective as of 17 Feb. 2015, available at <http://fidetel.prueba.mppeuct.gob.ve/publicos/fidetel-20141118-gacetaoficialextraordinaria-6152.pdf> (last access 24 April 2018).

<sup>88</sup> See Venezuela (National Report).

<sup>89</sup> Pistone & Baker, *supra* n. 8, at p. 28.

<sup>90</sup> See Germany (National Report).

<sup>91</sup> The new German Tax Code (*Abgabenordnung*) became effective as of 1 Jan. 2017, available at <https://www.buzer.de/gesetz/1966/v199808-2017-01-01.htm> (last access 24 April 2018).

<sup>92</sup> See Germany (National Report). More information is available at <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-germanyguide-2017.pdf> (last access 24 April 2018).

<sup>93</sup> See Turkey (National Report). More information is available at <https://mukellefportali.vdk.gov.tr/> (last access 24 April 2018).

audit analysis system was started, and ongoing tests have been conducted with respect to the electronic inspection of taxpayers using an electronic invoice and booking system.

In 2015, the paper version of the **Brazilian** corporate tax assessment was extinguished and replaced by the *Escrituração Contábil Fiscal* (ECF), which is an integrated online filing system. The programme has been improved ever since, even though there are still many duplicities of information and issues.

This is not the case of **Venezuela**: while e-filing of tax returns has been widely adopted by the national tax authority (*Servicio Nacional Integrado de Administración Aduanera y Tributaria*, SENIAT), the terms for filing tax returns for major corporations and individuals, regularly of 90 days, were significantly shortened by administrative regulations just a few days after the start of the tax collection season,<sup>94</sup> in most cases to only 30 days.<sup>95</sup>

Concerning the e-filing of tax returns and speeding up the finding of factual or legal mismatches, **Spain**<sup>96</sup> has introduced a new section in the tax returns formats, allowing the taxpayer to request a rectification of the filed self-assessment tax return. The self-assessment itself will also serve as the self-assessment rectification request. For the 2017 tax year, a mobile app was implemented for submitting the tax return.<sup>97</sup> Regarding VAT, a new management system, based on Immediate Supply Information (*Suministro Inmediato de Información*, SII), entered in force on 1 July 2017. Taxpayers subject to the SII (and those choosing to adopt it voluntarily) must send details of their billing records within 4 days of its issuance via online filing to the tax administration.

In addition, **China** has introduced the taxpayers' electronic filing system to speed up the tax assessments.<sup>98</sup>

In **India**, the concept of e-assessment was introduced in the budget of 2017. In the budget of 2018, this has been further refined and made applicable all over India, and a necessary legal provision has also been introduced in the Income Tax Act 1961 (ITA).<sup>99</sup> "E-proceeding" will enable a seamless flow of letters/notices, questionnaires, orders, etc. from the assessing officer to the taxpayer's account in the tax department's e-filing website, so all of the information can be viewed online. A team-based assessment with dynamic jurisdiction was also introduced through the said scheme of e-assessment.

<sup>94</sup> VE: Calendar for Special Taxpayers for the fiscal year 2017, Venezuelan Official Gazette No. 40,797 dated 27 Dec. 2016, available at <https://www2.deloitte.com/content/dam/Deloitte/ve/Documents/legal/ve-legal-calendariosparasujetos-noexpenglish.pdf> (last access 24 April 2018).

<sup>95</sup> See Venezuela (National Report).

<sup>96</sup> See Spain (National Report). More information is available at [http://www.agenciatributaria.es/AEAT.internet/en\\_qb/Inicio/La\\_Agencia\\_Tributaria/Sala\\_de\\_prensa/Notas\\_de\\_prensa/2017/La\\_Agencia\\_Tributaria\\_establece\\_RENTA\\_WEB\\_como\\_su\\_herramienta\\_universal\\_para\\_la\\_declaracion\\_de\\_la\\_Renta\\_por\\_internet.shtml](http://www.agenciatributaria.es/AEAT.internet/en_qb/Inicio/La_Agencia_Tributaria/Sala_de_prensa/Notas_de_prensa/2017/La_Agencia_Tributaria_establece_RENTA_WEB_como_su_herramienta_universal_para_la_declaracion_de_la_Renta_por_internet.shtml) (last access 24 April 2018).

<sup>97</sup> Indeed, the Renta Web platform allows the taxpayer (under the "Modify a filed tax return" option) to make rectifications to self-assessments and supplementary returns, as well as select the previously filed return that the taxpayer wishes to modify. More information is available at [http://www.agenciatributaria.es/AEAT.internet/en\\_qb/Inicio/La\\_Agencia\\_Tributaria/Sala\\_de\\_prensa/Notas\\_de\\_prensa/2017/La\\_Agencia\\_Tributaria\\_establece\\_RENTA\\_WEB\\_como\\_su\\_herramienta\\_universal\\_para\\_la\\_declaracion\\_de\\_la\\_Renta\\_por\\_internet.shtml](http://www.agenciatributaria.es/AEAT.internet/en_qb/Inicio/La_Agencia_Tributaria/Sala_de_prensa/Notas_de_prensa/2017/La_Agencia_Tributaria_establece_RENTA_WEB_como_su_herramienta_universal_para_la_declaracion_de_la_Renta_por_internet.shtml) (last access 24 April 2018). See also Spain (National Report).

<sup>98</sup> See China (National Report). More information is available at <https://www.adb.org/sites/default/files/publication/31155/electronic-taxpayer-services.pdf> (last access 24 April 2018).

<sup>99</sup> See India (National Report).

The **Serbian** legislation has also introduced e-filing (gradually for different types of taxes).<sup>100</sup>

### 4.3. Confidentiality

The right to privacy is widely acknowledged as a fundamental right. Considering the massive loads of information that tax administrations possess on their taxpayers and the sensitive nature of the information so collected, it is a general minimum standard of all tax systems that they take measures to provide such information with protection from any breach or misuse, either by tax administration officials or by third parties, such as withholding agents, that have access to the taxpayers' information. Some developments on the practical protection of the right to privacy have been recorded throughout the period under analysis in this report.

#### 4.3.1. Guarantees of privacy in the law

#### *Recent Relevant European Case Law*

##### European Court of Human Rights

- ***Othymia Investments BV v. The Netherlands (3rd Section, Application No. 75292/10, 16 June 2015)***: The company complained that the undertaking of an investigation by the Netherlands Tax and Customs Administration at the request of their Spanish opposite numbers (based on Directive 77/799/EEC), followed by the transfer of the information thus obtained to the Spanish tax authorities without its prior knowledge, constituted an unwarranted interference with its rights under article 8 European Court of Human Rights (ECHR). The Court held that there was an interference with article 8, but such interference does not constitute a violation of article 8 if it is “in accordance with the law”, pursues a “legitimate aim” and is “necessary in a democratic society”. The Court held that there was no violation of the ECHR, as (i) the exchange of information in question was in accordance with the law, since it was based on Directive 77/799/EEC; (ii) it pursued a legitimate aim, as it aimed to ensure that taxes were paid; and (iii) it was necessary in a democratic society, as, according to the Court of Justice of the European Union’s *Sabou* judgment, during the investigation stage of the tax proceedings, there is no obligation on either the requesting state or the requested state to inform the taxpayer or any other person potentially implicated.
- ***M.N. and others v. San Marino (3rd Section, Application No. 28005/12, 7 July 2015)***: Following a request from the Italian judicial authorities in an investigation concerning, inter alia, tax fraud, the San Marino court ordered the seizure (in the sense of copying and maintaining a copy) of all relevant information held by banks in San Marino that related to a certain company. Among the documents seized were documents pertaining to the applicant, who was not among the persons against whom the criminal proceedings were initiated in Italy. The seizure, in the sense of copying banking data (retrieved from bank statements, cheques, fiduciary dispositions and emails), which the Court considers as falling under the

<sup>100</sup> See Serbia (National Report). More information is available at <https://www.karanovic-nikolic.com/knnews/Pages/2017/11/New-Tax-Rulebooks-Will-Start-to-Apply-in-Serbia-from-2018.aspx> (last access 24 April 2018).

notion of both “private life” and “correspondence”, and the subsequent storage by the authorities of such data, amounts to an interference for the purposes of article 8 of the ECHR. In the present case, the Court found that there was a violation of article 8 of the ECHR, since the taxpayer did not have at his disposal a remedy that could be regarded as an “effective review” for the purposes of article 8 of the ECHR. In conclusion, domestic legislation allowing search and seizure of banking data for tax purposes has to provide procedural safeguards to taxpayers affected by such measures.

- ***Brito Ferrinho Bexiga Villa-Nova v. Portugal (4th Section, Application No. 69436/10, 1 December 2015)***: The taxpayer, a lawyer, was requested to produce copies of her bank account in order to be assessed with VAT on the lawyers’ fees she had received in 2005 and 2006, when lawyers’ fees were not exempt from VAT. The information was disclosed to the tax authority, following an order from a judicial authority that authorized the lifting of professional secrecy. Since the taxpayer did not have the chance to challenge this order that authorized the lifting of professional secrecy, the Court held that the interference with article 8 of the ECHR was not proportionate (it was not considered “necessary in a democratic society”), and therefore there was in violation of article 8 of the ECHR.<sup>101</sup>

Law-sourced privacy protections are widespread around the world. Either enacted by specific bodies of legislation or enshrined in constitutional rules, the general right to privacy enjoys general acceptance throughout most tax systems.<sup>102</sup> Here, the challenge is to provide effectiveness of such rules by means of establishing sanctions for persons – namely, tax officials – who give unauthorized disclosure, to ensure that sanctions are enforced as a minimum standard and to encrypt information held by tax authorities about taxpayers to the highest level attainable as a best practice.

In this regard, the **Argentinean** Law 27,260 of 2016 (tax amnesty) includes the notion of tax secrecy for the information obtained, and all judicial, administrative and political officers and third parties (with the exception of journalists) who disclose the information will be criminally prosecuted.

In Luxembourg, tax officials are required to strictly observe tax secrecy at the risk of sanctions, which include imprisonment from 8 days to 6 months and a fine from EUR 500 to EUR 5,000.<sup>103</sup>

Pursuant to the protection of relevant tax information set by article 95 of the General Tax Law, the **Spanish**<sup>104</sup> judiciary addressed the issue of data protection<sup>105</sup> and whistle-blowers,

<sup>101</sup> P. Baker, *Some Recent Decisions of the European Court of Human Rights on Tax Matters (and Related Decisions of the European Court of Justice)*, 56 Eur. Taxn. 8 (2016), Journals IBFD, available at [https://online.ibfd.org/kbase/#topic=doc&url=/document/et\\_2016\\_08\\_e2\\_2](https://online.ibfd.org/kbase/#topic=doc&url=/document/et_2016_08_e2_2) (last access 24 April 2018).

<sup>102</sup> In this regard, art. 8 of the European Convention on Human Rights provides the following: “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”.

<sup>103</sup> LU: *Abgabenordnung/Loi Générale des Impôts* (General Tax Act), sec. 412, introduced by the Law of 23 December 2016, *Portant mise en oeuvre de la réforme fiscale 2017* (this is the name of the law of 23 December 2016), (*Mémorial A*, No. 274, 27 Dec. 2016, p. 5137). See also Luxembourg (National Report).

allowing the so-called “Falciani List” as evidence of tax fraud, since the unlawful obtaining of evidence is not attributable to a state official.<sup>106</sup>

On the other hand, in 2016, **Turkey** enacted Law No. 6698 on the protection of personal data, in which – as provided in article 20 of the **Turkish** Constitution – measures have been implemented to protect personal data processed automatically by the Ministry of Finance. However, taxpayers are not entitled to access such data or to correct it, which does not appear to align with the standards of the *habeas data* rights.<sup>107</sup>

In addition, **Chinese** law imposed the obligation on tax administration officials to keep taxpayers’ information confidential and provides for corresponding administrative sanctions and criminal sanctions for the illegal disclosure of confidential information by officials.<sup>108</sup>

**Serbian** law also sets forth that tax officers and other persons participating in tax administrative procedures, misdemeanour procedures, pre-investigation procedures and criminal procedures must keep all documents, information, data, facts, data on technical inventions and patents of the taxpayer confidential.<sup>109</sup> Sanctions for officials who give unauthorized disclosure are contained in the Criminal Code.<sup>110</sup>

However, in **Australia**, the Federal Court of Appeal held, in *Federal Commissioner of Taxation v. Donoghue* [2015] FCAFC 183, that section 166 of the Income Tax Assessment Act of 1936 imposes an overriding *duty* on the Commissioner to use whatever information he has in his possession to make an assessment. This is a significant point, because it means that the protection of legal professional privilege may be lost whenever the ATO receives volunteered information from third parties and uses that information to issue assessments, even when – it would seem – the ATO knows that the information has been unlawfully provided by that third party.<sup>111</sup> Also in **Australia**, a high-profile breach of confidentiality and code of conduct breaches were carried out by senior officials, including a Deputy Commissioner of Taxation, Michael Cranston, who revealed confidential audit information to his son, whose affairs were subject to audit in 2017. In response, the Inspector-General of Taxation, Ali Noroozi, announced his terms of reference for review by the ATO.<sup>112</sup>

<sup>104</sup> See Spain (National Report). More information is available at <https://www.boe.es/buscar/act.php?id=BOE-A-2003-23186> (last access 24 April 2018).

<sup>105</sup> According to the decision of the Spanish *Audiencia Nacional*, dated 6 Feb. 2017, the Spanish General Tax Law has a specific legal regime of access to information that provides a special degree of protection for tax-related information. See <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=AN&reference=7941542&links=protecci%C3%B3n%20de%20datos%20Y%20tributario&optimize=20170223&publicinterface=true>, 8th legal ground (*Fundamento Jurídico 8*) (last access 24 April 2018).

<sup>106</sup> According to this decision, the so-called “Falciani List” is admissible as evidence of tax fraud committed by a Spanish citizen, since the data was obtained by an individual (Falciani) not acting on behalf of the state, collected by the French authorities within the frame of its powers in a house search and then required by the Spanish tax authorities through a request for exchange of information. See <http://s03.s3c.es/imag/doc/2017-02-24/sentencia-Lista-Falciani-1.pdf>, 6th legal ground (*Fundamento Jurídico 6*) (last access 24 April 2018). See also secs. 4.3.4. and 4.9.2. for more relevant information.

<sup>107</sup> See Turkey (National Report). More information is available at [http://www.cfe-eutax.org/sites/default/files/Session%20II\\_IFA%20General%20Report%202015%2C%20Baker%20Pistone%2C%20The%20practical%20protectio%20of%20taxpayers%20fundamental%20rights.pdf](http://www.cfe-eutax.org/sites/default/files/Session%20II_IFA%20General%20Report%202015%2C%20Baker%20Pistone%2C%20The%20practical%20protectio%20of%20taxpayers%20fundamental%20rights.pdf), pp. 29 and 33 (last access 24 April 2018).

<sup>108</sup> See China (National Report).

<sup>109</sup> Art. 7 Law on Tax Procedure and Tax Administration, available at <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN015630.pdf> (last access 24 April 2018).

<sup>110</sup> See Serbia (National Report).

<sup>111</sup> See Australia (National Report). For a discussion on the developments in this case and similar recent cases, see R. Woellner & J. Bevacqua, *The ATO, Conscious Maladministration and Stolen Information*, 46 Australian Tax Review 26 (2017).

<sup>112</sup> See Australia (National Report); and the Terms of Reference for Review into ATO Fraud Control Management, available at <https://cdn.tspace.gov.au/uploads/sites/16/2017/06/ToR-ATO-Fraud-Control.pdf> (last access 24 April 2018).

Also, in **Colombia**, Circular 001 of 2013 provides for confidentiality obligations for tax authorities, but it does not cover obligations for financial institutions and other actors under the Common Reporting Standard. Furthermore, the sanctions contained therein have not been applied because it is extremely difficult to demonstrate that a leak of information came from a specific official. The difficulties experienced by **Colombian** officials have gone further: experts called by the DIAN to implement digital footprints and firewalls to prevent leaks have denied informally declaring that they received threats while performing initial system checks.<sup>113</sup>

#### 4.3.2. Encryption control of access

Encryption of taxpayers' information is a key issue for guaranteeing its confidentiality and, therefore, the right to privacy of the citizens. In this regard, it is the best practice to ensure an effective firewall to prevent unauthorized access to data held by revenue authorities and a minimum standard to use adequate methods to guarantee that only authorized officers will have access to the taxpayers' data.

**China** has made taxpayer information highly encrypted. Moreover, only the officials of tax authorities can enter the intranet, which is a kind of physical isolation with high security, which can only be accessed by authorized officers. Each officer needs to use their own identification account to log into the system, and every single operation will be traceable by the system. Additionally, taxpayers need to use the taxpayer's certificate to deal with tax affairs online.<sup>114</sup>

Also, in 2017, **Italy** suffered the disclosure of data of millions of taxpayers contained on the digital platform, SOGEL. This accident shows that there is still work to be done on the framework of confidentiality of taxpayers' data.<sup>115</sup>

#### 4.3.3. Administrative measures to ensure confidentiality

Whereas tax information is extremely sensitive, good governance principles demand that the tax authorities – as a minimum standard – enact and enforce measures emphasizing the tax officials' duty of confidentiality. In this regard, to appoint data protection/data privacy officers at senior level and at local tax offices in order to protect the information relevant for tax purposes obtained by tax administrations to the highest level attainable is ostensibly a best practice.

In this regard, from 25 May 2018, **Danish** tax authorities will be required to appoint a data protection officer under the new EU General Data Protection Regulation.<sup>116</sup>

**Colombia** has taken a step further: Natasha Avendaño, a very high-level official, has been appointed data protection officer. She may be elected as the next DIAN chief.<sup>117</sup>

<sup>113</sup> See Colombia (National Report).

<sup>114</sup> See China (National Report). See also the press release from the Jilin Provincial State Taxation Bureau, dated 23 Sep. 2016 at [http://www.jl-n-tax.gov.cn/art/2016/9/23/art\\_50\\_77670.html](http://www.jl-n-tax.gov.cn/art/2016/9/23/art_50_77670.html); and the press release from the Office of the People Government of Yuncheng City dated 9 Oct. 2017 at <http://www.yuncheng.gov.cn/article/17/10/32790.shtml> (last access of both documents 24 April 2018).

<sup>115</sup> See Italy (National Report). On 3 Oct. 2017, the Italian Data Protection Authority (*Garante per la protezione dei dati personali*) sent a letter to the Prime Minister regarding this issue, available at <http://www.garanteprivacy.it/web/quest/home/docweb/-/docweb-display/docweb/6918092> (last access 24 April 2018).

<sup>116</sup> See Denmark (National Report). More information is available at <https://www.eugdpr.org/the-regulation.html> (see the section on DPOs) (last access 24 April 2018).

<sup>117</sup> See Colombia (National Report).

The **Spanish** Central Economic Administrative Court (*Tribunal Económico Administrativo Central*, TEAC), in its decision of 4 April 2017, provided an enhanced standard of protection to ensure confidentiality by absolutely prohibiting the disclosure to the taxpayer being audited of the information held by tax authorities used as a “secret comparable” in an indirect assessment procedure (*estimación indirecta*), even if the data are relevant and appropriate for performing the evaluation.<sup>118</sup>

Moreover, the **Italian** consolidated case law<sup>119</sup> punishes the unauthorized disclosure of confidential information made by tax inspectors as an “abusive access to a telematics system by a public official” (article 615ter of the **Italian** Criminal Code). The crime, if committed by a tax inspector (i.e. a public official) is punished with imprisonment from 1 to 5 years.<sup>120</sup>

However, in **Luxembourg**, the judiciary has been hesitant to grant compensation for non-pecuniary damage arising from breaches of the right to privacy. Different chambers of the Court of Appeal have adopted completely different approaches, allowing for a compensation of EUR 25,000 as compensation for non-pecuniary damage for a “breach of privacy of a client’s ‘private life’” because of his “disappointment” to see his legitimate expectations unfulfilled with regard to the bank’s obligation to bank secrecy.<sup>121</sup> In contrast, no damages have been awarded in similar cases of breaches of bank secrecy, as the Court ruled that the appellant’s legitimate expectations with regard to bank secrecy did not have “sufficient practical and autonomous existence in relation to the tax debt [at issue] to justify the award of damages and interest”.<sup>122</sup>

One additional point not directly related to tax issues is that the Supreme Court of **India** has declared the right to privacy a fundamental right guaranteed by the Constitution, and as such, the same should be enforceable by the courts.<sup>123</sup> Such decision may influence the provisions of the Tax Code.

On the other hand, **Argentinean** tax officers are under judicial investigation for selling confidential information obtained during the 2016 voluntary declaration of undeclared assets, an action that shows the commitment of **Argentinean** authorities to ensure confidentiality.

#### 4.3.4. Exceptions to confidentiality

### *Recent Relevant European Case Law*

#### European Court of Human Rights

<sup>118</sup> See Spain (National Report). More information is available at <https://www.iberley.es/resoluciones/resolucion-teac-7574-2015-00-00-04-04-2017-1443730> (last access 24 April 2018).

<sup>119</sup> See IT: ISC, Fifth Chamber, 22 May 2013, No. 22024. More information is available at <http://www.altalex.com/documents/massimario/2014/06/17/sistema-informatico-accesso-abusivo-persona-abilitata-limiti-condizioni> (see the bottom of the page for the complete text of the ruling) (last access 24 April 2018).

<sup>120</sup> See Italy (National Report). This approach was recently confirmed in IT: ISC, Grand Chamber, 8 Sept. 2017, No. 41210, available at <http://www.altalex.com/documents/massimario/2017/10/10/informatica-giuridica-accesso-pubblico-ufficiale> (last access 24 April 2018).

<sup>121</sup> See Luxembourg (National Report); Referring to LU: Cour d’Appel, 4th Chamber, 2 Apr. 2003.

<sup>122</sup> See Luxembourg (National Report); Referring to LU: Cour d’Appel, 9th Chamber, 5 Nov. 2009.; and LU: Cour d’Appel, 7th Chamber, 16 Mar. 2011.

<sup>123</sup> See India (National Report).

- ***K.S. and M.S. v. Germany (5th Section, Application No. 33696/11, 6 October 2016)***: The German tax authorities instigated proceedings against the applicants for suspected tax evasion after receiving information about the applicants' assets held in a Liechtenstein bank. The information (together with data relating to many other account holders domiciled in Germany for tax purposes) had been illegally copied by an employee of the bank and purchased by the German secret service before finding its way to the tax authorities. On the basis of that information, a prosecutor obtained a judicial warrant for a search of the applicants' home. The Court concluded that nothing indicated that the warrant was not limited to what was indispensable in the circumstances of the case, and therefore it held that there has been no violation of article 8 of the ECHR.
- ***G.S.B. v. Switzerland (3rd Section, Application No. 28601/11, 22 December 2015)***: In response to a request from the Internal Revenue Service (IRS), the Swiss Federal Tax Administration (AFC) instigated an administrative cooperation procedure and invited the bank UBS to supply detailed files on the customers mentioned in the appendix to an agreement between the AFC and the IRS. UBS transmitted the applicant's file to the AFC. The Court held that the disclosure of banking information to tax authorities of another state pursuant to a special bilateral agreement did not constitute a violation of article 8 of the ECHR or a violation of article 14 of the ECHR read in conjunction with article 8 of the ECHR.

### Court of Justice of the European Union

- ***WebMindLicences - C-419/14 (17 December 2015)***: The Court held that EU law must be interpreted as not precluding the tax authorities from being able, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained without the taxable person's knowledge in the context of a parallel criminal procedure that has not yet been concluded, by means of, for example, the interception of telecommunications and seizure of emails, provided that the obtainment of that evidence in the context of the criminal procedure and its use in the context of the administrative procedure does not infringe the rights guaranteed by EU law, including those contained in article 7 and article 47 of the EUCFR.

Although the right to privacy is widely acknowledged as a fundamental right, there are a few exceptions, which, by principle, should be explicitly stated in the law and interpreted narrowly so that the privacy's "hard core" as a fundamental right is preserved. One of the most commonly reported exceptions to such principle is the publishing of some taxpayers' overdue liabilities. In December 2016 in **Australia**, the ATO was enabled to disclose the tax debt information of businesses that have not effectively engaged with the ATO. The measure is still in the process of being implemented.<sup>124</sup>

<sup>124</sup> See Australia (National Report). More information is available at <https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Income-tax-for-businesses/Tax-compliance--improving-compliance-through-third-party-reporting-and-data-matching/> (last access 24 April 2018); and [https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/Improve-the-transparency-of-tax-debts/?page=1#Legislation\\_and\\_supporting\\_material](https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/Improve-the-transparency-of-tax-debts/?page=1#Legislation_and_supporting_material) (last access 24 April 2018).



Moreover, **Chinese** legislation has specified the conditions for the disclosure of taxpayers' information, which is strictly confined within necessary limits.<sup>125</sup>

There is also significant pressure on transparency as a new *leitmotiv* of taxation.<sup>126</sup> Transparency is addressed as a new paradigm that would assure more equitable tax systems, distributing more equally the tax burden among taxpayers and the taxable income among states through the disclosure from taxpayers of information about tax planning and encouraging tax administrations to make statistical information available about their efforts in fighting tax evasion and tax avoidance. In this regard, **Canada's** Standing Committee on Finance has issued a report entitled "the **Canada** Revenue Agency, Tax Avoidance and Tax Evasion" (2016),<sup>127</sup> which requires the **Canadian** Minister of National Review to establish a regular reporting programme for the **Canada** Revenue Agency that would facilitate the public availability of statistical information about enforcement efforts in relation to tax evasion and tax avoidance schemes by 31 August 2017. This reporting programme should identify the number of investigations leading to convictions or settlements, associated penalties and interest rates and enforcement efforts in relation to high-risk individuals and corporations.<sup>128</sup>

In this regard, on 29 August 2017, the **Finnish** Administrative Court ruled that public broadcaster Yle could not be forced to hand over documents leaked from the Panamanian law firm Mossack Fonseca in 2016, declaring that the media's opportunities to gain access to necessary material could be endangered if authorities were allowed to order such a handover against the wishes of the media and the source of the material. Moreover, regarding transparency in the collection of information from third parties, **Finland's** Supreme Administrative Court ruled that a tax consultancy company was not obliged to submit a tax memorandum, which is not a basis for tax assessment, to the tax administration. However, the **Finnish** Court also ruled that stolen data from the Liechtenstein LGT Bank that was received via exchange of information could be used as grounds for a tax assessment, despite possible criminal actions in the chain of information exchange preceding the **Finnish** tax administration.<sup>129</sup>

Also, in **Colombia**, interpretations of confidentiality following the Panama Papers scandal have become more broad and relaxed. The DIAN has considered press statements regarding investigations initiated against taxpayers revealed in the Panama Papers scandal.<sup>130</sup>

In **Italy**, from 2015 onward, all of the annual tax returns of politicians composing the **Italian** government (and certain special commissioners appointed by the government) shall be accessible to everyone, apart from certain sensible data (e.g. the place of residence, the tax code, etc.). This project, called "Transparent Administration", allows all citizens to check, on the official website of the **Italian** government, the income produced in the last years and the costs reimbursed by the state for their institutional functions (e.g. fuel or airplane tickets), which is something that the **Italian** report regards as positive.<sup>131</sup>

<sup>125</sup> See China (National Report).

<sup>126</sup> A. Turina, "Visible, Though Not Visible in Itself": Transparency at the Crossroads of International Financial Regulation and International Taxation, 8 World Tax J. (2016), Journals IBFD, available at [https://online.ibfd.org/kbase/#topic=doc&url=/document/wtj\\_2016\\_03\\_int\\_4](https://online.ibfd.org/kbase/#topic=doc&url=/document/wtj_2016_03_int_4).

<sup>127</sup> See [http://publications.gc.ca/collections/collection\\_2016/parl/xc26-1-1-421-6-eng.pdf](http://publications.gc.ca/collections/collection_2016/parl/xc26-1-1-421-6-eng.pdf) (last access 24 April 2018).

<sup>128</sup> See Canada (National Report). More information is available at [http://publications.gc.ca/collections/collection\\_2016/parl/xc26-1-1-421-6-eng.pdf](http://publications.gc.ca/collections/collection_2016/parl/xc26-1-1-421-6-eng.pdf) (see recommendation no. 10) (last access 24 April 2018).

<sup>129</sup> See Finland (National Report).

<sup>130</sup> See Colombia (National Report).

<sup>131</sup> See Italy (National Report). More information is available at [http://www.dt.tesoro.it/en/amministrazione\\_trasparente.html](http://www.dt.tesoro.it/en/amministrazione_trasparente.html) (last access 24 April 2018).

If “naming and shaming” is employed, it is a minimum standard to ensure adequate safeguards (e.g. judicial authorization after proceedings involving the taxpayer) and a best practice to obtain judicial authorization before any disclosure of confidential information. In **China**, “naming and shaming” is employed when the tax administration has made written tax assessments or applied penalties and the taxpayers applied neither for administrative review nor for judicial review during the statutory period, or when a final decision on a remedial procedure is followed. In this case, the disclosure of confidential information by the **Chinese** revenue authorities requires no judicial authorization.<sup>132</sup>

In this regard, **Serbian** law specifically prescribes the obligation of the tax administration to publish (twice a year, on its website) information on legal entities and entrepreneurs with outstanding tax debts above certain amounts (natural persons were also subject to this practice, but in 2014, changes were introduced due to confidentiality issues, and they were consequently excluded from the tax administration’s obligation to “name and shame”). Data included in the process of “naming and shaming” is explicitly excluded from the general obligation of confidentiality. With regard to this, no judicial authorization is required for the disclosure of confidential information. Several opinions of the Ministry of Finance confirmed that the taxpayer’s written consent is not required for “naming and shaming”.<sup>133</sup>

Additionally, the **Brazilian** Federal Revenue Service and the Federal Attorney Department have been publishing lists of taxpayers who owe taxes to the federal government, with no separation of tax credits that are under discussion and those that are simply not paid.

#### 4.3.5. The interplay between taxpayer confidentiality and freedom-of-information legislation

##### *Recent Relevant European Case Law*

##### **European Court of Human Rights**

- *See Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland (Grand Chamber, Application No. 931/13, 27 June 2017) infra*, at section 4.6.2.<sup>134</sup>

##### **Court of Justice of the European Union**

- *Pušár - C-73/17 (27 September 2017)*: The taxpayer in this case was included in the “*biele kone*” list, which is drawn up, published and used by the tax authority. This list consists of natural persons that the public authorities refer to by the expression “*biele kone*”

<sup>132</sup> See China (National Report).

<sup>133</sup> See Serbia (National Report).

<sup>134</sup> See also FI: ECJ, 16 Dec. 2008, Case C-73/07, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy, Satamedia Oy*, ECJ Case Law IBFD. According to this case, the gathering and distribution of data via SMS on the earned and unearned income and the assets of natural persons (collected from documents in the public domain held by tax authorities and processed for publication whereby mobile telephone users can, by sending a text message containing details of an individual’s name and municipality of residence to a given number, receive information concerning the earned and unearned income and assets of that person) must be considered as the “processing of personal data” within the meaning of 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, OJ L 281 (1995), EU Law IBFD. More information is available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=76075&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=322026> (last access 24 April 2018).

(“white horses”), i.e. persons acting as “fronts” in company director roles. Each natural person is, in principle, together with his national identity number and a tax identification number, associated with a legal person or legal persons within which he is deemed to be performing duties during a determined period. The Court held that article 7(e) of the Data Protection Directive (95/46) must be interpreted as not precluding the processing of personal data by the authorities of a Member State for the purposes of collecting tax and combating tax fraud, such as that effected by drawing up a list of persons such as that at issue in the main proceedings, without the consent of the data subjects, provided that (i) the authorities were vested by the national legislation with tasks carried out in the public interest within the meaning of that article; (ii) the drawing up of the list and the inclusion in it of the names of the data subjects are adequate and necessary for the attainment of the objectives pursued; (iii) there are sufficient indications to assume that the data subjects are rightly included in the list; and (iv) all of the conditions for the lawfulness of the processing of personal data imposed by Directive 95/46 are satisfied.

Also, **Spain**, along with **Denmark**, provide examples of the interplay between taxpayer confidentiality and the freedom-of-information legislation. A minimum standard on this topic requires the freedom of information legislation to allow a taxpayer to access information about himself. However, access to information by third parties should be subject to stringent safeguards: it can take place only if an independent tribunal concludes that the public interest in the disclosure outweighs the right to confidentiality and only after a hearing in which the taxpayer has an opportunity to be heard.

On one hand, according to the **Danish** report,<sup>135</sup> the taxpayer’s right to access information about himself follows from the **Danish** Act on Personal Data, which incorporates the EU Directive on Data Protection. The new EU General Data Protection Regulation will increase awareness of these rules.

In this regard, the **Argentinean** Law 27,430 (tax reform, 2017) specifically incorporates tax secrecy within the exceptions to the obligation to grant access to public information. The information protected by tax secrecy is excluded from the right to access public information established in Law 27,275, which regulates citizens’ access to public information. The **Argentinean** tax reform also widens the scope of article 107 of the Tax Procedure Law, establishing that public and private entities, banks and stockbrokers have the obligation to give the tax authority all of the information required in order to prevent or reduce tax fraud and evasion. Additionally, General Resolution 3952/16 prohibits financial entities and other agents from requiring taxpayers to present their tax returns in order to preserve tax secrecy.

**Brazil**’s Law 12,527, enacted in 2011, guarantees the protection of confidentiality of personal information held by government authorities. However, no encryption service is mentioned.

<sup>135</sup> See Denmark (National Report).

Conversely, the judgment of the **Spanish Audiencia Nacional** case of 6 February 2017 addresses the balance between the access to information as a universal right under Law 19/2013, on the one hand, and the confidentiality of relevant tax information under article 95 of the General Tax Act (LGT), on the other hand. Although the **Spanish** Court declared that “the confidential nature of tax information is not unlimited as it is public information”, it acknowledged that tax information serves a special purpose, i.e. applying taxes, so therefore it is confidential and covered by a special protection: “[T]he right to information is not an absolute right, being subject to certain limits”, i.e. “those [limits] established in other Laws regulating issues related to the Tax Administration”, pursuant to article 95 of the **Spanish Ley General Tributaria** (General Tax Act).

In **China**, taxpayers have the right to acquire their own tax information, and the judicial system has no jurisdiction in deciding on the access to information by third parties.<sup>136</sup>

#### 4.3.6. Anonymized judgments and rulings

Taxpayers have the right to maintain the privacy of their information as well as not be subject to public knowledge and questioning of their business activities. Therefore, minimum standards advise that tax rulings, if published, should be anonymized and details that might allow the identification of the taxpayer removed. Accordingly, a best practice would be to anonymize all of the taxpayers’ information contained in tax judgments.

Nevertheless, **Italy** has indicated that, while tax rulings are not published at all, the tax judgments are available through specialized databases, which frequently allow acknowledging the name(s) of the taxpayer(s) involved.<sup>137</sup>

In this regard, in **Brazil**, tax rulings of the federal government are not published. However, administrative decisions on tax appeals are, with full information regarding the taxpayer and the facts of the case.

The requirement to publish advance tax rulings was introduced in **Luxembourg** by a grand-ducal regulation released in December 2014.<sup>138</sup> The regulation implemented section 29a of the Luxembourg General Tax Act,<sup>139</sup> which formalized, for the first time, the administrative tax ruling practice in Luxembourg. Article 7 of the grand-ducal regulation provides that, prior to their publication, advance tax decisions must be summarized and *anonymously released*. The publication is made on an annual basis and is featured in the annual report of the Luxembourg Direct Tax Authorities. The first publication was made in the 2015 annual report of the tax authorities, which is available on their website. The information released in the annual report indicates mainly the number of tax rulings issued (tax rulings and advance pricing agreements are shown distinctively), the amount of favourable opinions versus negative answers and a very broad description of the subjects raised within the advance tax decisions, including their legal basis.

<sup>136</sup> See China (National Report).

<sup>137</sup> See Italy (National Report). More information is available at <http://www.finanze.it/export/sites/finanze/it/content/Documenti/Varie/RELAZIONE-BANCHE-DATI-DEL-SIF-al-14-10-2016.pdf> (see heading “Processo Tributario”) (last access 24 April 2018).

<sup>138</sup> Règlement grand-ducal du 23 décembre 2014 relatif à la procédure applicable aux décisions anticipées rendues en matière d’impôts directs et instituant la Commission des décisions anticipées (*Mémorial A*, No. 264, 29 Dec. 2014, p. 5612).

<sup>139</sup> Sec. 29a Luxembourg General Tax Act (*Mémorial A*, No. 257, 24 Dec. 2014, p. 5472).

### 4.3.7. Legal professional privilege

#### *Recent Relevant European Case Law*

##### European Court of Human Rights

- ***Lindstrand Partners Advokatbyrå AB v. Sweden, (3rd Section, Application No. 18700/09, 20 December 2016)***: This case concerned a search undertaken on the premises of the applicant law firm by the Tax Agency in the course of audits that were being carried out on two other companies, which were clients of the law firm. The Court concluded that the search of the applicant's offices was not disproportionate to the legitimate aims pursued. The interference was accordingly regarded as having been "necessary in a democratic society". It followed that there was no violation of article 8 of the ECHR. However, the Court also held that the applicant was denied legal standing and thus did not have access to any remedy for the examination of its objections to the search. In these circumstances, the applicant did not have an "effective remedy before a national authority". It followed that there was a violation of article 13 of the ECHR in conjunction with article 8.

Considering the nature of tax matters, where delicate financial, personal and corporate information is exchanged between the taxpayer and his tax advisers, in order to provide for his defence against a (potential) tax claim issued by the tax authorities, at least the legal professional privilege must apply to the tax advice. Naturally, it is advisable – as a best practice – that privilege of non-disclosure should apply to all tax advisers (not just lawyers) who supply similar advice to lawyers and that information imparted in circumstances of confidentiality – such as religious confession – should be privileged with non-disclosure in all cases.<sup>140</sup>

Following this path, the Supreme Court of **Canada** released its decision in *Canada v. Chambres des notaires du Québec*,<sup>141</sup> 2016 SCC 20 and *Minister of National Revenue v. Thompson*, 2016 SCC 21<sup>142</sup> on 3 June 2017, which, taken together, confirm the quasi-constitutional status of solicitor-client privilege in **Canada**, pursuant to section 8 of the **Canadian** Constitution.<sup>143</sup> However, as suggested by Action 12 of the BEPS Action Plan,<sup>144</sup> **Canada's** Standing Committee on Finance, entitled the **Canada** Revenue Agency, Tax Avoidance and Tax Evasion(2016),<sup>145</sup> has recommended the **Canadian** Minister of National

<sup>140</sup> Although art. 8 of the European Convention on Human Rights protects "the fundamental right to professional confidentiality", the European Court of Human Rights holds that "[t]he obligation to report suspicions does not [...] go to the very essence of the lawyer's defence role which [...] forms the very basis of legal professional privilege". See FR: ECtHR, 6 December 2012, Application No. 12323/11, *Michaud v. France*, sec. 128, available at <http://hudoc.echr.coe.int/eng/?i=001-115377> (last access 24 April 2018).

<sup>141</sup> CA: Supreme Court, 6 Mar. 2016, Case 35892, *Canada (Attorney General) v. Chambres des notaires du Québec*, available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15989/index.do> (last access 24 April 2018).

<sup>142</sup> CA: Supreme Court, 6 Mar. 2016, Case 35590, *Canada (National Revenue) v. Thompson*, available at [https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15990/index.do#\\_ftn1](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15990/index.do#_ftn1) (last access 24 April 2018).

<sup>143</sup> CA: Supreme Court, 6 Mar. 2016, Case 35892, *Canada (Attorney General) v. Chambres des notaires du Québec*, available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15989/index.do> (last access 24 April 2018).

<sup>144</sup> F.D. Martínez Laguna, *Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives – The Dividing Line between Intended and Unintended Double Non-Taxation*, 9 World Tax J. (2017), Journals IBFD, available at [https://online.ibfd.org/kbase/#topic=doc&url=document/wtj\\_2017\\_02\\_int\\_4](https://online.ibfd.org/kbase/#topic=doc&url=document/wtj_2017_02_int_4) (last access 24 April 2018).

<sup>145</sup> [http://publications.gc.ca/collections/collection\\_2016/parl/x26-1/XC26-1-1-421-6-eng.pdf](http://publications.gc.ca/collections/collection_2016/parl/x26-1/XC26-1-1-421-6-eng.pdf) (last access 24 April 2018).

Revenue to require tax advisers operating in **Canada** to register all of their tax products with the **Canada** Revenue Agency, regardless of their “aggressiveness”.<sup>146</sup>

Additionally, the **Portuguese** Law no. 83/2017 of 18 August 2017 requires lawyers to take the initiative to report certain transactions carried out by their clients in such ample terms that it appears necessary to revise such rules in accordance with the right to legal privilege and the balance of the burden of proof. These rules aim to fight money laundering and the financing of terrorism, and partially transpose EU legal instruments on those matters.<sup>147</sup>

Also, the **South African** Tax Administration Act was amended in January 2016, introducing a procedure in which legal privilege is asserted. When a person alleges the existence of legal privilege, such person must provide certain information to the SARS or a presiding officer or attorney.<sup>148</sup>

In the case of **Serbia**, the law includes lawyers, members of the clergy, taxpayers’ family members and tax advisers (and their assistants) within the scope of persons who are provided with the privilege of non-disclosure. However, the only specific rules relating to the search of premises containing privileged material are those regulating the search of a lawyer’s office or apartment. In such case, a lawyer designated by the Bar Association will be invited to be present during the search.<sup>149</sup>

#### 4.4. Normal audits

Tax audits are administrative procedures that produce effects in the taxpayer’s legal sphere by assessing either a balance of taxes owed or the fulfilment of the taxpayer’s duties. Therefore, such procedures may adversely affect the taxpayer’s rights if such audits are not conducted within certain limits.

It is a taxpayer’s right to be notified of the initiation of a tax audit. Moreover, the taxpayer shall be informed of the tax administration’s arguments and have the opportunity to file his defences and evidences during the procedure (the *audi alteram partem* principle). The taxpayer shall also have the right to be assisted by his legal advisers, especially during any relevant meeting with the tax administration. Best practices suggest that the tax administration should hold preliminary meetings with taxpayers to allow for the comprehension of the facts under investigation, as well as the possibility of advantageous arrangements that reduce the litigiousness of tax affairs.

For the purposes of protecting the principle of legal certainty, it is also essential that rules set forth a time limit for the extension of the tax audit, as well as a prohibition of conducting two tax audits on the same period and facts (the *ne bis in idem* principle). Legal certainty should also allow the taxpayer to request the initiation of a tax audit. Moreover, the tax administration should

<sup>146</sup> See Canada (National Report). More information is available at [http://publications.gc.ca/collections/collection\\_2016/parl/xc26-1/XC26-1-1-421-6-eng.pdf](http://publications.gc.ca/collections/collection_2016/parl/xc26-1/XC26-1-1-421-6-eng.pdf) (see Recommendation no. 2, p. 29) (last access 24 April 2018).

<sup>147</sup> See Portugal (National Report). More information is available at <https://dre.pt/application/file/a/108016630> (last access 24 April 2018).

<sup>148</sup> See South Africa (National Report). More information is available at <http://www.sars.gov.za/AllDocs/LegalDoclib/AmendActs/LAPD-LPrim-AA-2016-01%20-%20Tax%20Administration%20Laws%20Amendment%20Act%2023%20of%202015%20GG%2039586.pdf> (last access 24 April 2018).

<sup>149</sup> See Serbia (National Report); and RS: Law on Criminal Procedure, art. 156(6), available at [https://www.mpravde.gov.rs/files/Criminal\\_Procedure\\_Code\\_-\\_2012.pdf](https://www.mpravde.gov.rs/files/Criminal_Procedure_Code_-_2012.pdf) (last access 24 April 2018).

be obliged to publish their tax audit guidelines and create a manual of good practices at a global level. Similarly, taxpayers have the right that all administrative procedures end with the notification of a formal notice of the results of the investigation,<sup>150</sup> allowing the knowledge of the tax administration's intent, as well as the possibility of filing reviews and appeals against such notice.<sup>151</sup>

Administrative actions on tax audits, as well as the issuance of administrative measures to guarantee the compliance with tax obligations, should be proportionate to the aims pursued by such actions. Therefore, any action that may exceed these purposes is prohibited. As a result, in the application of the principle of proportionality, the authorities should only require information that is strictly necessary for the performance of their duties and that inflict the lowest possible burden on taxpayers. Finally, no administrative procedure shall oblige taxpayers to declare against himself (the *nemo tenetur se detergere* principle), implying the recognition of the right to remain silent during all tax audits.<sup>152</sup> Compliance with these principles is essential in any administrative procedure, and their violation makes any administrative action null and void.

#### 4.4.1. Tax audits and their foundation principles

##### 4.4.1.1. *Ne bis in idem*

#### *Recent Relevant European Case Law*

##### European Court of Human Rights

- *See A and B v. Norway* (Grand Chamber, Application Nos. 24130/11 and 29758/11, 15 November 2016) *infra*, at section 4.7.1.

Based on the previous assumptions that summarize the minimum standards and best practices in the field, it is worth noting that on 20 May 2016, the **Italian** Constitutional Court (ICC) published a decision regarding the legitimacy of the “double track” system between tax crimes and tax administrative penalties in relation to VAT evasion. The audit conducted led to both criminal and tax proceedings. In this case, the criminal court decided to remit the case to the ICC, considering the possible unconstitutionality of article 649 of the Criminal Procedural Code (prohibition of a second criminal proceeding), since it does not prohibit the prosecution of a criminal proceeding in the case that the defendant has already paid a consistent pecuniary

<sup>150</sup> There was an important case recently decided in South Africa that upholds the validity of these principles in the context of tax audits. According to the Port Elizabeth Tax Court of South Africa in IT 13726 (as of yet unreported), the Commissioner may not issue an additional assessment without notice, as this does not comply with the peremptory prescripts of the applicable legislation and is constitutionally unsound. An entire additional assessment was declared to be invalid, interest had to be remitted and the Commissioner was ordered to pay all of the appellant's costs for the appeal. Although this case does not set a precedent for higher courts, it does challenge the Commissioner's non-compliance with the Tax Administration Act (due procedures) and offends both the constitution and the principle of legality. See South Africa (National Report).

<sup>151</sup> However, Brazilian tax authorities and administrative courts continue to understand that these rights do not apply during auditing procedures. See Brazil (National Report).

<sup>152</sup> Nonetheless, the Australian Senate Standing Committee on Tax and Revenue recommended in 2015 that taxpayers charged with tax fraud or tax evasion should be granted the presumption of innocence in court, since the administrative and judicial practice at the moment is that a taxpayer accused of tax evasion is deemed guilty and must prove their innocence. The Standing Committee on Tax and Revenue recommended this change after hearing that the ATO often goes on “fishing expeditions” and uses its extraordinary powers to gather information that it then uses against the taxpayer. See Australia (National Report), as well as the full report, available at [http://www.aph.gov.au/~media/02\\_Parliamentary\\_Business/24\\_Committees/243\\_Reps\\_Committees/TaxRev/disputes/FullReport.pdf](http://www.aph.gov.au/~media/02_Parliamentary_Business/24_Committees/243_Reps_Committees/TaxRev/disputes/FullReport.pdf) (last access 24 April 2018).

penalty. In this case, the ICC returned the case to the criminal judge for a new evaluation of the issue in the light of the Legislative Decree No. 158 of 24 September 2015, which considered non-punishable the defendant that paid the taxes assessed, late payment interest and administrative penalties before the discussion phase of the criminal trial. Later, on 20 July 2016, the ICC, in a different case, declared the partial unconstitutionality of article 649 of the Criminal Procedural Code, considering it invalid that the provisions indicated that the facts under analysis were the same for the sole circumstance that there was a formal concurrence between the offence already judged and the offence under investigation in the second trial. Even with these decisions, the Grand Chamber of the **Italian** Supreme Court (ISC) has showed their doubts on the legitimacy of the “double track” system and has remitted the question to the Court of Justice of the European Union, asking if the *ne bis in idem* principle may operate regardless of the speed of the two proceedings.<sup>153</sup>

Moreover, the **Polish** Ministry of Finance conducted a major reform of the tax administration on 1 March 2017, prohibiting the carrying out of an audit for a second time (*ne bis in idem*). However, such rule provides for major exceptions and does not provide remedies for the taxpayer in the event of a breach of the new provision, which may challenge the effective application of said rule.<sup>154</sup>

Accordingly, **Chinese** law explicitly states that the frequency of audits must be strictly controlled. Tax authorities have no right to carry out repeated audits on the same taxpayer on the same matter during the same audit period.<sup>155</sup>

In **Mexico**, the Federal Constitutional Court decided that the tax audits conducted at the taxpayers’ domicile and at the tax administration office can only be performed in the same taxable year in which new facts come into play.<sup>156</sup>

#### 4.4.1.2. Principle of proportionality

Under the scope of the principle of proportionality and the limits on the administrative actions, in a recent decision of **Canada**’s Federal Court of Appeal (*BP Canada Energy Company v. Minister of National Revenue*, 2017 FCA 61), it reversed a lower court decision that granted general powers to the **Canada** Revenue Agency to have unrestricted access to the tax accrual working paper of the taxpayer.<sup>157</sup> In *Minister of National Revenue v. Cameco Corporation*, 2017 FC 763, the Federal Court denied the **Canada** Revenue Agency’s application for a compliance order in respect of the latter’s attempt to compel the taxpayer to make 25 people available for oral examinations. The case is under appeal at the Federal Court of Appeal.

<sup>153</sup> See Italy (National Report). More information is available at <http://curia.europa.eu/juris/document/document.jsf?docid=187040&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=418938> (last access 24 April 2018).

<sup>154</sup> See Poland (National Report).

<sup>155</sup> See China (National Report).

<sup>156</sup> See Mexico (National Report). Book 42, Volume III, *Semanario Judicial de la Federación*, (May 2017) I.16o.A.22 A.

<sup>157</sup> See Canada (National Report). More information is available at [http://www.ev.com/Publication/vwLUAssets/Canadian\\_Federal\\_Court\\_of\\_Appeal\\_denies\\_Canada\\_Revenue\\_Agency\\_request\\_for\\_tax\\_working\\_papers/\\$FILE/2017G\\_01559-171Gbl\\_CA%20Federal%20Court%20of%20Appeal%20denies%20Canada%20RA%20request%20for%20tax%20working%20papers.pdf](http://www.ev.com/Publication/vwLUAssets/Canadian_Federal_Court_of_Appeal_denies_Canada_Revenue_Agency_request_for_tax_working_papers/$FILE/2017G_01559-171Gbl_CA%20Federal%20Court%20of%20Appeal%20denies%20Canada%20RA%20request%20for%20tax%20working%20papers.pdf) (last access 24 April 2018).



Moreover, in 2016, the **Turkish** government introduced amendments to the tax law, providing for several limits on the powers of the tax administration, namely that (i) tax audits can only be conducted within the tax responsible and tax periods specified in the assignment letter of the tax auditor; (ii) the tax auditor is not entitled to demand any document or books that are not related to the specified audit subject and tax period; (iii) in cases in which the auditor assesses different topics to be investigated, he is not authorized to change or expand the initial assessment, but to inform the Ministry of Finance of the situation; (iv) during the tax audits, the auditor may demand the submission of books and documents by written letter; and (v) the auditor is obliged to set a limit of no less than 15 days after request for the submission of the referred documents.<sup>158</sup>

**Serbian** law has recently ruled the principle of proportionality for the first time, in line with the practice of the European Court of Human Rights. Additionally, the law establishes that the audits are based on risk assessment and are proportionate to the estimated risk.<sup>159</sup> In addition, **Serbian** law prescribes the obligation of the administrative authorities to obtain, on their own accord, all of the information/documents relevant for the case in question that is in the possession of other state authorities. In this respect, the law also prescribes the obligation of the administrative authorities not to request from the taxpayer information or documents unless such information or documents are not already on any of the official databases.<sup>160</sup> Misdemeanour liability is prescribed for the failure of the administrative official to act accordingly. This is expected to lower previously highly burdensome requests of the tax authorities directed at the taxpayer's obtainment of the information in the possession of other administrative and judicial authorities.<sup>161</sup>

The Tax Transparency Report proposed by the **Spanish** tax administration, regarding the behaviour of the companies in the light of BEPS, must be viewed under the scope of the proportionality principle. According to such proposal, the taxpayer shall file to the tax administration all transactions that may lead to double deductions of the expenditure, double access to tax benefits, double use of losses, the use of hybrid entities or instruments and double non-taxation situations, including an explanation on the justification and the degree of compliance with the principles in the BEPS Actions.

Compliance with the principle may also be at risk in the **Venezuelan** Tax Code, which increased all administrative and criminal sanctions associated with tax audits and all aspects of taxation whatsoever.<sup>162</sup>

Related to this point, it is also worth noticing that the **Indian** Finance Act 2017 introduced provisions that provide that there is no need to disclose reasons for a search to any authority or tribunal. Aside from this, survey operations can now be carried out at the premises of a charity organization.<sup>163</sup>

<sup>158</sup> See Turkey (National Report).

<sup>159</sup> RS: Law on General Administrative Procedure, art. 6, available at <http://www.parlament.gov.rs/upload/archive/files/lat/pdf/zakoni/2016/266-16-lat.pdf> (last access 24 April 2018); and RS: Law on Inspectional Supervision, art. 9(1), available at from [https://www.paragraf.rs/propisi/zakon\\_o\\_inspekcijskom\\_nadzoru.html](https://www.paragraf.rs/propisi/zakon_o_inspekcijskom_nadzoru.html) (last access 24 April 2018). See also Serbia (National Report).

<sup>160</sup> Arts. 9(3), 9(4) and 103 Law on General Administrative Procedure.

<sup>161</sup> See Serbia (National Report). More information is available at <http://www.parlament.gov.rs/upload/archive/files/lat/pdf/zakoni/2016/266-16-lat.pdf> (see art. 207) (last access 24 April 2018).

<sup>162</sup> See Venezuela (National Report). More information is available at <http://fidetel.prueba.mppeuct.gob.ve/publicos/fidetel-20141118-gacetaoficialextraordinaria-6152.pdf> (last access 24 April 2018).

<sup>163</sup> See India (National Report).

#### 4.4.1.3. *Audi alteram partem*

##### *Recent Relevant European Case Law*

##### **Court of Justice of the European Union**

- ***WebMindLicences - C-419/14 (17 December 2015)***: *supra*, at section 4.3.4.
- ***See also Berlioz - C-682/15 (16-05-2017)***, *supra*, at section 4.1.3.

Regarding the *audi alteram partem* principle, recently, the **Italian** ISC issued a decision that ratified the so-called “postponed exercise of defence”, which implies that the defence is considered adequately exercisable once the notice of the assessment has been issued and notified. Therefore, the right to defence is not recognized prior to such decision. However, the Tax Court of Tuscany considered the position of the ISC unacceptable and remitted the matter for review to the ICC. Nevertheless, even though the ICC precedents allow for the expectation of a favourable decision to protect the *audire alteram partem* principle, on 13 July 2017, the ICC declared the action inadmissible, leaving the matter still open to discussion.<sup>164</sup>

However, on the other side of the coin, in 2015, the **Turkish** Ministry of Finance introduced some amendments to the Regulation on the Tax Audit Procedure (RTAP), providing that taxpayers are entitled to include any kind of precedent advance rulings that might be relevant to the case in the tax audit’s minutes, which are drawn up by the tax auditor during the audit and include all kinds of facts, events and accounts positions related to taxation. The tax auditor must analyse the relevance of the precedents within his final audit report. Moreover, the tax auditor must inform the taxpayer of the future transactions that might be carried out upon consideration of the audit’s minutes. This implies that the taxpayer is allowed to receive information on the audit before the issuance of the final report.<sup>165</sup>

In addition, the right to defence was considered in the decision of 4 April 2017, issued by the **Spanish** Central Economic Administrative Court (*Tribunal Económico Administrativo Central*), emphasizing the impossibility of granting access to the confidential data on the possession of the tax administration to the taxpayer. However, the decision provided that the tax administration should justify the means selected for assessing the tax base, as well as the procedures conducted for the calculation of the tax, so that the taxpayer can be aware of the suitability of the procedures and file the corresponding reviews or appeals.<sup>166</sup>

The **Mexican** legal framework provides the possibility for the tax administration to conduct tax assessments with the information already available. If a balance of taxes is found, the authorities issue a pre-decision with a tax credit. If the taxpayer does not present evidence against this pre-decision, it can be executed. Recently, the Supreme Court of Justice ruled that such regulation is against the right to a hearing, and therefore the pre-decision cannot be

<sup>164</sup> See Italy (National Report).

<sup>165</sup> See Turkey (National Report).

<sup>166</sup> See Spain (National Report).

executed directly, but the taxpayer must have the chance to challenge the reasons and facts given by the authority. As a consequence, the legislator modified the rule to meet the requirements of the Supreme Court of Justice.<sup>167</sup>

#### 4.4.1.4. *Nemo tenetur se detegere*

### *Recent Relevant European Case Law*

#### *Nemo tenetur se detegere*

#### European Court of Human Rights

- ***Van Weerelt v. the Netherlands* (3rd Section, Application No. 784/14, 16 June 2015):** This case concerned the use of information shared under the procedure for spontaneous exchange of tax information (article 4 of Directive 77/799/EEC). The Dutch tax authorities requested the German tax authorities' permission to use these particulars in criminal proceedings to be held in public, which was granted. The applicant complained, referring to article 6 of the ECHR, that he had been forced, in civil summary injunction proceedings, to lend his active cooperation to the collection of evidence for use against him in tax proceedings in which substantial fines had already been imposed on him. The Court found the case inadmissible, since during the proceedings before the domestic courts, the Dutch Supreme Court had specifically restricted the use of evidences, the existence of which was dependent on the will of the applicant, only for the levying of taxes and not for the imposition of criminal charges. Therefore, the taxpayer was adequately protected against self-incrimination.

#### Court of Justice of the European Union

- See *Berlioz - C-682/15 (16-05-2017)*, *supra*, at section 4.1.3.

#### *Nullum crimen, nulla poena sine lege*

#### European Court of Human Rights

- ***Société Oxygène Plus v. France* (5th Section, Application No. 76959/11, 17 May 2016):** The applicant benefited from a favourable tax regime. In 2002, the tax authorities found that the applicant had not complied with one of the legal conditions of the scheme, and considered the anomalies serious enough to justify the lapse of the preferential regime. Tax plus interest was imposed. In the meantime, a new law replaced the measure of the lapse of the preferential regime in the case of irregularity by a system of fiscal fines. Subsequently, the legal conditions of the scheme were even removed. The applicant invoked the principle of the application of the softer criminal law, but the Court of Cassation dismissed his appeal

<sup>167</sup> See Mexico (National Report); and Book 35, Volume I, *Semanario Judicial de la Federación*, (October 2016), 2A./J. 157/2016 available at <https://www.scjn.gob.mx/sites/default/files/gaceta/documentos/tomos/2016-12/libro35t1.pdf> (last access 24 April 2018).

on the ground that the new law could not call into question obligations that were duly borne on the date of the event giving rise to the tax. The Court held that the case was inadmissible, as the lapse of a preferential tax regime did not constitute, in this case, a penalty within the meaning of article 7 of the ECHR.

### Court of Justice of the European Union

- ***M.A.S. and M.B. - C-42/17 (Grand Chamber, 5 December 2017)***: The Court was asked to interpret article 325(1) and (2) of the Treaty on the Functioning of the European Union (TFEU) as interpreted by the judgment of 8 September 2015 in *Taricco and Others (C-105/14)*. The Court held that article 325(1) and (2) of the TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to VAT, to disapply national provisions on limitation, forming part of national substantive law, that prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union or that lay down shorter limitation periods for cases of serious fraud affecting the interests of those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time at which the infringement was committed.
- ***Taricco and Others - C-105/14 (Grand Chamber, 8 September 2015)***: The Court held that the national court must give full effect to article 325(1) and (2) of the TFEU if need be by disapplying the provisions of national law, the effect of which would be to prevent the Member State concerned from fulfilling its obligations under article 325(1) and (2) of the TFEU, by providing for a shorter limitation period for crimes involving VAT fraud than for similar, domestic cases. The Court held that the sole effect of the disapplication of the national provisions at issue would be to not shorten the general limitation period in the context of pending criminal proceedings, to allow the effective prosecution of the alleged crimes and to ensure, if necessary, that penalties intended to protect the financial interests of the European Union and those intended to protect the financial interests of the Italian Republic are treated in the same way. Such a disapplication of national law would not infringe the rights of the accused, as guaranteed by article 49 of the Charter of Fundamental Rights of the European Union. *See*, however, the additional guidance that the Court gave in its subsequent *M.A.S. and M.B.* decision (*C-42/17, Grand Chamber, 5 December 2017*).

The right to not self-incriminate is one of the fundamental rights that has been acknowledged as such for the longest amount of time. This principle, according to which no one is bound to expose himself to an accusation, can be easily linked to human nature.<sup>168</sup> However, recently, the **Italian** Supreme Court issued a decision indicating that the *nemo tenetur se*

<sup>168</sup> In this regard, see the previous ECtHR decisions in the cases of CH: ECtHR, 6 Dec. 2007, Application No. 69735/01, *Chair and J. B. v. Switzerland*, available at <http://hudoc.echr.coe.int/eng?i=001-83809> (last access 24 April 2018); and BE: ECtHR, 5 Apr. 2012, Application No. 11663/04, *Chambaz v. Suisse*, available at <http://hudoc.echr.coe.int/eng?i=001-110240> (last access 24 April 2018).

*detegere* principle, which does not have constitutional recognition in **Italy**, could not take precedence over the obligation to contribute to public expenses.<sup>169</sup>

In addition, if not expressly referring to the principle of non-self-incrimination, it is worth mentioning that the **Mexican** Supreme Court of Justice ruled that the principle of presumption of innocence does not apply to tax audits.<sup>170</sup>

#### 4.4.2. The structure and content of tax audits

Any tax audit should be conducted within a specific set of rules. It is necessary that the tax administration officers are provided with guidelines and manual of practices that can ensure both the protection of the taxpayers' rights and an increase in the effectiveness of the tax audit procedures, reducing the reasons for the annulment of the audit reports and ensuring the collection of the taxes due.

Therefore, best practices advise that tax audits follow a pattern that is set out in published guidelines. In this regard, on 29 November 2016, the Auditor General of **Canada** released "Report 2, Income Tax Objections – **Canada** Revenue Agency", in which it was recommended that the **Canada** Revenue Agency review the reasons why objections are decided in favour of taxpayers so that it can identify opportunities to resolve issues before objections are filed. Moreover, it was advised that the **Canadian** tax administration ensure that decisions on objections and appeals are shared within the Agency in such a way that those performing assessments can use that information to improve future assessments.<sup>171</sup>

In addition, in 2016 the **Danish** Customs and Tax Administration (SKAT) published a new set of guidelines on the delimitation of cases during tax audits.<sup>172</sup> The guidelines deal with mainly (i) the constitutional limits of the SKAT in deciding to pursue or not to pursue specific items in the tax return; and (ii) the limits to both temporal and subject-based exclusion of items from an audit.

However, on 1 March 2017, the **Polish** Ministry of Finance introduced a major reform of tax administration, forming the so-called National Tax Administration (*Krajowa Administracja Skarbowa*). The reform included a merger of tax offices, fiscal audit offices and customs offices. In this case, the reform attributed an important number of competences to the tax auditors that could be considered invasive. Furthermore, the demarcation line between "normal" and "more intensive"<sup>173</sup> audits is not clearly drawn, which may give excessive discretionary powers to the tax administration, risking the protection of the proportionality principle.<sup>174</sup>

<sup>169</sup> See Italy (National Report).

<sup>170</sup> See Mexico (National Report). See also Book 28, Volume II, *Semanario Judicial de la Federación*, (March 2016). *Tesis: 2a. VI/2016 (10a.)*.

<sup>171</sup> See Canada (National Report).

<sup>172</sup> DK: SKAT, 7 Oct. 2016, Case 15-2069723, available at <http://www.skat.dk/skat.aspx?old=2234409> (last access 24 April 2018).

<sup>173</sup> This is used to tackle tax fraud, particularly in the area of VAT; see <http://www.mf.gov.pl/krajowa-administracja-skarbowa/kas/struktura-organizacyjna> (last access 24 April 2018).

<sup>174</sup> See Poland (National Report).

Also, rather than informing the taxpayer, a new practice by the **Colombian** DIAN is to notify them of the special summons via email without even visiting the taxpayer to obtain evidence.<sup>175</sup>

Additionally, it is advisable that a manual of good practice in tax audits is established at the global level, a practice that is somehow ruled in the 2016 Report of the Standing Committee on Finance (the **Canada** Revenue Agency, Tax Avoidance and Tax Evasion), which strengthens the protection for individuals under the Informant Leads Program and the Offshore Tax Informant Program.<sup>176</sup>

In **Spain**, the general guidance of the 2018 Annual Audit Plan for Taxes and Customs was approved through the Decision of 8 January 2018 of the General Directorate of the Tax Administration.<sup>177</sup>

However, unlike during the first decade of the 21st century, when the **Serbian** Tax Administration did publish manuals of good practice in tax audits, no such publications have been prepared or published more recently in the country.<sup>178</sup>

In the case of **Turkey**, on 24 April 2017, the Ministry of Finance issued the internal Circular No. 2017/1 on tax inspections. Such regulations provide that tax audits shall not be permitted to start within the final 6-month period of a statute of limitations. Thus, the assignment of a tax auditor should be made until the end of June of the relevant year for taxes that will be subject to a statute of limitations during the year of inspection.<sup>179</sup> This new regulation avoids the initiation of a tax audit during the last days of the statute of limitations, which may represent a breach of the legal certainty principle. Furthermore, the circular provides a time limit for the submission of the tax inspection report on taxes that will be subject to a statute of limitations during the year of inspection.<sup>180</sup>

The efficiency of the tax procedure is also increased if the tax administration decides to hold an initial meeting with the taxpayers, in which the former explains the purpose, procedures, timeframe and targets of the audit, as well as any evidence in its possession.

In **Serbia**, the taxpayer is informed about the audit before its commencement through a warrant, which is generally (several exceptions are prescribed) delivered to him by the tax inspector. The law specifically lists all of the elements that must be included in the warrant for inspection that is to be delivered to the taxpayer.<sup>181</sup> However, there is no practice of conducting initial meetings with the taxpayer.

<sup>175</sup> See Colombia (National Report).

<sup>176</sup> See Canada (National Report). More information is available at <https://www.ourcommons.ca/Content/Committee/421/FINA/Reports/RP8533424/finarp06/finarp06-e.pdf> (last access 24 April 2018).

<sup>177</sup> See Spain (National Report). Such plan is based on art. 116 of the General Tax Law (LGT), stating that the "Tax Administration will prepare a tax control plan with confidential nature, regardless of the publicity of general criteria used for its preparation"; see <https://www.boe.es/buscar/act.php?id=BOE-A-2003-23186> (last access 24 April 2018).

<sup>178</sup> See Serbia (National Report).

<sup>179</sup> The statute of limitation is of 5 years. More information is available at <http://www.ksavukatlik.com/verqi-inceleme-ve-denetim-ic-genelqesi-sira-no20171/> (last access 24 April 2018).

<sup>180</sup> See Turkey (National Report). More information is available at <http://www.ksavukatlik.com/verqi-inceleme-ve-denetim-ic-genelqesi-sira-no20171/> (last access 24 April 2018).

<sup>181</sup> RS: Law on Inspectional Supervision, art. 16(2), available at [https://www.paragraf.rs/propisi/zakon\\_o\\_inspekcijskom\\_nadzoru.html](https://www.paragraf.rs/propisi/zakon_o_inspekcijskom_nadzoru.html) (last access 24 April 2018).

Also, in **Argentina**, the 2016, the tax reform incorporated a new article, according to which the tax administration must issue an order of intervention in order to begin a tax audit. This order should include the date, the name of the tax officials involved and the taxes and information under investigation.

Finally, it is a best practice that taxpayers will be granted the right to request a tax audit, which does not appear to be offered by most legislations. In this regard, **Serbian** law provides that taxpayers are entitled to request the initiation of a tax audit. However, although such option does exist, the tax administration has not acted upon taxpayers' requests so far, according to the information provided by the internal reporter.<sup>182</sup>

#### 4.4.3. Time limits for tax audits

A milestone for the protection of taxpayers' rights under tax audits is the regulation of their time limits. This prevents the tax administration from continuously extending an ongoing audit, creating excessive burdens for taxpayers and affecting their legal certainty, which may be suddenly notified with either the obligation of rendering additional information or a balance of taxes, penalties and late payment interest fees assessed for any tax period.

In 2015, the **Turkish** Ministry of Finance introduced a 2-month time limit for the information collection procedure initiated due to an information exchange request by a foreign country, pursuant to article 26 of the corresponding tax treaty.<sup>183</sup>

The **Chinese** Working Procedures for Tax Audits provide that the general period of a tax audit is 60 days, the transfer period is 5 working days and the decision period is 15 days, and extensions can be granted by a higher authority. The tax authority strictly controls the duration of the procedures to reduce potential taxpayers' claims. During the reporting period, the number of tax administrative litigation claims filed by taxpayers on the grounds of tax audits overdue was almost zero.<sup>184</sup>

In 2016, a **Portuguese** regulation amendment reduced the term for filing a request for an *ex officio* review of a self-assessment of tax (e.g. Corporate Income Tax or VAT) from 4 to 2 years, which decreases the term for the taxpayer's request.<sup>185</sup>

On the other hand, **Serbian** law does not provide time limits for the conducting of tax audits. There is only a general limitation enshrined in the principle of acting in good faith, according to which frequency and duration of tax audits are limited to what is necessarily required. However, anticipated duration of the specific audit, taking into account the specific facts of the case, will be included in the warrant that is delivered to the taxpayer just before the commencement of the audit, indicating the exact dates of the commencement and finalization of the audit.<sup>186</sup>

<sup>182</sup> Id., at art. 6(3) and (4). See also Serbia (National Report).

<sup>183</sup> See Turkey (National Report).

<sup>184</sup> See China (National Report).

<sup>185</sup> See Portugal (National Report).

<sup>186</sup> Art. 16(2) Law on Inspectional Supervision. See also Serbia (National Report).

This is also the case in **Luxembourg**, where the *Cour Administrative d' Appel* (Administrative Court of Appeal) issued a decision on 17 November 2016, according to which there are no specific time limits on the use of the information obtained in an on-the-spot check for the purposes of taxation of the same taxpayer in respect of other taxation years. Legal provisions allow for the execution of an on-the-spot check outside the procedure for examining the tax return. This way, such control may still be carried out even though the investigation procedure relating to the tax year concerned has already been closed and as long as the prescribed tax claim is not acquired.<sup>187</sup>

In this regard, referring to the extension of administrative procedures (even if not directly related to tax audits) following the guidelines drawn by the parliament with Law no. 23 of 11 March 2014, in 2015, the **Italian** government approved several legislative acts, which, as clarified by the **Italian** Tax Administration in Circular Letter No. 9/E of 1 April 2016, has improved the preliminary rulings, reducing the tax administration's time of reaction, by bringing the preliminary ordinary ruling down from 120 to 90 days. Moreover, the circular also refers to the lightening of the taxpayers' duties, as well as the extension of the so-called "silent-consent" provision to all types of preliminary rulings.<sup>188</sup>

Also, since 2017, the **Finnish** income tax statute of limitations has been reduced from 5 years to 3 years, starting from the subsequent year after the assessed fiscal year. This period can be extended to up to four to six years if certain criteria<sup>189</sup> are met.

Additionally, the **Colombian** statute of limitations for the impossibility of amending a taxpayer return was increased from 2 to 3 years.<sup>190</sup>

Additionally, **Poland** tends to extend VAT refund deadlines. Even though the regulations provide 60 days for deciding the refund request, such term may be extended in the event that the authorities need to verify the correctness of the tax settlement. The fight against tax fraud implies that such extensions are frequent, usually because taxpayers do not promptly responded to this request. Taxpayers are not easily allowed to challenge the legitimacy of the verification process. In addition, rules do not provide for a maximum period of verification, which leads to extensions of several months or years, and potentially indefinite extensions.<sup>191</sup> Therefore, the law does not provide for legal guarantees for a timely response to the taxpayer on his request.

In the case of a request for a refund of overpaid taxes, the **Mexican** Supreme Court of Justice ruled that, if the tax authority does not request information from the taxpayer within 20 days after the request is presented, the procedure should end immediately with the information available.<sup>192</sup>

<sup>187</sup> See Luxembourg (National Report).

<sup>188</sup> See Italy (National Report). More information is available at <http://def.finanze.it/DocTribFrontend/getContent.do?id=%7BE3792435-25F6-4144-8CC6-A5DC67242CE1%7D> (last access 24 April 2018).

<sup>189</sup> The 3-year limit may be continued for 1 year if, for example, the taxation proceedings are considered to have been impeded by the taxpayer or if the matter requires the tax administration's cooperation with other officials. An extended time limit of 6 years may be applied in matters concerning, for example, transfer pricing or financing arrangements between related companies. More information is available at <http://www.ev.com/gl/en/services/tax/international-tax/alert-finland-reduces-statute-of-limitations-under-withholding-tax-procedure-from-five-to-three-years> (last access 24 April 2018). See also Finland (National Report).

<sup>190</sup> See Colombia (National Report).

<sup>191</sup> See Poland (National Report).

<sup>192</sup> See Mexico (National Report). Book 46, Volume I, *Semanario Judicial de la Federación*. (September 2017) *Tesis 2a/J. 119/2017*. available at <https://www.scjn.gob.mx/sites/default/files/gaceta/documentos/2017-10/libro46.pdf> (last access 24 April 2018).



#### 4.4.4. Tax audit report

Any administrative procedure should conclude with the issuance and notification of an audit report, which allows the taxpayer to acknowledge the results of the investigation, as well as to file defence against the report if it adversely affects his rights.

The **Turkish** legislation<sup>193</sup> provides that auditors are required, at the end of the process, to prepare a tax audit report, which is subject to the supervision of the tax audit report evaluation by commissions. The amendments to the Regulation on the Organization and Procedure of Tax Audit Report Evaluation Commission provide that taxpayers may be heard by such commission before the issuance of the final report, as long as they indicate their intention, which should be included in the audit minutes. In addition, taxpayers should be provided with the draft of the report before the hearing in order to be able to provide their observations.<sup>194</sup> Even though the term for submitting objections is short (only 2 days), the current regulations provide for an exchange of information between the taxpayer and the tax administration before the issuance of the audit minutes.

Additionally, in **China**, the audit department will make a final report for consideration of the final conclusion after the tax audit is completed. In making the final report, the audit department will listen to the views of the administrative counterparts. The final conclusion of the tax audit will contain all aspects of the audit and will form a final decision to serve the administrative counterpart. After the tax audit, the tax authorities should make a tax audit report to provide information on the taxpayer's situation, where even the absence of illegal facts should be described.<sup>195</sup>

In this regard, in **South African** judiciary requires the tax authority to issue a report in every case of an audit. However, when conducting verifications, there appears to be no necessity of such report, since the tax authority revises an assessment without issuing a letter of findings to the taxpayer.<sup>196</sup>

The **Italian** Supreme Court recently specified that a final audit report (*processo verbale di constatazione*) should also be issued in the case of a "short tax inspection" made on the taxpayer's premises that is aimed at collecting specific elements of proof.<sup>197</sup>

However, although the **Brazilian** authorities usually issue a document asserting the completion of an audit, there is no participation of the taxpayer.<sup>198</sup>

#### 4.5. More intensive audits

<sup>193</sup> TR: Tax Procedure Law, art. 140, available at <http://www.gib.gov.tr/taxonomy/term/86146> (last access 24 April 2018).

<sup>194</sup> Id.

<sup>195</sup> See China (National Report).

<sup>196</sup> See South Africa (National Report).

<sup>197</sup> See Italy (National Report). See also IT: ISC, Tax Chamber, 10 May 2017, No. 11471. More information is available at <https://www.studiocerbone.com/corte-cassazione-ordinanza-10-maggio-2017-n-11471-accertamento-tavolino-ossia-mancanza-accesso-ispettivo-pvc> (last access 24 April 2018).

<sup>198</sup> See Brazil (National Report).

In some cases, the tax administration should conduct more intensive audits to ensure an effective reaction to non-compliance. In such cases, tax administrations should be provided with higher and stronger powers to conduct the audit, preventing any action of the taxpayer that may result in the deterioration, destruction or alteration of the relevant information. Additionally, the tax administration should rely on the possibility of searching and seizing information by different means, which may not be voluntarily provided by the taxpayer. However, such powers should not be exercised in violation of the taxpayers' rights.

In this regard, **Colombia** has just implemented a criminal offence for tax avoidance and evasion (2017 reform, approved in Law 1819/16), but the only charge made so far was accompanied by several other charges in connection with the Panama Papers scandal. It is too early to tell if administrative practice will respect this minimum standard.<sup>199</sup>

#### 4.5.1. The general framework

Such intensive audits should be limited to the extent strictly necessary to prevent the taxpayer's non-compliance. However, as indicated in Section 4.4.1.1., on 1 March 2017, the **Polish** Ministry of Finance introduced a major reform of the tax administration, forming the so-called National Tax Administration, where the demarcation line between "normal" and "more intensive"<sup>200</sup> audits is not clearly drawn, which may grant excessive discretionary powers to the tax administration, potentially challenging the proportionality principle.

#### 4.5.2. The implications of the *nemo tenetur* principle in connection with subsequent criminal proceedings

**Denmark** seems to have advanced in the direction of the referenced best practice, reducing administrative intervention to the minimum extent possible. As part of the current government's *Retssikkerhedspakke I (First Package on Legal Protection)*, the tax administration is no longer authorized to conduct inspections on outdoor professional construction work without a court order.<sup>201</sup> In addition, the SKAT decided not to continue the practice whereby telecom operators could be asked by the SKAT to provide information about their customers' use of their mobile phones. Now, this practice will only be applied in cases of criminal investigation.<sup>202</sup>

The **Spanish** courts recently published two decisions regarding the need to obtain tax court authorizations before entering a taxpayer's home, as well as for inspections to be conducted at headquarters. The first decision was published on 31 March 2016, and it was issued by the *Juzgado Contencioso-administrativo* (Lower Court) of Cádiz, providing that, unless the agreement of the person is obtained, a prior judicial authorization is required for entrance into the home or headquarters. The second decision was issued by the Supreme Court on 22 February 2017, indicating that the inspection can only be conducted within the limits of the authorization and can only be related to the gathering of the information relevant for the corresponding procedure.<sup>203</sup>

<sup>199</sup> See Colombia (National Report).

<sup>200</sup> This is used to tackle tax fraud, particularly in the area of VAT.

<sup>201</sup> DK: Act No. 1885 of 29 December 2015, available at <https://www.retsinformation.dk/pdfPrint.aspx?id=176790> (last access 24 April 2018).

<sup>202</sup> See Denmark (National Report).

<sup>203</sup> See Spain (National Report).

### 4.5.3. Court authorization or notification

The **Italian** Supreme Court has ruled that the authorization from the Public Prosecutor aimed at allowing searches by tax authorities in the taxpayer's private home shall not legitimize searches in the domicile of third parties (i.e. parties that are not the "direct target" of the tax audit). In the absence of specific authorization for entering a third party's domicile, all the proof collected shall not be usable for justifying a tax assessment.<sup>204</sup>

In addition, according to article 16 of the **Mexican** Constitution, intervention of communications (by any means) requires judicial authorization. Currently, eight federal judges have the competence to receive these kinds of requests (in May 2017, the Judicial Branch created a centre specialized in the control of techniques of investigation, detention at home and intervention on communications).<sup>205</sup>

Moreover, as of October 2015, the **Serbian** Law on Payment Services prescribes an obligation for the National Bank of **Serbia** (NBS) to maintain a Single Register of Accounts (SRA) of legal and natural persons. Information contained in the SRA relating to legal entities and entrepreneurs is public and may be accessed on the website of the NBS. However, the transparency has been established only with regard to the information relating to the holders of bank accounts and not with regard to the balance and transactions relating to those accounts. Information relating to natural persons who are not entrepreneurs is not made publicly available, but the tax administration has the right to access such information without judicial authorization.<sup>206</sup>

In 2016, article 25(3) of the **Greek** Tax Procedure Code was amended. The new rule indicates that tax authorities can enter the private home of a taxpayer not only upon prior authorization of the public prosecutor (a condition already present in the provision before its amendment), but also in the presence of a member of the judiciary.<sup>207</sup>

However, also in 2016, the **Brazilian** Federal Supreme Court ruled that the tax authorities need no previous judicial authorization to access taxpayers' bank accounts.<sup>208</sup> According to the judiciary, in the scope of official investigations, tax information can be obtained by the judicial police, by the Public Advocacy and by the Central Bank, regardless of judicial authorization. The decision of the Brazilian Supreme Court, in summary, understands that tax activity is a fundamental duty of the state and that the secrecy of the information is not broken in such cases, since the investigative bodies also have the duty of secrecy. Thus, according to the **Brazilian** report, in reality, what happens is merely information transfer, which can occur normally if due process is observed.<sup>209</sup>

<sup>204</sup> See Italy (National Report). See also IT: ISC, Fifth Chamber, 22 Apr. 2015, No. 8206. More information is available at <https://www.unipa.it/riviste/osservatorioTributario/content/documenti/documenti-news-osservatorio/2016-04-14-Verifiche-fiscali-e-tutela-del-contribuente-Villani-Attanasi.pdf> (last access 24 April 2018).

<sup>205</sup> See Mexico (National Report).

<sup>206</sup> RS: Law on Payment Services, art. 74(4)(5), available at [https://www.nbs.rs/internet/latinica/20/zakoni/pp\\_platnim\\_uslugama\\_novo.pdf](https://www.nbs.rs/internet/latinica/20/zakoni/pp_platnim_uslugama_novo.pdf) (last access 24 April 2018). See also Serbia (National Report).

<sup>207</sup> See Greece (National Report). See also GR: Law 4410/2016, Official Gazette Folio A, 141 of 3 August 2016, art. 40(11a).

<sup>208</sup> BR: Sao Paulo Supreme Federal Tribunal. 24 Feb. 2016. Recurso Extraordinário 601.314. 24 Feb. 2016. See also Brazil (National Report).

<sup>209</sup> See Brazil (National Report).

Also, the implementation of the Common Reporting Standard has made bank information available in **Colombia** without any need for a judicial order.<sup>210</sup>

#### 4.6. Reviews and appeals

Taxpayers should be granted the right to request a review or to appeal an assessment notice, seeking the correction or the annulment of the assessment, the penalties or the interest calculated, due to either violations within the administrative procedure, false perception of the facts or any other reason that could produce the partial or total repeal of the tax audit report.

Such review and appeal shall be granted under conditions and guarantees that ensure the real exercise of the taxpayer's right to be heard. No limitations, whether legal, factual or economic, should prevent the taxpayer from submitting and continuing the review or appeal procedure until a final decision is issued.

##### 4.6.1. The remedies and their functions

#### *Recent Relevant European Case Law*

##### European Court of Human Rights

- See *Lindstrand Partners Advokatbyrå AB v. Sweden* (3rd Section, Application No. 18700/09, 20-12-2016), *supra* section 4.3.7.

##### Court of Justice of the European Union

- *Ordre des barreaux francophones et germanophones e.a. - C-543/14 (28 July 2016)*: The *Ordre des barreaux* complained that (i) by subjecting services supplied by lawyers to VAT without taking into account the right to the assistance of a lawyer and the principle of equality of arms and (2) subjecting the services supplied by lawyers to clients who qualify for legal aid under a national legal aid scheme to VAT, adversely affect the right to an effective remedy and the principle of equality of arms. The Court held that that the protection conferred by the right to an effective remedy does not extend to the imposition of VAT on the services supplied by lawyers, and also that the guarantee conferred by the principle of equality of arms does not extend to the charging of VAT at the rate of 21% in the case at issue on services supplied by lawyers, irrespective of whether the clients qualified for legal aid or not.

The free exercise of the right of defence implies that the limitations on filing appeals against tax assessments should be reduced to a bare minimum. Facilities should be granted for the filing of the observation, including enabling e-filing channels, such as in the case of **South Africa**. In this regard, the SARS announced recently that taxpayers can now request reasons for an assessment, as well as request the suspension of payment of tax in disputes electronically via the SARS e-filing.

<sup>210</sup> See Colombia (National Report).

The **Brazilian** Federal Revenue Service has also implemented e-filing of tax appeals.<sup>211</sup>

Also, **Chinese** law allows e-filing of review appeals, as long as certain technical conditions are met. On 1 January 2017, the Beijing Municipal People's Government Office of Legislative Affairs opened an online administrative review service platform on its official website.<sup>212</sup>

Moreover, it should not be considered mandatory to exhaust administrative reviews before filing an appeal against the tax notice. However, several countries, such as **Denmark**, have reported that such exhaustion is a requirement for the admission of the appeal.

In the case of **Spain**, the Supreme Court has admitted a cassation appeal regarding the prior exhaustion of administrative reviews as a condition to submit a judicial appeal in some cases ("Auto" of 6 July 2017).<sup>213</sup>

In addition, **Portugal** has introduced new limits for the exercise of appeals, as in 2015, the quantitative threshold of the value of a case to allow an appeal from the decision of the First Instance Court was increased to EUR 5,000.<sup>214</sup>

Furthermore, in his report on the Management of Tax Disputes (January 2015), the Inspector General of Taxation of **Australia** recommended that an Appeals Group be established within the ATO. The Appeals Group would be a centralized, dedicated and separate internal group within the ATO for managing tax disputes independently for all taxpayers, including conducting pre-assessment reviews, objections and litigation processes and employing alternative dispute resolution (ADR) as necessary.<sup>215</sup>

With regard to the right to conduct requests, on 23 September 2015, the **Portuguese** Supreme Administrative Court clarified that the deadline for a non-resident to file an administrative objection against tax withheld in excess is counted from the same date as that legal term granted to the entity responsible for withholding such tax (i.e. the last day of the calendar year) and not from the date on which the tax was effectively withheld.<sup>216</sup>

#### 4.6.2. Length of the procedure

### *Recent Relevant European Case Law*

#### **European Court of Human Rights**

- *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (Grand Chamber,

<sup>211</sup> See Brazil (National Report).

<sup>212</sup> See China (National Report).

<sup>213</sup> See Spain (National Report).

<sup>214</sup> See Portugal (National Report). More information is available at <https://gettingthedealthrough.com/area/98/jurisdiction/20/appeals-2017-portugal/> (last access 24 April 2018).

<sup>215</sup> See Australia (National Report); and the full report, available at [https://cdn.tspace.gov.au/uploads/sites/16/2015/04/management\\_tax\\_disputes.pdf](https://cdn.tspace.gov.au/uploads/sites/16/2015/04/management_tax_disputes.pdf) (last access 24 April 2018).

<sup>216</sup> See Portugal (National Report).

**Application No. 931/13, 27 June 2017):** Excessive length of judicial proceedings (over 6 years and 6 months) before domestic courts; violation of article 6.

The right of defence should not only comprise the ability to file the appeal, produce evidence and be heard within the procedure, but also the ability to obtain a timely response to the request.

In this regard, the 2016 Report of the Auditor General of **Canada**<sup>217</sup> examined delays in the **Canada** Revenue Agency's management of objections filed by taxpayers to challenge income tax assessments. The recommendations included specific suggestions for setting timeframes for the decision of the reviews and appeals, as tabled on 21 June 2017.<sup>218</sup>

Accordingly, the **Danish** National Audit Office and the State Auditors in Report 6/2016 strongly criticized the **Danish** Tax Appeals Agency's average time spent handling appeals, stating that an average of 27 months was extremely unsatisfactory.<sup>219</sup>

In **Brazil**, between 2014 and 2015, the Federal Administrative Court of Tax Proceedings was closed due to criminal investigations and no tax appeal was examined.<sup>220</sup>

In the same regard, there are no time limits on the judicial appeal process in **Serbia**, and procedures before the Administrative Court commonly take longer than 2 years to resolve.<sup>221</sup>

The **Chinese** Administrative Litigation Law, which came into effect on 1 May 2015, extended the first stage review timeframe from 3 to 6 months and the second stage timeframe from 2 to 3 months. The amendment of the law also added the regulation of a simplified procedure, with a shorter period of 45 days, but both parties must agree on its application. Based on such rules, usually, taxpayers are able to receive a final decision on any appeal within 2 years. However, **Chinese** law allows that, in certain situations, the term for deciding appeals can be extended, in which case the tax administration will take more than 2 years to reach a final decision.

On the other hand, the **Portuguese** deadline for filing a request for an *ex officio* review of a tax self-assessment was reduced from 4 to 2 years in 2016, so now, the **Portuguese** tax authority will have 4 years to issue additional tax assessments, whereas taxpayers will only have 2 years to request a review of their own self-assessment if they detect an overpayment.

#### 4.6.3. *Audi alteram partem* and the right to a fair trial

### *Recent Relevant European Case Law*

<sup>217</sup> Canada Revenue Agency, *Report 2: Income Tax Objections*, available at [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201611\\_02\\_e\\_41831.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_02_e_41831.html) (last access 24 April 2018).

<sup>218</sup> See Canada (National Report). More information is available at [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201611\\_02\\_e\\_41831.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_02_e_41831.html) (last access 24 April 2018).

<sup>219</sup> See Denmark (National Report).

<sup>220</sup> See Brazil (National Report).

<sup>221</sup> See Serbia (National Report).

### European Court of Human Rights

- **Chap v. Armenia (1st Section, Application No. 15485/09, 04 May 2017):** The company was charged with tax evasion, which was based, among others, on witness evidence collected by the tax administration. The company filed an application to the domestic court, which was competent to examine the merits of the case and summon the witnesses, but the court refused to allow this, finding that their evidence was not relevant, despite the fact that the very same evidence was later relied on in its judgment. The domestic court also rejected the applicant company's request to examine the tax records of companies and individual businessmen who had claimed not to have received properly-documented services from the applicant company, which could have allowed the assessment of the credibility of their statements. The Court held that there had been a violation of article 6 of the ECHR, due to not allowing the taxpayer to examine the witnesses on whose evidence the tax assessment was based.

### Court of Justice of the European Union

- **Toma - C-205/15 (30 June 2016):** The taxpayer complained that the right of access to court proceedings and, in particular, the principle of equality of arms is breached when a domestic law provision governing the proceedings before national courts for the enforcement of a judicial decision relating to the repayment of a tax levied in breach of EU law grants an exemption from the payment of court stamping fees and the lodging of a security only to the requests made by the public authorities, whereas applications that are submitted by natural persons are not, in principle, exempt. The Court held that, in the present case, the exemption provided for in the domestic legislation in favour of persons governed by public law could not cause the position of a person such as Mr. Toma to be weaker than that of his opponent, and therefore concluded that there was no breach of article 47 of the ECHR.
- **See also *Ordre des barreaux francophones et germanophones e.a.* - C-543/14 (28 July 2016), supra,** at section 4.6.1.

As it was indicated while considering the taxpayers' guarantees within a tax audit (section 4.4), the *audi alteram partem* principle is of the essence in any procedure and should be protected during the review processes.

In this light, the **Spanish** Supreme Court provided for the freedom of producing evidence in a decision dated 20 April 2017. In such decision, the Court stated that the provision of pieces of evidence in the administrative review and judicial appeals when no evidence was provided in the assessment procedure was possible.<sup>222</sup> Also in **Spain**, it can be highlighted that the cassation system, created by Law 7/2015 and modified by the Judicial Administrative Law (LJCA), has replaced, since 22 July 2016, the amount requirement by the so-called "*interés casacional*" (cassation's appeal interest), which implies the reinforcement of the possibility to access the

<sup>222</sup> See Spain (National Report).

cassation appeal. In this regard, in practice, public audiences have increased, based on article 92(6) of the LJCA.

In **Argentina**, the 2017 tax reform allows the tax court, in cases where the facts are controverted, to call both the taxpayer and the tax administration to audience in order to hear and question both parties regarding the facts and present evidence.

In the case of **Serbia**, with regard to administrative reviews, the law provides that the taxpayer must be allowed to express himself about the facts relevant for deciding on the case in question. The novelty, in comparison to the previous law, relates to the fact that this obligation is prescribed for the administrative authority (including the tax authority) in the course of reaching any type of decision in administrative matters (both rulings and conclusions). Prior to this amendment, this obligation was prescribed only in the case that the administrative authority was in the course of issuing a ruling.<sup>223</sup> With regard to the judicial review, the law presupposes that the Administrative Court has to hold a full hearing (which, prior to the introduction of this regulation in 2009, was not the case). However, the same law allows the Administrative Court not to hold a full hearing if the case at hand does not require a direct hearing of parties, or if the parties agree to it explicitly. Based on these exceptions, the Administrative Court has not applied full hearings in practice thus far.<sup>224</sup>

However, in **Denmark**, Act No. 688 of 8 June 2017 may challenge certain existing procedural rights in the appeals procedure before the **Danish** Tax Appeals Agency and the **Danish** Regional Property Valuation Boards, which take effect in 2019. Even though the right to be heard will continue being protected, the extended right to receive a proposed decision and the opportunity to address such a preliminary assessment of the case is no longer in force.<sup>225</sup>

A similar case can be found in the case of **China**. Administrative reviews are conducted solely by the tax administration, but when applicants request or the review department finds it necessary, the opinions of applicants should be heard. As to administrative litigation, the trial court shall hold a hearing, while the appeal shall be heard only in writing. The new amended Administrative Litigation Law, which came into effect on 1 May 2015, included, as a general rule, that appeal procedures shall include a hearing of the taxpayer's arguments. Only after reading the files, investigating the case and consulting the parties, if no new facts, evidence or reasons are brought, the collegiate bench may decide not to have a hearing.<sup>226</sup>

One **Brazilian** decision of the Federal Court of Appeals (*Tribunal Regional Federal da 4a Região*) ruled that the first-level administrative secret judgments do not violate the due process of law (case number 5049862-61.2014.4.04.7000 dated 9 December 2015). The Bar Association appealed to the Superior Court of Justice and to the Supreme Court. Those high-

<sup>223</sup> Art. 11 Law on General Administrative Procedures.

<sup>224</sup> RS: Law on Administrative Disputes, art. 33(1) and (2), available at [https://www.paragraf.rs/propisi/zakon\\_o\\_upravnim\\_sporovima.html](https://www.paragraf.rs/propisi/zakon_o_upravnim_sporovima.html) (last access 24 April 2018). See also Serbia (National Report).

<sup>225</sup> See Denmark (National Report). More information is available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=191817> (last access 24 April 2018).

<sup>226</sup> See China. More information is available at <http://www.lawinfoChina.com/Display.aspx?lib=law&Cqid=239820> (last access 24 April 2018).



level Courts have not yet examined the case.<sup>227</sup> Also in **Brazil**, legal assistance for the taxpayer is limited to the clarifications that every public servant must provide to the citizen.<sup>228</sup>

In his December 2016 Report on Taxpayer Rights and Remedies, the **Australian** Inspector-General of Taxation considered the ATO's level of compliance with the **Australian** Model Litigant Obligation (MLO), which sets out standards of conduct for all commonwealth agencies when conducting litigations. In relation to the MLO, the Inspector General of Taxation (IGT) has recommended, among other things, that the ATO work with the ATO Complaints Unit to enhance its investigation of allegations of MLO breaches to address perceptions of bias and lack of independence.<sup>229</sup>

On the other hand, article 131(22) of the **Venezuelan** Tax Code allows the tax administration to exercise procedures for prosecuting felonies, on behalf of the state, repealing the constitutional monopoly of such action by the public prosecutor's office,<sup>230</sup> which may affect the *audi alteram partem* and the adversarial principles applicable to both criminal and tax law.<sup>231</sup>

#### 4.6.4. *Solve et repete*

The request of paying the amounts assessed as a requisite for the filing of an administrative review or an appeal could represent an economic limitation on the exercise of the right to defence. Taxpayers with low acquisitive power may be prevented from filing the appeal due to the burden of paying both the debts assessed and the costs of the proceedings. Therefore, suspension of the payment should be possible to allow access to justice by all taxpayers. Moreover, best practice advises that an appeal should not require prior payment of taxes in all cases.

In this regard, since 2015, **Portugal** not request taxpayers' to provide a guarantee or security to suspend tax foreclosure proceedings when the underlying tax liability is being disputed if the tax claimed by the tax authorities is less than EUR 5,000 for companies or EUR 2,500 for individuals. In 2017, such thresholds were increased to EUR 10,000 and EUR 5,000, respectively. In addition, on 8 February 2017, the Supreme Court clarified that collection proceedings must remain suspended until the tax authorities provide a decision on the taxpayers' request to determine the amount of the guarantee or security to be provided. The Supreme Court provided that, unless the tax administration replies and the taxpayer fails to file the guarantee by the deadline granted, the taxes cannot be collected.<sup>232</sup>

Accordingly, since 2017, **Mexico** has a new procedure called "Trial of contents" (*Juicio de Fondo*). Under this procedure (optional for taxpayers), both the tax authorities and taxpayers disregard formal mistakes and allegations and focus on the substance of the case. Under this

<sup>227</sup> See Brazil. More information is available at <https://trf-4.jusbrasil.com.br/jurisprudencia/266552137/embarqos-de-declaracao-em-apelacao-civel-ed-50498626120144047000-pr-5049862-6120144047000/inteiro-teor-266552227> (last access 24 April 2018).

<sup>228</sup> See Brazil (National Report).

<sup>229</sup> See Australia (National Report); and the full report, available at <http://igt.gov.au/publications/reports-of-reviews/taxpayers-charter-and-taxpayer-protections-review/> (last access 24 April 2018).

<sup>230</sup> See Venezuela (National Report).

<sup>231</sup> C.E. Wefke, *The Right to Be Informed: The Parallel between Criminal Law and Tax Law, with Special Emphasis on Cross-Border Situations*, 9 World Tax J. (2017), Journals IBFD, available at [https://online.ibfd.org/kbase/#topic=doc&url=/document/wtj\\_2017\\_03\\_int\\_4](https://online.ibfd.org/kbase/#topic=doc&url=/document/wtj_2017_03_int_4) (last access 24 April 2018).

<sup>232</sup> See Portugal (National Report).

procedure, taxpayers are not obliged to pay the tax prior to the final decision. This procedure is also expected to be faster than the standard judicial administrative procedure.<sup>233</sup>

The **Italian** tax system allows tax authorities to be able to collect at least part of the tax requested while the appeal before the tax courts is still pending, depending on the stage of the defence procedure. If the taxpayer does not (or cannot) fulfil such “fractioned” tax collection, the tax office is authorized to initiate the forced tax collection and apply, in addition, a tax administrative penalty of 30% for “delayed payment of taxes”. Lower Courts have interpreted such rule in a way that could be considered unfavourable for the taxpayer.<sup>234</sup>

In **South Africa**, a senior official of the SARS may suspend payment of disputed tax or a portion thereof having regard to relevant factors, including (i) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets; (ii) the compliance history of the taxpayer with SARS; (iii) whether fraud is prima facie involved in the origin of the dispute; (iv) whether payment will result in irreparable hardship for the taxpayer that is not justified by the damage that SARS will eventually suffer if the disputed tax is not paid or recovered; or (v) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of the SARS or the fiscus.<sup>235</sup>

In the case of **Venezuela**, the Tax Code provides that tax authorities are fully able to collect taxes requested by an audit, even without allowing an appeal or any previous administrative or judicial review over the tax audit, adding a tax administrative penalty of 10% of all debt for “delayed payment of taxes”.<sup>236</sup>

#### 4.6.5. Cost of proceedings

As indicated above (see section 4.6.4.), costs of proceedings could represent an economic limitation for the exercise of the right to defence. If costs of proceedings are high, low-income taxpayers will not be allowed to access justice and request the review of their assessments.

In this regard, as part of *Retssikkerhedspakke II* (Second Package on Legal Protection), the **Danish** system of state reimbursement of costs in tax cases, which, in 2009, had been limited to cover individuals only, was expanded by Act No. 1665 of 20 December 2016 to include companies and other legal persons, with effect for assistance provided on 1 January 2017 or thereafter.<sup>237</sup>

Moreover, the new **Brazilian** Code of Civil Procedure makes it so that the state is liable to pay attorney fees to the taxpayer’s representation if it loses a law suit.<sup>238</sup>

In the case of **Spain**, in the administrative framework, the submission of reviews is free, and it is not required to have legal assistance. However, the Judgment of the Constitutional Court

<sup>233</sup> See Mexico (National Report). More information is available at [http://dof.gob.mx/nota\\_detalle.php?codigo=5470083&fecha=27/01/2017](http://dof.gob.mx/nota_detalle.php?codigo=5470083&fecha=27/01/2017) (last access 24 April 2018).

<sup>234</sup> See Italy (National Report). See also the decision of IT: Tax Court of First Instance of Prato, First Chamber, 4 June 2014, No. 173.

<sup>235</sup> ZA: Tax Administration Act, sec. 164(3). See also South Africa (National Report).

<sup>236</sup> See Venezuela (National Report).

<sup>237</sup> See Denmark (National Report). More information is available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=185826> (last access 24 April 2018).

<sup>238</sup> See Brazil (National Report).

140/2016 (21 July 2016), based on the proportionality principle, underlines that the excessive nature of court fees may dissuade and obstruct the fundamental right to an effective judicial protection (*tutela judicial efectiva*), enshrined in article 24 of the Constitution and article 6(1) of the ECHR. Moreover, article 139 of the **Spanish** LJCA (with its latest reform of 22 July 2016) provides that costs of proceedings will be afforded by the party whose claims have been rejected, unless there are doubts of law or facts. In cases of partial acceptance of the claims, each party will afford its own costs, unless there is bad faith from one of the parties.<sup>239</sup>

**Switzerland**, in the legislative process conducted in 2018, intends to introduce raised costs to be borne by the party whose appeal has been declined, which may affect both the taxpayer and the tax administration.<sup>240</sup>

#### 4.6.6. Public hearing

**Mexico** has indicated that the role of the ombudsman (PRODECON) is increasing day by day in order to provide legal assistance for taxpayers who cannot afford it.<sup>241</sup>

Additionally, the **Spanish** Law 1/1996 grants taxpayers free legal aid in cases provided for in its text.

In the case of **China**, there is no special legal aid for taxpayers; however, the general systems of legal aid and legal services are both available to taxpayers. In 2015, the General Office of the State Council required local governments to expand civil or administrative legal aid. Local governments offer a free legal service hotline for their residents, as well as legal service centres for free legal consultation and legal aid. In 2017, the Ministry of Justice decided to speed up the construction of a public legal services platform, which aimed to offer universal, public benefit and optional legal services for people.<sup>242</sup>

**Serbian** law provides that the state shall bear the proceeding costs for the party who has submitted the request to the court but is unable to bear the costs without adversely affecting his minimum necessary means for support and the support of his family members. The Draft of the Law on pro bono Legal Assistance has been prepared, but has not yet been enacted. The anticipated deadline for its entry into force, 1 January 2018, was postponed.<sup>243</sup>

With regard to privacy, the **Italian** legal framework provides that a tax procedure conducted as a consequence of the appeal of the taxpayer before the Tax Court of First Instance does not imply the discussion of the case in *public* hearings, unless the taxpayer expressly requests it.<sup>244</sup>

<sup>239</sup> See Spain (National Report). More information is available at <https://www.boe.es/buscar/act.php?id=BOE-A-2015-8167#dftercera> (last access 24 April 2018).

<sup>240</sup> See Switzerland (National Report).

<sup>241</sup> See Mexico (National Report).

<sup>242</sup> See China (National Report).

<sup>243</sup> See Serbia (National Report). More information is available at <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-serbia.pdf> (last access 24 April 2018).

<sup>244</sup> See Italy (National Report).

In this regard, in **Colombia**, tax judgments are public unless the case is closed in the administrative stage.<sup>245</sup>

In **China**, administrative hearings and trial hearings are publicly held, and when national secrets, commercial secrets or individual privacy are involved, hearings are held privately, according to the amended Administrative Litigation Law, which came into effect on 1 May 2015.<sup>246</sup>

#### 4.6.7. Publication of judgments and privacy

**Italy** has indicated that, unlike administrative judgments, which are all freely available online, only selected tax judgments are published on specialized databases for paying subscribers. Nevertheless, there is a recent positive trend of publishing the principles established by (certain) provincial and regional lower courts' decisions.<sup>247</sup>

In **China**, from 1 October 1 2016, judicial decisions, including those of tax cases, must be published on the **Chinese** Judicial Decision Website. Judicial decisions related to commercial secrets or other decisions that the courts conclude are unsuitable to publish are excluded from publication.<sup>248</sup>

#### 4.7. Criminal and administrative sanctions

Regardless of the consideration given to the awareness of wrongdoing as a subjective element of tax offences,<sup>249</sup> there is general consensus on the application of most constitutional principles applicable to tax matters in criminal law.<sup>250</sup> As a minimum standard, the principles of proportionality and *ne bis in idem* should be entirely applicable in tax matters. In this regard, from a substantive standpoint, the *ne bis in idem* principle also implies a prohibition of double sanction in a certain event: as an expression of proportionality, it is best practice to exclude administrative sanctions when they concur with criminal penalties in a single event.

Moreover, considering that *ius puniendi* is the last resort that a legal system uses in order to prevent and sanction non-compliance with its rules, it is logical to adhere to some form of discretionary prosecution in tax matters. Similarly, voluntary disclosure should lead to a reduction of penalties and sanctions should not be increased simply to encourage taxpayers to make voluntary disclosures, since it would be neither proportionate nor adequate according to the *ultima ratio* rationale of punitive law.

<sup>245</sup> See Colombia (National Report).

<sup>246</sup> See China (National Report). More information is available at <http://www.lawinfochina.com/Display.aspx?lib=law&Cqid=239820> (last access 24 April 2018).

<sup>247</sup> See Italy (National Report).

<sup>248</sup> See China (National Report). More information is available at <http://wenshu.court.gov.cn> (last access 24 April 2018).

<sup>249</sup> Therefore, regardless of the acknowledgment of standards of inculpability when the taxpayer has been indicted (correct? i.e. accused) in error, either by mistakes induced by a bona fide reliance on legitimate expectations created by unclear guidelines issued by tax authorities or when objective elements demonstrate ambiguous interpretations of some rules. See Pistone & Baker, *supra* n. 8, at p. 54.

<sup>250</sup> In this regard, the Brazilian Federal Supreme Court has been applying these principles to tax penalties. See Brazil (National Report), as well as the decision of the Federal Supreme Tribunal BR: Supremo Tribunal Federal (Federal Supreme Court). 28 Apr. 2015. Case 727.872 Rio Grande Do Sul. .

#### 4.7.1. The general framework<sup>251</sup>

##### *Recent Relevant European Case Law*

##### **European Court of Human Rights**

- ***A and B v. Norway (Grand Chamber, Application No. 24130/11 and 29758/11, 15 November 2016)***: The taxpayers complained that they had been prosecuted and punished twice – in administrative and criminal proceedings – for the same offence. The Court held that the two proceedings were sufficiently closely connected in substance and in time and, as a result, they had been combined in an integrated manner so as to form a coherent whole. Therefore, the court concluded there was no violation of article 4 of Protocol No. 7 of the European Convention on Human Rights (the *ne bis in idem* principle).
- ***Johannesson and others v. Iceland (1st Section, Application No. 22007/11, 18 May 2017)***: The applicants – two individuals and one company – complained that they had been tried twice for the same conduct of failing to make accurate declarations for tax assessments, first through the imposition of tax surcharges and second through a subsequent criminal trial and conviction for aggravated tax offences. The Court applied the criteria developed in *A and B v. Norway* and found that, due to the limited overlap in time and the largely independent collection and assessment of evidence, the Court could not find that there was a sufficiently close connection in substance and in time between the tax proceedings and the criminal proceedings in the case for them to be compatible with the *bis* criterion in article 4 of Protocol No. 7. Accordingly, the Court concluded that there had been a violation of article 4 of Protocol No. 7 (the *ne bis in idem* principle).

##### **Court of Justice of the European Union**

- ***Joined Cases Orsi and Baldetti - C-217/15 and C-350/15 (5 April 2017)***: The taxpayers complained that the *ne bis in idem* principle was breached because the administrative decision under review provided for an administrative penalty and a criminal penalty for the same offences, relating to the non-payment of VAT. The Court held that there was no violation of the *ne bis in idem* principle since article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation that permits criminal proceedings to be brought for non-payment of VAT after the imposition of a definitive tax penalty with regard to the same act or omission when that penalty was imposed on a company with legal personality, while those criminal proceedings were brought against a natural person.
- ***See also Taricco and others - C-105/14 (8 September 2015) supra***, at section 4.4.1.4.

<sup>251</sup> See also R. Attard, *Constitutional Court Delivers Landmark Double Jeopardy Decision*, 55 Eur. Taxn. 11 (2015), Journals IBFD, available at [https://online.ibfd.org/kbase/#topic=doc&url=/document/et\\_2015\\_11\\_mt\\_1](https://online.ibfd.org/kbase/#topic=doc&url=/document/et_2015_11_mt_1) (last access 24 April 2018); R. Attard, *The ECtHR's Recent Tax Judgments on the Non Bis in Idem Rule*, 26 EC Tax Review 6, pp. 335-338 (2017), available at <https://www.kluwerlawonline.com/document.php?id=ECTA2017036&PHPSESSID=r1hjt92p8stvc8711cv2rjvh5> (last access 24 April 2018); and Baker, *supra* n. 101.

There have been significant developments reported regarding proportionality in the period under analysis in this report. For instance, the 2015 Court of Justice of the European Union judgment on the *Taricco* case,<sup>252</sup> which ruled **Italian** criminal courts not to apply national legislation laying down absolute limitation periods leading to impunity, raised a broad debate on the statute of limitations applicable to tax crimes linked to VAT and stimulated a cross-border dialogue between courts. In addition, on 26 January 2017, the ICC submitted the issue to the Court of Justice of the European Union with regard to offences that may jeopardize the financial interests of the European Union and violate the principle of effectiveness provided for in article 325 of the TFEU, setting forth the respect of the legality principle, the prohibition of retrospective application of rules and the legal regulation of the statute of limitation period.<sup>253</sup>

Additionally, the **Argentinean** Law 27,430, part of the 2017 tax reform, increased the requirements that the tax administration must fulfil in order to close an establishment, even if it maintains the possibility of such closure, which was widely criticized. The reform also eliminated the fine that used to be required, along with the closure of the establishment, and it also reduced the number of days of the closure. Also, the tax reform maintained the Tax Criminal Law article that forbids tax authorities to apply sanctions before the criminal procedure is finished.

As of 2017, taxpayers may be subject to both criminal and administrative procedures in **Colombia**.<sup>254</sup>

Simultaneously, the 2016 **Polish** Civil Law Transactions Act (PCC) established a presumption of guilt as a standard for certain withholding tax penalties.<sup>255</sup> Previously, notaries were subject to tax liability for any errors in withholding the taxes ruled in the PCC, for not withholding the tax in a proper amount when acting as withholding agents while authenticating a civil law transaction as objective accountability. Pursuant to the new PCC, a notary may prove his innocence, which is certainly a sort of improvement in the withholding agent's situation.<sup>256</sup> Also, regarding proportionality, **Polish** legislation raised penalties for VAT-related "invoice offences" and introduced new criminal offences in the Criminal Code, where the highest penalty for forgery of an invoice can reach 25 years of imprisonment.<sup>257</sup>

Regarding *ne bis in idem*, the 2015 reform of the **Spanish** General Tax Act focused on all aspects of the principle: the new Title VI includes the prohibition of double penalties on the same facts, as well as the regulation of procedures in cases of tax crimes.<sup>258</sup>

<sup>252</sup> IT: ECJ, 8 Sept. 2015, Case C-105/14, *Criminal proceedings against Ivo Taricco and Others*, ECJ Case Law IBFD, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=167061&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=89930> (last access 24 April 2018).

<sup>253</sup> See Italy (National Report). More information is available at <http://curia.europa.eu/juris/document/document.jsf?docid=197423&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=456650> (last access 24 April 2018).

<sup>254</sup> See Colombia (National Report).

<sup>255</sup> The Polish report expresses that it improves the position of the withholding agent. See Poland (National Report).

<sup>256</sup> The Polish report enthusiastically expresses this to be an improvement, to the extent that it asks for it to be extended to all Polish taxes and implemented in the General Tax Law. See Poland (National Report).

<sup>257</sup> When the amount presented on the invoice exceeds PLN 10 million. See Poland (National Report). More information is available at <https://www.lexology.com/library/detail.aspx?q=fc9fbf9b-24ad-4ae5-92b9-d1f5d3b01d02> (last access 24 April 2018).

<sup>258</sup> See Spain (National Report). More information is available at <http://www.boe.es/buscar/act.php?id=BOE-A-2015-10143> (last access 24 April 2018).

In the case of **Greece**, changes were adopted by Law 4337/2015 to the administrative penalties (the highest amount was initially up to 100% and it was lowered to 50%), based on the need to keep the penalties proportional, given that, for cases of tax fraud, criminal sanctions also apply. In this sense, the law provides for a system where the same set of facts is used for the imposition of both administrative and criminal penalties. In 2016, an amendment was introduced to the legal framework, stipulating that administrative courts, which are competent for, inter alia, tax disputes, are bound by acquitting decisions issued by criminal courts unless the acquittal was based on the absence of objective and subjective elements of criminal liability that are not relevant to the administrative dispute.<sup>259</sup>

In **Sweden**, the law was changed in 2016 to meet the *ne bis in idem* principle's requirements pursuant to the European Charter and the European Convention on Human Rights<sup>260</sup> after the 26 February 2013 *Åkerberg/Fransson* case.<sup>261</sup>

On the substantive approach, there is no legal basis for administrative sanctions in **Denmark**, but for the collection of tax with surcharges. Criminal sanctions may be applied in cases of deliberate or grossly negligent violations.<sup>262</sup>

In this regard, the **Spanish** report deems the **Spanish** legislation to be effectively aligned with the European Court of Human Rights' interpretation of article 4 of Protocol No. 7 in the wake of the new doctrine of the *ne bis in idem* principle stated in *A and B v. Norway* case of 15 November 2016, since the suspension of the penalty procedure in cases of tax crimes constitutes a proper mechanism to warrant the proportionality of the penalty imposed because of a tax infringement. Thus, the initiation of a tax procedure aimed at punishing the taxpayer when the criminal court deemed the facts not to be criminally punishable will not imply per se the contravention of that principle, since, according to the new ECHR interpretation, both procedures can also be considered connected in respect of the time at which they are carried out simultaneously.<sup>263</sup>

In 2015, **Portugal** introduced additional sanctions for companies that have not regularized their tax affairs, including the prohibition of certain capital market transactions (e.g. initial public offerings and public issues of debt securities) and of distributions of profits that may be interpreted as going against the *ne bis in idem* principle.<sup>264</sup>

#### 4.7.2. Voluntary disclosure

Regarding the application of the principle of opportunity to tax offences, **South African** law was amended to create the so-called Special Voluntary Disclosure Programme (SVDP), whereby **South African** taxpayers can give voluntary disclosure to the tax administration about unauthorized foreign assets prior to the entry into force of the automatic exchange of information rule in September 2017. The SVDP commenced on 1 October 2016 and ended on 31 August

<sup>259</sup> See Greece (National Report). See also GR: Official Gazette Folio A, 129, 17 Oct. 2015, arts. 3-7; and GR: Law 4446/2016, Official Gazette Folio A, 240 22 Dec. 2016, art. 17, amending art. 5(2) of the Code of Administrative Court Procedure.

<sup>260</sup> See Sweden (National Report).

<sup>261</sup> SE: ECJ, 26 Feb. 2013, Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, ECJ Case Law IBFD, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0617:EN:HTML> (last access 24 April 2018).

<sup>262</sup> See Denmark (National Report).

<sup>263</sup> See Spain (National Report).

<sup>264</sup> See Portugal (National Report).

2016, and in all cases, successful application was not be subject to the understatement penalty they would have been subject to had the SARS identified them before the voluntary disclosure.<sup>265</sup>

Additionally, **Spain** introduced in 2015 a voluntary tax regularization in article 252 of the LGT, allowing the taxpayer to issue a complete acknowledgment and payment of the tax debt.<sup>266</sup>

In addition, as from 1 January 2016 and for a limited period of 2 years, **Luxembourg** introduced a voluntary disclosure programme for individuals and corporate entities, allowing them to declare any income that was not declared since 2006, provided that such income falls under certain categories of offences. One of these categories is that of voluntary or involuntary tax fraud or tax scam (the programme does not apply if the income falls within the scope of anti-money laundering or anti-terrorism regulations; in this case, the offence will be reported to the Public Prosecutor for a sentence). The sanctions in cases of disclosure are limited to the payment of taxes due, with an additional 20% increase if the corrective tax returns were filed in 2017.<sup>267</sup>

With regard to the same principle, **Italian** tax penalties are structured with very high rates (e.g. 100%, 200% or 240%), which may stimulate the taxpayer to (i) pay before the deadlines; (ii) try to reach a settlement with the tax office; or (iii) apply for voluntary disclosure programmes (when available), which will allow the taxpayer to benefit from a reduction in the penalties applied.

Moreover, **Canadian** authorities have proposed several changes to the legal framework, one of them being the restriction of the kinds of penalties that will be waived in situations of “major non-compliance” (high levels of taxpayer culpability). The changes have been delayed.<sup>268</sup>

On the other hand, based on the 30th Normative Document of the State Administration of Taxation in 2017, the **Chinese** tax authorities are required to classify cases according to different situations, focus on major tax violations, temper justice with mercy and punish illegal action according to its illegality and with strong evidence. According to the **Chinese** report, full use of the function of tax inspections should be made and guarantee the organic unity of legal effects and social effects so that the standard of not increasing sanctions simply to encourage taxpayers to give voluntary disclosures is met.<sup>269</sup>

#### 4.8. Enforcement of taxes

Collection of taxes should favour the continuance of the taxpayer’s economic activity, as well as the sustainability of his living expenses. Consequently, any action aimed at the collection of taxes must consider the minimum amount necessary for living and also avoid the bankruptcy of taxpayers. Therefore, the tax administration should grant taxpayers the possibility to pay taxes due in instalments or grant the suspension of payments in exceptional cases.

<sup>265</sup> See South Africa (National Report). More information is available at <http://www.sars.gov.za/Legal/VDP/Pages/Special-Voluntary-Disclosure.aspx> (last access 24 April 2018).

<sup>266</sup> See Spain (National Report). More information is available at <https://www.boe.es/buscar/doc.php?id=BOE-A-2015-10143> (last access 24 April 2018).

<sup>267</sup> See Luxembourg (National Report).

<sup>268</sup> See Canada (National Report). More information is available at <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/report-on-voluntary-disclosures-program.html> (last access 24 April 2018).

<sup>269</sup> See China (National Report).



It is also necessary that the seizure of assets for the payment of goods is conducted by the judicial authorities. Judicial intervention allows for the balancing of the state's interest in the collection of taxes and the taxpayer's right to protect his equity. Therefore, the judiciary will be able to ensure that the collection of taxes is not conducted against the ability-to-pay principle.

In this regard, the **Italian** Law Decree No. 193 of 22 October 2016 (*Legge di Stabilità* 2017) introduced a special procedure that allowed taxpayers to seek, by 31 March 2017, a quick settlement of tax collection notices concerning tax debts accrued until 31 December 2016.<sup>270</sup> In addition, in 2016, the **Italian** Bankruptcy Law was modified to align with the recent EU case law that admits the partial payment of VAT during pre-bankruptcy agreements with creditors.<sup>271</sup> These amendments constitute important changes that assist taxpayers in serious financial conditions, allowing them to reach agreements with their creditors without the practical obstacle that the existence of VAT debts represent in the negotiation.<sup>272</sup>

Also in this line, according to **Portuguese** Law No. 13/2016, tax enforcement proceedings cannot include the judicial sale of the “family home”, except if the official tax value exceeds the higher Municipal Property Tax threshold (currently EUR 574,323).<sup>273</sup>

However, the **Venezuelan** Tax Code prioritizes tax debts over almost any other obligation of the taxpayer, only excluding meal allowances, salaries and other rights derived from labour and social security, which was added to the state's privilege over taxpayer's rights to goods that was established in 2001.<sup>274</sup>

Also, in **Colombia**, the administrative practice of seizing bank accounts without judicial authorization has become quite common in most municipalities, causing severe damage to business flows for taxpayers. In addition, Law 1819/2016 provides for new opportunities for taxpayers to pay in arrears or even to receive a partial condoning of interest. Furthermore, regarding the temporary suspension of tax enforcement that should, by principle, follow a natural disaster, in **Colombia**, natural disasters are usually followed by an executive decree providing for temporary tax relief, depending on the severity of the disaster. The Mocoa landslide in 2017 stimulated a 5-year relief.<sup>275</sup>

In **Brazil**, Law No. 13,606 entered into force on 10 January 2018, introducing article 20-B to Law No. 10,522/2002, which allows a prejudgment attachment without authorization by the judiciary. In addition, the progressive tax rates regarding income taxation on individuals have not been reviewed since 2015. Nowadays, people with a monthly income of BRL 1,903.99 (roughly USD 570.05) have to pay income tax.<sup>276</sup>

<sup>270</sup> See Italy (National Report). More information is available at <http://www.gazzettaufficiale.it/eli/id/2016/12/02/16A08374/sg> (last access 24 April 2018).

<sup>271</sup> IT: ECJ, 7 Apr. 2016, Case C-546/14, *Degano Trasporti S.a.s. di Ferruccio Degano & C., in liquidazione*, ECJ Case Law IBFD.

<sup>272</sup> See Italy (National Report). More information is available at <http://www.altalex.com/documents/codici-altalex/2014/10/30/legge-fallimentare> (last access 24 April 2018).

<sup>273</sup> See Portugal (National Report). More information is available at <https://dre.pt/web/quest/pesquisa/-/search/74498465/details/maximized> (last access 24 April 2018).

<sup>274</sup> See Venezuela (National Report).

<sup>275</sup> See Colombia (National Report).

<sup>276</sup> See Brazil (National Report). More information is available at [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/L13606.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13606.htm) (last access 24 April 2018).

The **Mexican** tax courts have increased the number of decisions considering the *minimum vitalis* as a milestone for taxation, limiting taxation on the amounts requested for the payment of the taxpayer's basic needs.<sup>277</sup> The **Mexican** legal framework also provides that taxpayers can choose between deferral of the payment (up to 12 months) and payment in instalments (up to 36 months). The tax credit will not be updated from the moment at which the request is authorized, but rather at the moment of the actual payment of the tax.<sup>278</sup>

One additional issue was that on 7 and 19 September 2017, two major earthquakes hit the South of **Mexico**. In both cases, the President of **Mexico** enacted rules to reduce the tax burden of legal entities and people living in the affected areas. The major given benefits included (i) suspension of the obligation to deliver provisional payments of income tax (income tax is paid on an annual basis on the third month of the following taxable year, but every 2 months, provisional payments are due); (ii) immediate deduction of investments in real estate (this deduction is usually made over a 10-year period); (iii) deferral of the withheld income tax to the first 3 months of 2018; (iv) deferral of the payment of VAT and additional tax on products and services (IEPS) to the first 3 months of 2018; and (v) in the case of deferral of taxes authorized prior to the events, suspension of payments for the rest of 2017 without additional interest on the due amount.<sup>279</sup>

Additionally, in **South Africa**, the Tax Administration Act allows both the taxpayer and all third parties affected by a tax collection procedure to request the tax administration to amend the notice to allow the taxpayer to pay basic living expenses for himself and his dependents. Also in this regard, a **South African** taxpayer may, within 5 days of receiving a letter of demand, apply to the tax authorities for a reduction of the amount to be paid based on his living expenses and those of his dependents.<sup>280</sup>

#### 4.9. Cross-border procedures

For a number of reasons, as a general rule, there is a general weakening of the practical protection of taxpayers' rights in cross-border situations.<sup>281</sup> This result is mainly attributable to the fact that tax procedures dealing with such situations, namely the exchange of information and the mutual agreement procedure (MAP), are fundamentally carried out among states. As a consequence, taxpayers are not bound to intervene in these procedures, regardless of the large effects that these procedures will have on the assessment of the taxpayers' tax liabilities and, consequently, the obvious interest of said taxpayers on the results of such procedures.

All things considered, it should be remembered that taxpayers are human beings and, as such, holders of human rights in all taxing states involved in cross-border situations.<sup>282</sup> Also, it should be kept in mind that, as a minimum standard, the greater the powers of the tax

<sup>277</sup> See Mexico.

<sup>278</sup> Id.

<sup>279</sup> Id. More information is available at <https://www.gardere.com/Newsroom/Alerts/223911/Tax-Benefits-in-Areas-Affected-by-the-Earthquake-in-Mexico> (last access 24 April 2018).

<sup>280</sup> ZA: Tax Administration Act, sec. 179(4) and (5)(a). See also South Africa (National Report).

<sup>281</sup> Pistone & Baker, *supra* n. 8, at p. 58.

<sup>282</sup> R. Cordeiro Guerra & S. Dorigo, *Taxpayer's Rights as Human Rights during Tax Procedures*, in *Human Rights and Taxation in Europe and the World*, p. 425 (G. Kofler, M. Poiares Maduro & P. Pistone eds., IBFD 2011), Online Books IBFD, available at [https://online.ibfd.org/linkresolver/static/hrte\\_p07\\_c24?WT.z\\_nav=crosslinks](https://online.ibfd.org/linkresolver/static/hrte_p07_c24?WT.z_nav=crosslinks) (last access 24 April 2018).

administration – as it happens, for instance, in the automatic exchange of information – the greater the protection of taxpayers’ rights should be.

#### 4.9.1. Exchange of information by request: The right of the taxpayer to be informed and to challenge the exchange of information

As a paramount instrument for proper defence, the right to be informed of any kind of limitative measures from all states involved in the exercise of taxing powers is to be safeguarded in all tax procedures, including exchange of information.<sup>283</sup> Therefore, it is a minimum standard that the requesting state should notify the taxpayer of cross-border requests for information, unless it has specific grounds for considering that this would prejudice the process of investigation. The requested state should inform the taxpayer unless it has a reasoned request from the requesting state that the taxpayer not be informed on the grounds that it would prejudice the investigation; in other words, the taxpayer should generally be informed that a cross-border request for information is to be made.

Following this trend, **Australia**’s Inspector General of Taxation’s Taxpayers Charter and the taxpayer protections review have considered the rights of taxpayers in the context of exchanges of information, so a recommendation was made for the ATO to centrally publish guidance on exchange of information. Particularly, these guidelines should contain (i) guidelines for requesting and responding to an exchange of information; (ii) safeguards for protecting taxpayer information; (iii) avenues through which taxpayers may raise concerns; and (iv) when taxpayers are to be informed of an exchange of information request being made in relation to their affairs and, where appropriate, giving them an opportunity to review the information obtained.<sup>284</sup> The ATO should inform taxpayers when they are considering an exchange of information and even give the taxpayers an opportunity to provide the required information themselves, except for in extreme situations, such as fraud.<sup>285</sup> The ATO agreed, stating its long-standing commitment to transparency and compromising to maintain up-to-date guidance “to help taxpayers understand when and why we exchange information with other tax jurisdictions and what it might mean for them. Contemporary channels also provide taxpayers the ability to click through to get more detailed information or make contact with an ATO staff member to assist them in understanding exchange of information”.<sup>286</sup>

Also, **China** has prescribed that the tax authorities can notify the taxpayer, withholding agent or other parties of the aim, source and content of the information requested, unless they are suspected of being involved in tax violations and the notification may affect the investigation, or if the requesting state disallows the notification.<sup>287</sup>

On the other hand, on 17 February 2017, the Tokyo District Court (**Japan**) rejected taxpayers’ claims concerning exchange of information requests made by the National Tax

<sup>283</sup> Weffe, *supra* n. 231, at pp. 463-469.

<sup>284</sup> The recommendation concluded that while the ATO’s procedures in this regard aligned with international practices and appeared reasonable, there was minimal public information on which taxpayers and tax practitioners could rely. Accordingly, the Inspector General of Taxation (IGT) recommended that the ATO provide additional public guidance on the ATO’s approach, particularly with regard to data security, notification to taxpayers when their information is being exchanged with other revenue authorities and opportunities for them to consider that information. See <http://igt.gov.au/publications/reports-of-reviews/taxpayers-charter-and-taxpayer-protections-review/> (last access 24 April 2018).

<sup>285</sup> See Australia (National Report). More information is available at <https://www.ato.gov.au/General/Consultation/In-detail/Stewardship-groups-minutes/Large-Business-Stewardship-Group/Large-Business-Stewardship-Group-minutes-7-August-2017/?page=2> (last access 24 April 2018).

<sup>286</sup> See Australia (National Report).

<sup>287</sup> See China (National Report).

Agency (NTA) to the Singapore and Dutch competent authorities, stating that such requests did not affect any legal rights of the plaintiffs, and thus the plaintiffs had no merit for such confirmation of their status because there were no imminent risks on the plaintiffs' legal position concerning tax matters. Even if the NTA received the information it had requested, it would not necessarily mean that the plaintiffs would be taxed based on such information, so an uninformed exchange of information was absolutely legal according to the Court, referring to the Commentary on the OECD Model Tax Convention on Income and on Capital.<sup>288</sup> However, such assertion needs to be revised, considering that, in any exchange of information situation, there are rights of the taxpayer that must be protected, such as the right to be informed of the exchange of information, the right of *habeas data* and the protection of the confidentiality of such information, as addressed earlier (section 4.3).<sup>289</sup> Nevertheless, on 26 October 2017, the Tokyo High Court rejected the taxpayers' appeal.

**Mexico** has indicated that the taxpayer is to be informed when a cross-border request of information is made, in accordance with the Mexican Tax Rules (RMF) for FATCA exchange of information and with the Mexican Law for Credit Institutions for the exchange of banking information. If **Mexico** is receiving information, the notification that the authorities must give a to taxpayer with regard to an exchange of information procedure is only with regard to the final result of such exchange, but not in connection with the whole proceeding. For the case of automatic exchange, no previous notice is required. Since 2014, **Mexico** has signed more than 40 treaties for automatic exchange of information (TIEAs) and complies with the Common Reporting Standard. Additionally, domestic law foresees the exchange of information under specific and detailed conditions, strengthening legal certainty for taxpayers.<sup>290</sup> **Mexico** has one of the highest standards for protection, encryption and security of exchanged information.<sup>291</sup>

#### 4.9.2. Additional safeguards in connection with exchange of information upon request

##### *Recent Relevant European Case Law*

###### **European Court of Human Rights**

- See *G.S.B. v. Switzerland* (3rd Section, Application No. 28601/11, 22 December 2015), *supra*, at section 4.3.4.

###### **Court of Justice of the European Union**

- See *Berlioz - C-682/15* (16 May 2017), *supra*, at section 4.1.3.

In addition to the right to be informed, the principles of equality of arms and equality of the parties in the tax relationship demand from the states participating in an exchange of information that the information-requesting powers are not used only to get information that

<sup>288</sup> See Japan (National Report).

<sup>289</sup> Id. See also Pistone & Baker, *supra* n. 8, at p. 61; and sec. 4.3 of this Observatory.

<sup>290</sup> See Mexico (National Report).

<sup>291</sup> Id.

harms the taxpayer's position, but also information that assists in their defence. Pursuant to **German** tax law, the principle of official investigation in tax matters (*Untersuchungsgrundsatz*) applies, so tax authorities must investigate both against and in favour of taxpayers, including cross-border situations according to the OECD criterion of "foreseeable relevance" for tax assessments. According to the **German** report, information exchange includes information both advantageous and disadvantageous for taxpayers, both legally and practically. In fact, in January 2017, the **German** tax authorities released an explanatory note on joint tax audits, where it is pointed out that cross-border examination tools should be used both to avoid double taxation and double non-taxation.<sup>292</sup> Therefore, **German** procedure should be regarded as a best practice in this matter.<sup>293</sup>

In the case of **Finland**, the new double tax treaty signed between Finland and Germany includes specific conditions for the exchange of information.<sup>294</sup>

In December 2015, **Australia** enacted legislation for the implementation of BEPS Action 13 on country-by-country reporting. These new provisions commenced operation on 1 January 2016. In this regard, **Australia** entered into an agreement for automatic exchange of information based on the Common Reporting Standard with the Inland Revenue Authority of Singapore in September 2016.<sup>295</sup> The **Australian** Transaction Reports and Analysis Centre, **Australia's** financial intelligence agency, signed a Memorandum of Understanding for the exchange of financial intelligence with **China**.<sup>296</sup> Also, the ATO has updated its guidance on automatic exchange of information in relation to FATCA and the Common Reporting Standard.<sup>297</sup>

In this context, it is also a best practice to give the taxpayer access to information received by the requesting state. **Japan** clearly does not comply with this standard, as pointed out by the judgment of the Tokyo District Court of 17 February 2017, previously mentioned (section 4.9.1).<sup>298</sup>

This is also the case of **New Zealand**, unless the information is required to be provided in response to a request under the Official Information Act 1982, the Privacy Act 1993 and/or discovery obligations in litigation. Notwithstanding this, under the current common law, New Zealand taxpayers subject to an information request related to a foreign taxpayer that arises from that foreign taxpayer's tax authority have the right to challenge the legal propriety of such a request,<sup>299</sup> as pointed out in *Chatfield & Co Ltd v. Commissioner of IRD* (2015, 27 NZTC 22-024 (HC)), a case involving an exchange of information between New Zealand and South Korea.<sup>300</sup>

<sup>292</sup> See Germany (National Report). More information is available at [http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF\\_Schreiben/Internationales\\_Steuerrecht/Allgemeine\\_Informationen/2017-01-06-Merkblatt-ueber-koordinierte-steuerliche-Aussenpruefungen-mit-Steuerverwaltungen-anderer-Staaten-und-Gebiete-englische-Version.pdf?\\_\\_blob=publicationFile&v=1](http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2017-01-06-Merkblatt-ueber-koordinierte-steuerliche-Aussenpruefungen-mit-Steuerverwaltungen-anderer-Staaten-und-Gebiete-englische-Version.pdf?__blob=publicationFile&v=1) (last access 24 April 2018).

<sup>293</sup> Pistone & Baker, *supra* n. 8, at p. 63.

<sup>294</sup> See Finland (National Report).

<sup>295</sup> See Australia (National Report). ATO, *Singapore and Australia to share data to reduce tax evasion*, Press Release (6 Sept. 2016), available at <https://www.ato.gov.au/Media-centre/Media-releases/Singapore-and-Australia-to-share-data-to-reduce-tax-evasion/> (last access 24 April 2018).

<sup>296</sup> See Australia (National Report). See also Australian Transaction Reports and Analysis Centre, *AUSTRAC signs historic MoU with China*, Press Release (2 Nov. 2016), available at <http://austrac.gov.au/media/media-releases/austrac-signs-historic-mou-china> (last access 24 April 2018).

<sup>297</sup> See Australia (National Report). See also ATO, *Automatic exchange of information guidance – CRS and FATCA*, Press Release (21 Apr. 2017), available at <https://www.ato.gov.au/General/International-tax-agreements/In-detail/International-arrangements/Automatic-exchange-of-information--guidance-material/> (last access 24 April 2018).

<sup>298</sup> See Japan (National Report).

<sup>299</sup> See New Zealand (National Report).

<sup>300</sup> NZ: Supreme Court, 11 Apr. 2017, Case SC 9/2017, *Chatfield & Co. Limited v. Commissioner of Inland Revenue*, available at [https://www.courtsofnz.govt.nz/cases/chatfield-co-limited-v-commissioner-of-inland-revenue/@\\_images/fileDecision](https://www.courtsofnz.govt.nz/cases/chatfield-co-limited-v-commissioner-of-inland-revenue/@_images/fileDecision) (last access 24 April 2018).

Naturally, the prohibition of supplying information when the originating cause was the acquisition of stolen or illegally obtained data is to be regarded as a best practice, regarding all forms of exchange of information. This is the case of **China**, the legal framework of which prohibits the use of this type of data.<sup>301</sup>

Nonetheless, in 2016, the **Finnish** Supreme Administrative Court ruled, in case KHO 2016:100, that data from the Liechtenstein LGT Bank that was originally stolen and received via an exchange of information could be used as a basis for a tax assessment, despite “possible” criminal actions in the chain of information exchange preceding the **Finnish** tax administration.<sup>302</sup> Such judgment is rather surprising, given that the Administrative Court of Helsinki ruled, on 29 August 2017, that the tax administration cannot force the media to hand over documents related to the Panama Papers, and also considering that the **Finnish** Supreme Administrative Court upheld that a tax consultancy company was not due to submit to the tax administration a document that was not a basis for a tax assessment.<sup>303</sup>

This has also been stated by **Italy**: the established **Italian** case law admits that information stolen or illegally obtained abroad may successfully ground a notice of assessment served to an **Italian** taxpayer. The **Italian** Supreme Court has adopted this approach in relation to the *Falciani list* (see IT: ISC, Tax Chamber, 28 April 2015, No. 8605; and IT: ISC, Tax Chamber, 13 May 2015, No. 9760).<sup>304</sup>

Moreover, the **Luxembourg** tax reform of 2017 (Bill No. 7223 of 19 December 2017) suggests three amendments to the *Berlioz* contested law: (i) the verification of the “foreseeable relevance” by the direct tax authorities;<sup>305</sup> (ii) the reintroduction of an action for annulment before administrative courts by the taxpayer (*recours en annulation*) against the request for information (which was abolished by the Law of 25 November 2014);<sup>306</sup> and (iii) the possibility of the judicial authorities to access the information request.<sup>307</sup> According to the new law, the taxpayer subject to an audit *should not be informed* of the exchange of information request of the foreign authority. This non-disclosure obligation is addressed specifically to the information holders. Any breach of this obligation of confidentiality is sanctioned by a fine. However, in the absence of such a request for “confidentiality” from the foreign authority, the current law does not specify the role of the **Luxembourg** administration with regard to the taxpayers for whom it has the information sought by the foreign authority. In the past, however, administrative practice would provide, on a case-by-case basis, prior notification of taxpayers subject to international control, despite the lack of an expressed legal basis.

#### 4.9.3. Automatic exchange of information: The different issues of taxpayer protection

From an *a minori ad maius* approach, it is evident that minimum standards and best practices regarding the right to be informed are fully applicable to the automatic exchange of

<sup>301</sup> See China (National Report).

<sup>302</sup> Therefore, a criminal act performed by foreign tax officials did not prevent using the data. Namely, had the Finnish tax administration (instead of the German counterpart) issued payment, the data could not have been used. See Finland (National Report).

<sup>303</sup> See sec. 4.1.2.

<sup>304</sup> See Italy (National Report). More information is available at <http://www.ledaritaicorrado.it/cass-sez-vi-civ-t-28-aprile-2015-ord-n-8605-testo/>; and from <http://www.ledaritaicorrado.it/cass-sez-vi-civ-t-13-maggio-2015-ord-n-9760-testo/> (last access 24 April 2018).

<sup>305</sup> See Luxembourg (National Report). See also LU: Draft of the Law No. 7223 amending the law of 25 Nov. 2014, specifically article. 3(1), available at <http://www.chd.lu> (last access 24 April 2018).

<sup>306</sup> See Luxembourg (National Report). See also *id.*, at art. 6(1).

<sup>307</sup> *Id.*

information. As previously stated,<sup>308</sup> the greater the powers of the tax administration, the greater the protection of taxpayers' rights should be. Therefore, as a matter of principle, the taxpayer should be notified of the proposed automatic exchange of information regarding financial information in sufficient time to exercise data protection rights.

In this regard, **Australia** reported a piece of legislation enacted in December 2015 for the implementation of the OECD BEPS Action Plan's country-by-country reporting. The ATO's initiative included updating its guidance on automatic exchange of information in relation to FATCA and the Common Reporting Standard, entering into an automatic exchange of information agreement with Singapore. Moreover, the **Australian** financial intelligence agency signed a Memorandum of Understanding for the exchange of financial intelligence with China.<sup>309</sup>

On 30 August 2016, the **Brazilian** government enacted Decree 8,842/2016, approving the OECD's Multilateral Convention on Mutual Assistance in Tax Matters for the purposes of implementing an international agreement on the automatic exchange of information under the Common Reporting Standard regime related to transactions carried out from 1 January 2017.<sup>310</sup>

In addition, the **Canadian** Standing Committee on Finance Report, entitled the **Canada** Revenue Agency, Tax Avoidance and Tax Evasion, addressed offshore non-compliance, increasing collaboration with other jurisdictions, including through enhanced joint audits with tax treaty partners. In December 2016, **Canada** passed legislation to formally implement country-by-country reporting for large multinationals, and on 3 February 2017 and 2 March 2017, respectively, the **Canada** Revenue Agency issued the relevant reporting form and related administrative guidance for country-by-country reporting.<sup>311</sup>

**China** joined the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information in December 2015, which specifies data security and a commitment to confidentiality. Also, according to the **Chinese** report, legislation gives enough time to financial institutions to submit information on changes to taxpayers' financial information.<sup>312</sup>

In the case of **Switzerland**, the indicated rights are guaranteed by the Exchange of Information Act, effective as of 1 January 2017 (*Bundesgesetz über den internationalen automatischen Informationsaustausch in Steuersachen/Loi fédérale sur l'échange international automatique de renseignements en matière fiscale*, SR/RS 653.1), which is the unilateral act to implement the Multilateral Competent Authority Agreement on Automatic Exchange of Information). Pending in the parliament is an initiative with the goal of strengthening even more the judicial protection of the data requested (Parliamentary No. 17,3973).<sup>313</sup>

<sup>308</sup> See sec. 4.9.

<sup>309</sup> See Australia (National Report). More information is available at <http://www.austrac.gov.au/media/media-releases/austrac-signs-historic-mou-china> (last access 24 April 2018).

<sup>310</sup> See Brazil (National Report).

<sup>311</sup> See Canada. More information is available at <https://www.pwc.com/gx/en/tax/newsletters/pricing-knowledge-network/assets/pwc-TP-Canada-final-CbCR-legislation.pdf> (last access 24 April 2018); <https://www.canada.ca/content/dam/cra-arc/formspubs/pbg/rc4649/rc4649-16e.pdf> (last access 24 April 2018); and <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4651/guidance-on-country-country-reporting-canada.html> (last access 24 April 2018).

<sup>312</sup> See China (National Report).

<sup>313</sup> See Switzerland (National Report).

Additionally, under **Luxembourg**'s new Data Protection Bill No. 7223, when data has not been obtained from the data subject, the latter has to be informed within a maximum of 1 month from the collection or until the first communication (transmission) of the data at the latest. However, under the new bill, this obligation to information does not exist in the following cases: (i) the person has voluntarily already provided the information; (ii) the acquisition or communication of the information is provided in EU or Luxembourg law (as is the case with the automatic exchange of financial information); (iii) it is impossible or requires disproportionate efforts to inform the subject; or (iv) it is covered by professional secrecy.<sup>314</sup>

#### 4.9.4. Mutual agreement procedure

Taxpayers are also holders of rights in all states in MAPs, since such procedures are relevant to the application of a double tax convention, and therefore to the assessment of taxpayers' tax liabilities in cross-border situations. Consequently, taxpayers are also entitled to request the initiation of a MAP in order to address issues of interpretation and application of a double tax convention that may harm their legal position regarding taxes in cross-border situations. In 2016, the **Danish** Western High Court addressed the conditions of taxpayers' requests for MAPs under the EU Arbitration Convention (90/436/EEC), ruling that the taxpayer does have a right to request the initiation of a MAP under the Convention if the requirements are met. According to the **Danish** Court, this right can be enforced through ordinary court proceedings.<sup>315</sup>

Also, in **China**, the general rule is that taxpayers have the right to request from provincial tax authorities the initiation of MAPs.<sup>316</sup>

There has been communication between the **Serbian** tax authorities and competent authorities of other contracting states without much formalism regarding MAPs. However, none of the 64 **Serbian** double tax treaties contain a provision corresponding to the one found in article 25(5) of the OECD Model Tax Convention on Income and on Capital, since **Serbia** has so far refused to include the arbitration clause in its treaties. The reason that has been put forward for this approach is the protection of fiscal sovereignty. Keeping in mind the signing of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, changes are expected in respect of the obligation of the **Serbian** Tax Administration to implement a bilateral notification or consultation process with the competent authorities of the other contracting state for cases in which it does not consider taxpayers' requests justified.<sup>317</sup>

Luxembourg tax authorities published Circular Convention D.I. No. 60 on 28 August 2017. According to the Circular, MAPs should be available to taxpayers in as many circumstances as possible (including in all cases related to a tax audit). Of Luxembourg's 81 tax treaties, 74 either contain a provision allowing taxpayers to submit a MAP request within a period of no more than 3 years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular tax treaty or do not provide for a deadline for

<sup>314</sup> See Luxembourg (National Report).

<sup>315</sup> See Denmark (National Report).

<sup>316</sup> See China (National Report).

<sup>317</sup> See Serbia (National Report).



such a request. The remaining seven tax treaties provide for a 2-year deadline for submitting an application for the initiation of a MAP. Taxpayers can only initiate the procedure and are called by the tax authorities to submit documents relevant for the procedure. They may ask the tax authorities about the progress of their case, and usually, they are notified that the procedure is still pending. In general, they do not participate in the procedure unless it is initiated by the tax authorities.<sup>318</sup>

#### 4.10. Legislation

##### *Recent Relevant European Case Law*

##### European Court of Human Rights

- ***P. Plaisier B.V. and others v. The Netherlands (3rd Section, Application No. 46184/16, 14- November 2017)***: The applicant companies complained of a high wages tax surcharge that was imposed retrospectively and thus had been unforeseeable. They also complained that the surcharge had failed to take account of individual financial circumstances, had affected only a very small group of employers and had caused disproportionate hardship for individuals in relation to its impact on the government budget. The Court observed that retrospective tax legislation is not as such prohibited by article 1 of Protocol No. 1, as it accepts that the public interest may override the interest of the individual in knowing his tax liabilities in advance, provided that there are specific and compelling reasons for this. The Court concluded that, taking into account the margin of appreciation that states have in taxation matters, the measure in question did not upset the balance that must be struck between the demands of public interest and the protection of the applicant companies' rights, and therefore there was no breach of the right to property by the retroactive imposition of the surcharge.

Human rights are spread throughout all aspects of taxation, both adjectively – as we have seen through this whole document– and subjectively. This means that the practical protection of taxpayers also extends to substantive tax law as well, since the rightful assessment of taxpayers' ability to pay starts from a proper design of tax legislation in a safe and democratic way.<sup>319</sup> On one hand, it requires that retrospective tax legislation be completely banned, or at least only permitted in limited circumstances spelled out in detail.<sup>320</sup> On the other hand, this principle compels public consultation preceding the making of tax policy and tax law.

<sup>318</sup> See Luxembourg (National Report).

<sup>319</sup> Pistone & Baker, *supra* n. 8, p. 66.

<sup>320</sup> However, the ECtHR has stated that "retrospective tax legislation is not as such prohibited by Article 1 of Protocol No. 1. It has accepted that the public interest may override the interest of the individual in knowing his or her tax liabilities in advance, provided that there are specific and compelling reasons for this". See NL: ECtHR, 14 Nov. 2017, Application No. 46184/16, *P. Plaisier B.V. and others v. The Netherlands*, para. 84, available at <http://hudoc.echr.coe.int/eng?i=001-179536> (last access 24 April 2018). See also HU: ECtHR, 14 May 2013, Application No. 66529/11, *N.K.M. v. Hungary*, para. 75, available at <http://hudoc.echr.coe.int/eng?i=001-119704> (last access 24 April 2018); HU: ECtHR, 25 June 2013, Application No. 49570/11, *Gáll v. Hungary*, para. 74, available at <http://hudoc.echr.coe.int/eng?i=001-121777> (last access 24 April 2018); and HU: ECtHR, 2 July 2013, Application No. 41838/11, *R.Sz. v. Hungary*, para. 61, available at <http://hudoc.echr.coe.int/eng?i=001-121958> (last access 24 April 2018).

Regarding retrospective tax legislation, as previously addressed,<sup>321</sup> the Court of Justice of the European Union has ruled that the **Italian** national judge shall not apply national legislation laying down absolute limitation periods leading to impunity.<sup>322</sup> On 26 January 2017, the ICC remitted the issue to the Court (*prescrizione*) in respect of offences that may jeopardize the financial interests of the European Union and violate the principle of effectiveness provided by article 325 of the TFEU, setting forth the respect of the principle of legality, the prohibition of retrospective application of rules and the legal regulation of the statute of limitation period.<sup>323</sup>

Also, the **Spanish** Constitutional Court upheld the unconstitutionality of retrospective modification of personal income tax to allow the tax administration to disregard stock option agreements regarded as a means to avoid taxes.<sup>324</sup> It is also worth mentioning the judgment of the **Spanish** Supreme Court, dated 21 February 2017 in the *Schweppes* case, regarding the nullity of the retroactive application of a valuation method of related transactions that were valid after the accrual of verified taxes.<sup>325</sup>

As a general rule, retrospective tax legislation is not allowed in **Luxembourg**. Exceptions include interpretative laws, more favourable fiscal laws and retroactivity for the purposes of general interest and combating tax evasion.<sup>326</sup>

However, during May 2017, the **South African** Gauteng High Court held that a retrospective tax amendment did not violate the Rule of Law in the **South African** Constitution,<sup>327</sup> and therefore did not violate the taxpayers' right to property.<sup>328</sup> In its decision, the **South African** Court upheld the *dictum* of the Supreme Court of the United States in *US v. Carlton*,<sup>329</sup> according to which it is possible to uphold retrospective tax legislation vis-à-vis the due process clause, since "tax legislation is not a promise and a taxpayer has no vested right in the Internal Revenue Code".<sup>330</sup>

This is also the case of the **Colombian** Constitutional Court, which allows retrospective legislation on the grounds of the economic effects theory, bearing in mind the **Colombian** fiscal deficit after the final agreement to end the armed conflict and build a stable and lasting peace was signed.<sup>331</sup>

<sup>321</sup> See sec. 4.7.1.

<sup>322</sup> Please introduce link with full citation.), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=167061&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=89930> (last access 24 April 2018).

<sup>323</sup> See Italy (National Report). More information is available at <http://curia.europa.eu/juris/document/document.jsf?docid=197423&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=456650> (last access 24 April 2018).

<sup>324</sup> (Please provide full citations for both with standard case law citation format as with previous citations, i.e. country code: court, date, case number, case name.) STC 121/2016, dated 23 June 2016, available at <http://www.fiscal-impuestos.com/sites/fiscal-impuestos.com/files/NCJ061443.pdf> (last access 24 April 2018). Regarding retrospective application of laws, see also STS 123/2017, dated 24 February 2017 <http://www.poderjudicial.es/stjts/TRIBUNAL%20SUPREMO/DOCUMENTOS%20DE%20INTER%20C3%89S/TS%20Civil%20Pleno%2024-02-2017.pdf> (last access 24 April 2018).

<sup>325</sup> See Spain (National Report). (see comment in previous footnote.) STS 704/2017, dated 21 February 2017. <http://www.poderjudicial.es/stjts/TRIBUNAL%20SUPREMO/DOCUMENTOS%20DE%20INTER%20C3%89S/TS%20Contencioso%2021%20feb%202017.pdf> (last access 24 April 2018).

<sup>326</sup> See Luxembourg (National Report).

<sup>327</sup> ZA: High Court, 29 May 2017, Case 87760/2014, *Pienaar Brothers (Pty) Ltd v. Commissioner for the South African Revenue Service and the Minister of Finance*, available at <http://www.saflii.org/za/cases/ZAGPPHC/2017/231.pdf> (last access 24 April 2018).

<sup>328</sup> See South Africa (National Report) (practitioner what does this represent/where can it be found?).

<sup>329</sup> US: Supreme Court, 13 June 1994, Case 92-1941, *US v. Carlton*, available at <https://supreme.justia.com/cases/federal/us/512/26/case.html> (last access 24 April 2018).

<sup>330</sup> Id., opinion of Justice Blackburn.

<sup>331</sup> See Colombia (National Report). See also: Final agreement to end the armed conflict and build a stable and lasting peace, at: <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>.

Also, the **Chinese** Measures for the Administration of Taxation Normative Documents provide that a regulation that is enacted as a consequence of a request included in higher-level tax norms will be effective retroactively to the time of implementation of the supplemented regulations, which will create cases of retrospective tax legislation that go against the taxpayers' rights.<sup>332</sup>

In addition, retroactivity continues to be the norm in **Australia**. For example, on 9 May 2017, the government announced that it will negate the use of foreign trusts and partnerships in corporate structures to circumvent the multinational anti-avoidance law. This measure will apply retroactively from 1 January 2016, which is when the multinational anti-avoidance law originally came into effect.<sup>333</sup>

With regard to the public consultation and involvement in the making of tax policy and law, the **Danish** Minister of Taxation has stated his interest in improving the processes of public consultation before a bill is presented in the parliament by ensuring, as a main rule, respect of the 4-week standstill for consultation as part of *Retssikkerhedspakke I*. In addition, **Danish** public consultation procedures are being established concerning draft general instructions for the tax administration concerning the application and interpretation of tax rules (the so-called “*styresignaler*”).<sup>334</sup>

**China's** legal framework provides that the drafts of new laws to be discussed by the Standing Committee of the National People's Congress should be published to the public, including its drafting and instructions, for comments (e.g. the case of the Environmental Protection Tax Law). In addition, the *Measures* for the Administration of Taxation Normative Documents provides that the drafting of tax rules should consider the views of local tax authorities as well as those of citizens if such rules will have a significant impact on taxpayers' rights and obligations.<sup>335</sup>

In **Poland**, a new practice is the introduction of tax legislation drafted by the government as bills submitted by members of the parliament, which reduces the public consultation requirements, along with the increasing pace of adopting new legislation and the growing frequency of tax law amendments.<sup>336</sup>

In the case of **Serbia**, according to the data available for the first 3 months after the new **Serbian** government was formed (August-October 2016), less than 8% of all of the law proposals were subject to public discussion.<sup>337</sup>

In this regard, **Brazil** has implemented public consultation before the adoption of new regulations, but the government provides no justification as to why a particular proposal is rejected or adopted.

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<sup>332</sup> See China (National Report).

<sup>333</sup> See Australia (National Report).

<sup>334</sup> See Denmark (National Report).

<sup>335</sup> See China (National Report).

<sup>336</sup> See Poland (National Report).

<sup>337</sup> See Serbia (National Report).

#### 4.11. Revenue practice and guidance

Tax matters are governed by the principle of legality, whereby all governing rules should be contained in laws issued by the legislative power, or at least with its authorization (e.g. Law Decrees issued by the National Executive Officer).<sup>338</sup> Other tax provisions different from those aimed at creating taxes may be issued by the tax administration or other officers. However, all rules must be public and widely communicated among taxpayers. This is especially necessary in tax matters, a very specialized area of knowledge without global understanding. Therefore, the tax administration must enable the necessary mechanisms that facilitate the dissemination of the existing legal system, with special attention on the rights and duties of taxpayers.

Similarly, the tax administration should make public its interpretations on rules and specific cases submitted for its consideration, which might constitute a valid precedent to allow taxpayers to foresee the consequences of their activities. Based on the principle of legitimate expectation, the tax administration should also assume responsibility for its errors in interpreting rules and transactions under its consideration. Therefore, any change in criteria can only be applied prospectively.

In 2016, the **Australian** tax administration implemented procedures (jointly called Project Refresh) for modernizing its public binding advice by rewriting, updating, withdrawing or consolidating it with other advisory documents. Moreover, the authorities released a platform named iNOW!, aimed at raising awareness of certain important court decisions, why they are important and the key principles espoused in an easily digestible format.<sup>339</sup>

In addition, on 5 June 2017, the report entitled “Rights and rulings: Understanding the decision” was released. In this report, **Canada’s** Federal Taxpayers’ Ombudsman made recommendations to improve the transparency of rulings issued by the tax administration in respect of determinations of whether a worker is an employee or independent contractor for the purposes of pension plans and employment insurance rules.<sup>340</sup>

In this regard, **Argentina’s** 2017 tax reform entitles taxpayers to access all rulings by the tax authority, which should be published with all regulations dictated, even though these rulings are not always binding precedents.

Another development in the best practices on communication of regulations and rulings can be found in **Poland**. Commencing in January 2017, the Ministry of Finance has been providing *practical* explanations on the general application of tax law provisions (*objaśnienia podatkowe*), including examples. At the time of preparing this report, only one explanatory document of this kind has been published.<sup>341</sup> However, as previously stated,<sup>342</sup> **Poland** has ruled

<sup>338</sup> In this regard, the Spanish Constitutional Court has upheld the unconstitutionality and nullity of the so-called “*declaración tributaria especial*”, regarding income tax amnesties enacted by decree that affect – so the Court declared – the general duty of contribution to public budgets. See Spain (National Report); and ES: Constitutional Court (Tribunal Constitucional), 8 June 2017, STC 73/2017, available at [https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP\\_2017\\_038/2012-3856STC.pdf](https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2017_038/2012-3856STC.pdf) (last access 24 April 2018).

<sup>339</sup> See Australia (National Report). See also ATO, Legal Database, available at <https://www.ato.gov.au/Law/#Law> (last access 24 April 2018).

<sup>340</sup> See Canada (National Report). More information is available at <https://www.canada.ca/en/taxpayers-ombudsman/programs/reports-publications/special-reports/rights-and-rulings.html> (last access 24 April 2018).

<sup>341</sup> See Poland (National Report).

<sup>342</sup> See sec. 4.2.

out the possibility of obtaining a private ruling if it can be reasonably assumed that the factual situation or future event will fall under the 15 July 2016 GAAR or constitute an abuse of law in the area of VAT. In such a case, a “protective opinion” (*opinia zabezpieczająca*) may be requested, with the exception of cases related to VAT, making it more expensive for taxpayers to get the tax administration’s opinion on the matter. The **Polish** report emphasizes that general and private rulings and tax explanations do not provide any protection if a decision is issued on the basis of the GAAR or the VAT abuse-of-law clause, which decreases the level of protection enjoyed by the taxpayer. Besides, tax authorities refuse private rulings on the grounds of assumed application of the GAAR.<sup>343</sup> Moreover, as of January 2017, **Poland** has extended the protective effects of binding tax rulings to those who settle their tax liabilities in accordance with “settled interpretative practices”<sup>344</sup> (*utrwalona praktyka interpretacyjna*).<sup>345</sup>

**Portugal** has issued recent regulations on the term granted to the tax administration for the issuance of rulings. The deadline for the tax administration replying to urgent binding rules was reduced in 2017 from 90 to 75 days.<sup>346</sup> Also, the **Portuguese** Order No. 7689/2017 of 1 September 2017 requires the **Portuguese** Tax Authority to collate and publish (anonymized versions of) existing binding rulings and all binding rulings going forward.

In the case of **Italy**, only certain rulings, if considered particularly relevant, are published as “resolutions” of the **Italian** tax authorities in an anonymized form.<sup>347</sup> Accordingly, in **Germany**, binding rulings are not published. However, the **German** law governing binding rulings was amended in 2016. As a consequence, the tax authorities must make a decision within 6 months after the application is filed. If the tax authorities cannot make a decision within the time limit, they must at least notify the applicant and give reasons.<sup>348</sup>

However, **Brazil** has not implemented digital inclusion satisfactorily, which is also reflected in some difficulties in accessing information on tax issues.<sup>349</sup>

With regard to the principle of legitimate expectation, the **Danish** Eastern High Court released an important decision in 2016, declaring that an established and well-known administrative tax practice can only be amended in the taxpayer’s disfavour prospectively and only after a notice.<sup>350</sup> The judgment was appealed by the **Danish** Ministry of Taxation to the Supreme Court, which heard the case on appeal in June 2017.<sup>351</sup>

However, the most recent case law of the **Serbian** Appellate Court shows that the **Serbian** Ministry of Finance subsequently published guidelines on specific matters, changing its position so that the tax administration would in essence retrospectively apply the new position to

<sup>343</sup> See Poland (National Report).

<sup>344</sup> Settled interpretative practices are interpretations of the application of law provisions, contained in individual rulings, based on the same legal status and facts during the same tax period or the 12 months preceding the beginning of the tax period.

<sup>345</sup> See Poland (National Report).

<sup>346</sup> See Portugal (National Report).

<sup>347</sup> See Italy (National Report).

<sup>348</sup> See Germany (National Report).

<sup>349</sup> See Brazil (National Report).

<sup>350</sup> See Denmark (National Report).

<sup>351</sup> However, on 30 June 2017, the Supreme Court reversed the decision of the Danish Eastern High Court, considering that the tax administration can apply their new interpretations of the law retrospectively. In the case under study, the tax administration changed its interpretation of the deduction of the business payroll, which was applied to previous situations. See DK: Supreme Court, 30 June 2017, Joined Cases 137/2016 and 138/2016, *Ministry of Taxation v. Arbejdernes Landsbank* and *Ministry of Taxation v. Lån & Spar Bank* case, Available at <http://bit.ly/2xYAMHx> (last access 24 April 2018).

situations that took place when the previous position was the one publicly available and according to which the taxpayer determined its tax obligations.<sup>352</sup>

As for the obligation to publish the legal framework, the **Mexican** Federal Constitutional Court ruled that mandatory guidelines for accountants should be published in the Official Federal Diary. If they are not published, accountants cannot be sanctioned for not following them. This is a criterion from a Federal Constitutional Court. It is not yet mandatory.<sup>353</sup>

In the case of **Serbia**, taxpayers with no Internet access may obtain necessary information via the Tax Administration Contact Centre over the phone. Additionally, numerous special Contact Centres from which taxpayers may obtain necessary relevant information in person have been established around the country. A number of leaflets have been published, covering various subject matters relevant for individual taxpayers (relating to different forms of tax).<sup>354</sup>

In 2017, the **Greek** legislation<sup>355</sup> specifically provided that (i) published guidelines are binding for the tax administration unless there is a change in the tax legislation that they are interpreting; (ii) changes in interpretation of the law by the tax administration do not adversely affect the taxpayer retrospectively and are only valid for the future; and (iii) in the case that the taxpayer has followed the guidelines published by the tax administration in relation to his tax obligations, he cannot be held liable for not filing a tax return or for filing an inaccurate tax return.

#### 4.12. Institutional framework for protecting taxpayers' rights

The practical protection of taxpayers' rights requires the enactment of a taxpayers' chart of rights, as well as the forming of institutions whose aim is to conduct practical activities to ensure the enjoyment of the taxpayers' guaranteed rights. Several countries have organized formal structures of taxpayers' advocates or ombudsmen to scrutinize the activities conducted by the tax administration and intervene in appropriate cases. Such entities may be part of the tax administration, but shall remain independent from normal operations of that authority.

**Australia** has recognized the importance of a taxpayers' chart of rights. In December 2016, the Inspector General of Taxation (IGT, the **Australian** ombudsman) indicated in his report, entitled "Review into the Taxpayers' Charter and taxpayers protection", that the tax administration can introduce several measures to improve the protection of rights before enacting new amendments to the legal framework. In this report, the IGT also examined the tax administration's adherence to the model litigant obligation, which binds all Commonwealth agencies, the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) and the protection of taxpayers' rights in the context of cross-border exchange of information.<sup>356</sup> A recommendation was also made for the ATO to undertake consultation with a view to updating the **Australian** Taxpayers' Charter to record improvements in taxpayer rights

<sup>352</sup> See Serbia (National Report).

<sup>353</sup> See Mexico (National Report). Also, see *Semanario Judicial de la Federación* Book 46, Volume III, (September 2017) 9o.A.99 A.

<sup>354</sup> See Serbia (National Report).

<sup>355</sup> See Greece (National Report).

<sup>356</sup> See Australia (National Report). More information is available at <http://igt.gov.au/publications/reports-of-reviews/taxpayers-charter-and-taxpayer-protections-review/> (last access 24 April 2018).

and addressing other relevant matters, such as the role of (and the ATO's interaction with) tax practitioners and the increasing use of digital interactions.<sup>357</sup> The report also considered taxpayer access to compensation when they suffer a loss or detriment as a result of unreasonable ATO action. The focus was on the CDDA Scheme, a discretionary Commonwealth scheme through which agencies are able to pay compensation in circumstances where there is no legal requirement to do so. The report recommended that the ATO raise awareness of the availability of the CDDA Scheme, as well as ensure that taxpayers are able to access internal review of decisions when there are sufficient grounds warranting reconsideration.<sup>358</sup>

It is also worth mentioning that, at the beginning of any audit in **Mexico**, taxpayers receive a specific document called the Charter of Audited Taxpayers' Rights.<sup>359</sup>

Moreover, the regulations of the **Chinese** State Administration of Taxation include several provisions on the protection of taxpayers' rights. In addition, the **Chinese** tax administration has created specialized agencies to handle the complaints of taxpayers, the operating mechanism of which is relatively independent (even though they are part of the tax administration branch). In addition, the State Administration of Taxation and the Local Taxation Bureau have jointly established an organization for the protection of taxpayers' rights, protecting the rights and interests of taxpayers and providing legal advice and assistance to taxpayers, including mediation in tax administrative disputes.<sup>360</sup>

In the case of **South Africa**, in September 2016, the Commissioner for the tax administration indicated that the Service Charter would be updated by December 2016. However, up to the date of this report, the new Charter has not been released or published for public commentary.<sup>361</sup>

With regard to the recognition of the need for taxpayers' advocates, in April 2016, the **Australian** House of Representatives Standing Committee on Tax and Revenue published its report of an "Inquiry into External Scrutiny of the Tax Administration". The IGT made two submissions to the Inquiry, outlining the critical role that external scrutiny plays in the tax administration system, so the institution shall continue exercising its powers within the next years.<sup>362</sup> The Committee recognized that "the complexity of the tax system, and the substantial resources and powers of the ATO, mean that a role for the Inspector-General, or at least a scrutineer that pledges to reach out to taxpayers, should continue for the foreseeable future".<sup>363</sup> In this regard, from 1 May 2015, the IGT assumed responsibility from the Commonwealth Ombudsman for investigating tax complaints.<sup>364</sup>

<sup>357</sup> The IGT raised the possibility of further review, noting (in the Executive Summary of the Report) that "[o]verall, the IGT has made four recommendations with which the ATO has either agreed in full, in part or in principle. However the ATO's level of agreement and their accompanying commentary create a level of uncertainty as to how and to what extent the recommendations would be implemented. Accordingly, to the extent that stakeholder concerns persist, the IGT may undertake a follow-up review to assess the effectiveness of resulting ATO actions and, if necessary, make recommendations for government to consider mandatory reporting of the ATO's compliance with the Charter and additional enforceable remedies". See Australia (National Report).

<sup>358</sup> See Australia (National Report) for a detailed summary on the Australian IGT's recommendations and the ATO's responses.

<sup>359</sup> See Mexico (National Report).

<sup>360</sup> See China (National Report).

<sup>361</sup> See South Africa (National Report).

<sup>362</sup> See Australia (National Report). See also IGT, *Submission to the Standing Committee on Tax and Revenue* (2016), available at <http://igt-staging.tspace.gov.au/publications/publication/submission-to-the-standing-committee-on-tax-and-revenue/> (last access 24 April 2018); and IGT, *Supplementary Submission to the Standing Committee on Tax and Revenue* (2016), available at <http://igt-staging.tspace.gov.au/publications/publication/supp-sub-standing-committee-tax-revenue/> (last access 24 April 2018).

<sup>363</sup> See Australia (National Report). See also House of Representatives Standing Committee on Tax and Revenue, *External Scrutiny of the Australian Taxation Office* (2016), p. 44.

<sup>364</sup> See Australia (National Report).

Also, in **Colombia**, there also exists a taxpayer defender, but the faculties and budget granted are too limited for it to be truly effective. Fortunately, tax courts have placed large importance on the recommendations writs issued by the defender in specific cases, which has lately increased the effectiveness of the institution.<sup>365</sup>

Moreover, in **South Africa**, the Tax Administration Act was amended,<sup>366</sup> extending the term of office of the Tax Ombudsman from 3 to 5 years. The law provides for different rules that increase the independence of the Office of the Tax Ombudsman: (i) the Tax Ombudsman can appoint his own staff without involving the Commissioner of the SARS; (ii) the Office is financed by funds to be provided by the National Treasury and not from the funds of the SARS; and (iii) the Office of the Tax Ombudsman can ask the Minister of Finance to agree to investigate systemic issues in the tax system. In addition, it was proposed that when recommendations are not accepted by a taxpayer or the tax administration, reasons for such a decision must be provided to the Tax Ombudsman within 30 days of notification of the recommendation. These measures should enhance the independence of the Office of the Tax Ombudsman in **South Africa**. During 2017, the Tax Ombudsman received authorization from the Minister of Finance to investigate the alleged undue delay in tax refunds generally experienced by taxpayers.<sup>367</sup>

Furthermore, the **Danish** parliament's ombudsman has established a new office with effect from 1 January 2017, which is responsible for reviewing tax and tax administration cases only.<sup>368</sup> Such office is separated from the tax administration, as opposed to the SKAT's Director of Legal Protection. The procedural rules have been amended (by Act No. 1665 of 20 December 2016) so that a taxpayer can await a decision from the ombudsman before deciding whether to go to court.<sup>369</sup>

**Mexico** has had a tax ombudsman, PRODECON, since 2011. In 2016 and the beginning of 2017, PRODECON acted as moderator between the tax administration (SAT), taxpayers and tax practitioners to review the draft of the rules to follow the implementation of Action 13 of OECD BEPS Project (article 76-A of the Income Tax Law). This is the first time that SAT rules were consulted by the public prior to their enactment. An email account was opened, and the opinions received were analysed and compiled. Afterwards, a final meeting hosted by PRODECON and SAT produced debate and exchange of ideas, which were summarized in a final report.<sup>370</sup>

However, the **Italian** Taxpayers' Ombudsmen (provided by article 13 of Law No. 212/2000, the Taxpayers' Bill of Rights) are established at the regional level, but their powers (e.g. to request documents or clarifications from tax offices or make recommendations) are limited and non-enforceable.<sup>371</sup>

<sup>365</sup> See Colombia (National Report).

<sup>366</sup> See South Africa (National Report). See also ZA: Tax Administration Laws Amendment Act 16 of 2016, promulgated on 19 Jan. 2017.

<sup>367</sup> See South Africa (National Report).

<sup>368</sup> This measure was within the scope of *Retssikkerhedspakke II* (Second Package on Legal Protection).

<sup>369</sup> See Denmark (National Report).

<sup>370</sup> See Mexico (National Report).

<sup>371</sup> See Italy (National Report).



In addition, after the IFA Congress in Basel (2015), **Venezuelan** tax scholars proposed the idea of enacting a Taxpayers' Bill of Rights and creating an ombudsman. The Finance Commission of the **Venezuelan** parliament planned to reform both the Tax Code and the Income Tax Law in order to bring efficient procedural rights to taxpayers and to reach a fair balance between the powers of the tax administration and taxpayers' rights, among other initiatives. However, these initiatives have not been debated at the National Assembly, but there is a commitment by its Finance Commission to reinforce and properly protect taxpayers' rights.<sup>372</sup>

In **Spain**, the Taxpayers' Ombudsman, which was established in 1996, deals with complaints and suggestions that arise due to the application of the Spanish tax system by the institutions of the state. Royal Decree 1070/2017 of 29 December 2017 amended the regulation powers of the Taxpayers' Ombudsman in respect of its composition and the regime for rejecting complaints and suggestions to be in line with the new administrative provisions. According to the 2016 Annual Report of the Taxpayers' Ombudsman, the number of complaints and suggestions (18,562) has increased in comparison with prior years (14,000 in 2015 and 15,931 in 2014) and constitutes the highest register since the Taxpayers' Ombudsman was established. However, the Report underlines that this number is quite reduced in respect of the millions of actions carried out by the tax authorities. On the other hand, it could be highlighted that 57.26% of the complaints have been submitted by electronic means.<sup>373</sup>

## 5. Conclusions

After setting the minimum standards and best practices of procedural rights at the 2015 IFA General Report, it was possible to identify some developments in and movements away from the protection of taxpayers' rights up to 31 December 2017.

Our goal is to continue increasing the number of participants in this project as much as possible, giving a voice to all parties who feel affected by the delimitation of taxpayers' rights. We appreciate the work of the national reporters who agreed to grant us part of their time for the collection of information, from which it has been possible to acquire up-to-date information on the following general remarks, which do not intend to exhaust all of the considerations made in the main text of this document:

- *Identifying taxpayers, issuing tax returns and communicating with taxpayers:* Various countries have reported an increase in online tools for communication between the tax administration and taxpayers, as well as for facilitating compliance with tax duties. In addition, some countries have taken measures to restrict the access to private information of the taxpayer that may be in the possession of third parties, such as withholding agents. However, there is still pending work for expediting the procedures and increasing the protection of taxpayers' data. A closer look is necessary into the case law authorizing the use of stolen data as a basis for a tax assessment.

<sup>372</sup> See Venezuela (National Report).

<sup>373</sup> See Spain (National Report).

- *The issuance of a tax assessment:* While some countries still have yet to introduce proper measures to increase communication with their tax administrations, others have approved rules and procedures to promote voluntary disclosure, taxpayer transparency and the construction of a dialogue that could reduce tax assessments and appeals on tax objections for the benefit of both the taxpayers and the tax administrations.
- *Confidentiality:* Although there have been leaks of confidential information held by the tax administrations reported, some countries have taken technical measures to protect such data. In addition, the illegal disclosure of confidential information by tax officers is punished in most of the countries reported. “Naming and shaming” is a possible exception to confidentiality in some countries, under specific circumstances and after the administrative or judicial decision is final. However, other countries allow the tax administration to publicly reveal information on tax duties without judicial authorization.
- *Normal audits:* Time for conducting audits is limited according to the legislations of the various countries reviewed. In addition, several countries set forth a prohibition on conducting audits on specific issues for a second time (although one country provided for major exceptions to this rule), as well as limitations on the tax administration’s powers to maintain proportionality in assessments. Various countries indicated that the right to be heard is of the essence in administrative procedures, and are even drafting good practice manuals for its tax officers. However, a close analysis is required on case law providing the validity of the postponed exercise of defence and the non-applicability of the presumption-of-innocence principle.
- *More intensive audits:* Some reports indicated that their legislation provides for court authorization for specific search and seizure, including inspections at the taxpayers’ place of work and premises. Nevertheless, in one case reported, the tax administration can access information without judicial authorization.
- *Review and appeal:* Most of the legislations reported provide for the right to appeal administrative objections, even though at least two countries require the exhaustion of the administrative procedure before an appeal can be filed. Generally, legislations provide for the right to be heard and to produce evidence against the tax objection, but the excessive length of the appeal was an issue highlighted by some countries. Free legal assistance and cooperation in the bearing of costs of proceedings are offered to taxpayers that lack the means to conduct appeals against tax assessments. In addition, some legislations allow the collection of the taxes while a decision on the appeal filed is pending, while others provide for the suspension of the collection under specific conditions.
- *Criminal and administrative sanctions:* Several of the countries reported that the penalties for tax offences were increased, even so far as to promote voluntary

disclosure by the taxpayers. On the other side, some legislations were amended to rule the *ne bis in idem* principle, prohibiting the imposition of double penalties on the same facts.

- *Enforcement of taxes:* Some of the legislations include special provisions for allowing the payment of taxes preventing bankruptcies, ensuring the protection of the family home and of the *minimum vitalis* principle. However, other legislations provide for the full collection of taxes, regardless of the consequences for the taxpayers' rights and equity.
- *Cross-border procedures:* The rights of taxpayers to be notified of an exchange of information upon request, to oppose the submission of data about themselves and to request the amendment of wrongful information were in some way considered in several legislations. However, other countries did not consider the participation of the taxpayer necessary for the submission of data under an exchange of information upon request. In the case of automatic exchange of information, some provisions for securing data were included in the legal framework. Recent rules provide for the right of taxpayers to request the initiation of MAPs.
- *Legislation:* There appears to be a contradiction in the legal and judicial treatment of the retrospective application of the law. While in some cases, the courts hold the unconstitutionality of such practices, others consider it valid for norms to be applied retroactively. The same happens with regard to the public consultation of tax law, which is mandatory in some cases and not requested in others.
- *Revenue practice and guidance:* Public rulings, relevant court decisions and guidelines should be made available to taxpayers, according to the practice of several countries. Setting a time limit for the tax administration to provide a response to the taxpayers' request for a ruling is also important.
- *Institutional framework for protecting taxpayers' rights:* In a few cases, it can be seen that the tax administrations have the intention of creating a taxpayers' chart of rights, which could represent a model to be replicated by other countries. In addition, most of the countries provided information on the legal and effective existence of an ombudsman office. However, some countries have indicated the need for strengthening the powers of this office in order to better contribute to the protection of taxpayers' rights.

## 6. Appendices

### 6.1. Appendix A: The practical protection of taxpayers' rights in a nutshell (2015-2017)

The following is a summary of the contents explained in detail in the main text of this General Report. Accordingly, it is not advisable to interpret the content expressed in this table separately from the explanation carried out in the main text of this document.

Taxpayers' right	Shift towards	Shift away from
<b>1. Identifying taxpayers, issuing tax returns and communicating with taxpayers</b>		
Identification of taxpayers	<ul style="list-style-type: none"> <li>- <b>Argentina</b> has enacted regulations imposing new requirements for the representatives of corporations or estates to obtain and use the e-password, as well as liabilities for the user of the e- password with regard to safeguarding and protecting it. The amount of information and services provided through the AFIP's web service varies according to different levels.</li> <li>- <b>Colombian</b> Christian protestant movements are treated by the judiciary as being exempt from income tax in spite of not complying with the requirements established for every other non-profit entity. There is currently no system to obtain tailored taxpayer IDs for members of restrictive religious movements, and there is no way of associating an individual tax ID with a specific religion or cult.</li> <li>- <b>Japan</b> has developed a programme for a unique ID number for citizens in their relationship with public administrations, including tax authorities.</li> <li>- <b>Spain</b> has increased the use of electronic identification systems (i.e. the so-called "Cl@ve PIN") for the carrying out of some tax obligations.</li> <li>- <b>Germany</b> forbids using information related to the membership of a religious group for purposes other than withholding tax by third parties obliged to withhold Church Tax.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Poland</b> has an administrative practice of summarily deregistering taxpayers without either notification or any procedural rights.</li> </ul>
Information supplied by third parties and withholding obligations	<ul style="list-style-type: none"> <li>- <b>Finnish</b> courts forbid forcing a broadcaster to hand over documents related to the Panama Papers.</li> <li>- <b>Finnish</b> courts ruled that a tax consultancy company was under no obligation to submit data to the tax administration that was not a basis for a tax assessment.</li> <li>- <b>Germany</b> has enhanced the protections given by law to the information gathered by third parties for tax purposes.</li> <li>- <b>Switzerland</b> excludes any liability on</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Colombia</b> requires third-party financial withholding agents to reveal taxpayer information that was not required before, including nationalities and beneficial owners of legal entities, although there are no resources and many times no access to reported information due to the implementation of the Common Reporting Standard.</li> <li>- A decision of the <b>Finnish</b> courts allow the use of data originally stolen as evidence of tax fraud, since it was not obtained illegally by a state official.</li> </ul>

	<p>the transporter of goods cross-border for the taxes due.</p>	
<p>The right to access (and correct) information held by tax authorities</p>	<ul style="list-style-type: none"> <li>- <b>Argentina</b> grants access to taxpayers' personal information via a website and allows taxpayers to electronically request the correction of inaccuracies. The AFIP performs an analysis of the taxpayers' positions by means of certain indicators and classifies them into categories using the risk profile system, SIPER. Through General Resolution 3985-E, a new system that is considered more efficient was implemented.</li> <li>- <b>Brazil</b> has enacted legislation used by taxpayers and tax academics to obtain access to information previously not published. The best practice, however, is not met, since there is no further guidance on how to correct inaccuracies.</li> <li>- <b>Italy</b>, by law, grants taxpayers the opportunity to correct errors in prepopulated returns.</li> <li>- <b>Denmark</b> has incorporated the EU Directive on Data Protection, increasing awareness of these rules in the country.</li> <li>- <b>Luxembourg</b> has introduced a bill for implementing the European General Data Protection Regulation EU 2016/679. The (subject's) right to information may be further limited in the processing of his data in order to safeguard the state's financial interests, including in taxation matters.</li> <li>- <b>Luxembourg</b> taxpayers cannot rely on the General Tax Act to request access to their tax files as confirmed by the judiciary, since such a right should be interpreted by virtue of the right to defence guaranteed under section 205 of the General Tax Act.</li> <li>- <b>Mexico</b> has developed a website where taxpayers can amend prepopulated returns, as well as any other information regarding their situations for tax purposes.</li> <li>- <b>China's</b> Chongqing province requires the tax authorities to notify the tax amount payable and the deadline for tax returns in advance.</li> <li>- <b>China</b> legally states the right of taxpayers to inquire about their own tax-related information and apply for verification when there are objections.</li> <li>- <b>Serbia</b> acknowledges the taxpayers' right to access personal information held about them and allows taxpayers to <i>habeas data</i>.</li> <li>- <b>Serbia</b> has published official Guidance on the Law on the Protection of</li> </ul>	<ul style="list-style-type: none"> <li>- In <b>Colombia</b>, the Common Reporting Standard has created new opportunities for mistaken information that taxpayers may not see or correct.</li> </ul>

	Personal Information.	
Communication with taxpayers	<ul style="list-style-type: none"> <li>- <b>Brazil</b> has accepted digital certification for the transmission of tax returns.</li> <li>- In <b>Brazil</b>, the ancillary electronic financial report, which must be filled by entities selling pension plans and entities managing individual retirement funds, has been amended. Executive Act No. 33/2017 introduced the Manual of Data Compression and Encryption for the electronic financial report.</li> <li>- <b>Colombia's</b> DIAN now has a free online system to verify if any communication received by the taxpayer was truly originated by the tax administration.</li> <li>- <b>Turkey</b> introduced an electronic application and a satisfaction management system for tax refunds, where all communication is conducted online.</li> <li>- <b>Luxembourg's</b> platform, <i>MyGuichet</i>, allows taxpayers to file online official forms, attach supporting documents and submit electronic signatures.</li> <li>- <b>Mexico</b> verifies taxpayers' email accounts for the exchange of data between tax officers and taxpayers.</li> <li>- <b>Serbian</b> law provides for an electronic signature, designed to prevent impersonations or interception of the party.</li> </ul>	
Cooperative compliance	<ul style="list-style-type: none"> <li>- <b>Germany</b> deems the lack of taxpayers implementing their Tax Compliance Control Framework to be an indication of intent and recklessness for criminal law purposes.</li> <li>- <b>Spain</b> has approved 11 compliance indicators to improve transparency and legal certainty. Taxpayers may provide tax authorities with information about certain actions and decisions in tax matters, i.e. explanations about the presence in tax havens, the financial structure of the group, the degree of compliance with principles of OECD BEPS Actions or the tax strategy of the group, among others.</li> <li>- <b>Spain</b> has enabled assistance services for people who are either unable or unwilling to use electronic means of identification/authentication for tax compliance purposes.</li> </ul>	
Assistance with compliance obligations	<ul style="list-style-type: none"> <li>- <b>Spain</b> has enabled assistance services for people either unable or unwilling to use electronic means of identification/authentication for tax compliance purposes.</li> <li>- <b>Canada</b> is broadening the number of online services.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Mexico</b> does not provide advice to taxpayers regarding specific issues.</li> <li>- <b>Portugal</b> has shortened the notification period of any tax-related acts issued by electronic means.</li> </ul>

	<ul style="list-style-type: none"> <li>- <b>China</b> requires tax authorities to provide convenient tax services for taxpayers in order to improve efficiency and standardize procedures.</li> <li>- <b>China</b> does not provide any special assistance for those unable to use electronic means of compliance.</li> <li>- <b>Mexico</b> has increased the number of applications to be submitted online, including appeals.</li> <li>- <b>Serbia</b> obliges the tax administration to warn the taxpayer about other rights to be exerted instead of the one originally exercised by him.</li> <li>- The <b>South African</b> revenue authority has increased the number of mobile offices to assist those who are located in remote areas in meeting their compliance obligations.</li> <li>- In <b>Finland</b>, the Parliamentary Ombudsman has issued a decision that paper-based filings must be allowed along with e-filings.</li> </ul>	
<b>2. The issuance of tax assessment</b>		
	<ul style="list-style-type: none"> <li>- <b>Argentina</b> allows the tax administration to seek an agreement with taxpayers in certain cases when estimations, measurements or assessments of certain information or data is necessary to assess the tax obligation. Additionally, the Tax Procedure Law allows the taxpayer to modify the tax return once presented for miscalculations or material errors.</li> <li>- In <b>Brazil's</b> federal administrative procedures, the appeals of a taxpayer are examined by a body composed of both the Federal Revenue service and taxpayer representatives.</li> <li>- <b>Brazil</b> has incorporated an online filing system, the ECF (<i>Escrituração Contábil Fiscal</i>). The program has been improved since its introduction, even though there still are many duplicities of information and issues.</li> <li>- <b>Australia</b> has enacted a Tax Transparency Code, encouraging greater transparency within the corporate sector.</li> <li>- The <b>Australian</b> Tax Office also commenced consultations in 2016 to implement a legislative requirement for significant global entities to provide the ATO with general purpose financial statements if they do not already lodge them with the Australian Securities and Investments Commission.</li> <li>- <b>Canada</b> intends to broaden its Voluntary Disclosure Program, increasing collection and reducing tax audits.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Canada</b> has delayed its actions to broaden its Voluntary Disclosure Program.</li> <li>- <b>Colombian</b> tax authorities have chosen to send special summons writs by email, mostly based on misunderstandings of the taxpayer's business that could be avoided with an auditing visit, which was usually performed before issuing the special summons.</li> <li>- <b>Poland</b> overrules the possibility of obtaining a tax ruling on factual situations or future events that may fall under the GAAR or constitute VAT-related abuse.</li> <li>- <b>Polish</b> tax rulings do not provide any protection if a decision is issued through operation of the GAAR.</li> <li>- <b>Venezuela</b>, while admitting e-filing, has significantly reduced the time for special taxpayers to file tax returns.</li> <li>- <b>Venezuela</b> has endorsed a number of measures against constructive dialogue between the tax administration and taxpayers, increasing the statute of limitations, hardening sanctions, etc.</li> </ul>

	<ul style="list-style-type: none"> <li>- <b>China</b> has introduced a taxpayers' electronic filing system to speed up tax assessments.</li> <li>- <b>Italy</b> has approved legislation to enhance dialogue between tax authorities and taxpayers.</li> <li>- <b>Germany</b> has increased the use of e-technology in tax procedures, especially for e-filing purposes.</li> <li>- <b>Turkey</b> has launched a taxpayer portal, increasing the use of e-technology for control of tax audits.</li> <li>- <b>Spain</b> allows the taxpayer to electronically request a rectification of a filed, self-assessed return (box 127).</li> <li>- <b>Spain</b> has launched a VAT management system (SII), electronically recording the details of taxpayers' billing records online.</li> <li>- <b>Spain</b> allows the taxpayer to fill in electronic tax returns.</li> <li>- In <b>India</b>, The "E-Proceeding" enables the flow of letters, notices, etc. from the assessing officer to the taxpayer's account on the tax department's e-filing website so that all of the information can be viewed online. A team-based assessment with dynamic jurisdiction was also introduced through the mentioned scheme of e-assessment.</li> <li>- <b>Luxembourg's Cour Administrative d' Appel (CAA)</b> ruled on 6 December 2016 that the tax authorities have a positive obligation to communicate to the taxpayer the elements on the basis of which they decided not to follow his tax return/assessment. If the taxpayer is not heard, the consequence is, according to the CAA, that it is not possible for the tax authorities to assess the tax situation of the taxpayer.</li> </ul>	
<b>3. Confidentiality</b>		
<p>Guarantees of privacy in the law</p>	<ul style="list-style-type: none"> <li>- <b>Argentinean</b> Law 27,260 of 2016 (tax amnesty) includes the notion of tax secrecy for the information obtained, and all judicial, administrative or political officers or third parties (with the exception of journalists) who disclose the information will be criminally prosecuted.</li> <li>- <b>Australia's</b> Inspector General of Taxation announced the terms of reference for review by the tax authority in response to high-profile confidentiality and code of conduct breaches by senior officials in 2017.</li> <li>- <b>China</b> obliges tax officials to keep taxpayers' information confidential, punishing contraventions.</li> <li>- <b>Luxembourg</b> tax officials are required to strictly observe tax secrecy at the</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Argentina</b> leaked information obtained by the tax administration in the 2016 voluntary declaration of undeclared foreign and national currency and asset holdings.</li> <li>- <b>Colombia</b>, although investing large amounts of money in digital security solutions, does not cover confidentiality obligations by financial institutions and other actors under the Common Reporting Standard. Furthermore, the sanctions contained therein have not been applied because it is extremely difficult to demonstrate that a leak of information came from a specific official. Experts called by the DIAN to implement digital footprints and firewalls to prevent leaks have renounced</li> </ul>



	<p>risk of sanctions, which include imprisonment from 8 days to 6 months and a fine from EUR 500 to EUR 5,000.</p> <ul style="list-style-type: none"> <li>- <b>Spanish</b> courts allowed the “Falciani list” to be used as evidence of tax fraud since it was not illegally obtained by a state official.</li> <li>- <b>Serbia</b> provides for confidentiality of taxpayers’ information in all tax procedures, punishing contraventions pursuant to the Criminal Code.</li> <li>- <b>Turkey</b> has enacted legislation on the protection of personal data.</li> </ul>	<p>informally declaring that they received threats while performing initial system checks.</p> <ul style="list-style-type: none"> <li>- <b>Turkey</b> does not allow access to or corrections of personal data collected automatically by the tax authorities.</li> </ul>
Encryption: Control of access	<ul style="list-style-type: none"> <li>- <b>China</b> highly encrypts taxpayers’ information. Every user (only authorized tax officials) needs to use an individual login and password. Every operation is traceable by the system.</li> <li>- <b>Argentinean</b> tax administration officials are under investigation for selling confidential information.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Italy</b> suffered the disclosure of data of millions of taxpayers through a breach in the digital platform, SOGEI.</li> </ul>
Administrative measures to ensure confidentiality	<ul style="list-style-type: none"> <li>- <b>Colombia</b> has appointed a high level official as Data Protection Officer.</li> <li>- <b>Danish</b> tax authorities shall appoint a data protection officer under the new EU General Data Protection Regulation.</li> <li>- <b>Italy</b> punishes the unauthorized disclosure of confidential information made by tax inspectors as “abusive access to a telematics system by a public official”, with imprisonment from 1 to 5 years.</li> <li>- <b>Spain</b> upheld an absolute prohibition of disclosure to the taxpayer being audited for the information used as a “secret comparable” in an indirect assessment procedure.</li> <li>- The <b>Luxembourg</b> judiciary has been on the fence about allowing monetary compensation for breaches of the taxpayers’ right to a private life due to his disappointment in seeing his legitimate expectations regarding bank secrecy fulfilled.</li> </ul>	
Exceptions to confidentiality	<ul style="list-style-type: none"> <li>- <b>Argentina</b> has enacted legislation protecting confidentiality, so tax information held by public authorities is not of common access.</li> <li>- <b>Argentina</b> has enacted legislation that establishes the obligation of public and private entities to give the tax authority all information required in order to prevent/reduce tax fraud and evasion.</li> <li>- <b>Australia</b> has enacted legislation to disclose tax debt information of businesses that have not engaged with the ATO.</li> <li>- <b>Canada</b> will establish a regular reporting programme, facilitating the public availability of statistical</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Brazilian</b> authorities have been publishing lists of taxpayers who owe taxes to the federal government, with no separation of tax credits that are under discussion and those that are simply not paid.</li> <li>- <b>Finland</b> ruled that stolen data from the Liechtenstein LGT Bank that was received via exchange of information could be used as grounds for a tax assessment, despite possible criminal actions in the chain of information exchange preceding the <b>Finnish</b> tax administration.</li> <li>- <b>Serbia</b> requires no judicial authorization for “naming and</li> </ul>

	<p>information about enforcement efforts regarding tax evasion and tax avoidance.</p> <ul style="list-style-type: none"> <li>- <b>China</b> has specified the conditions for disclosure of taxpayers' information, within strict limits.</li> <li>- <b>China</b> limits "naming and shaming" to administrative decisions and court rulings that are final.</li> <li>- <b>Colombian</b> interpretations of confidentiality following the Panama Papers scandal have become more broad and relaxed. The DIAN has considered press statements regarding investigations initiated against taxpayers revealed in the Panama Papers scandal.</li> <li>- <b>Finnish</b> courts have upheld that taxpayers are not bound to hand over documents leaked from the <i>Panama Papers</i> case. Also, tax consultancy firms are not bound to submit tax information that is not a basis for tax assessment.</li> <li>- <b>Italy</b> obliges all members of the government and certain special commissions to make their tax returns accessible to everyone.</li> <li>- <b>Serbia</b> excludes information on certain taxpayers with outstanding debts from "naming and shaming".</li> <li>- <b>Spain's</b> TEAC upheld an absolute prohibition of disclosure to the taxpayer being audited for the information used as a "secret comparable" in an indirect assessment procedure.</li> </ul>	<p>shaming".</p>
<p>The interplay between taxpayer confidentiality and the freedom of information legislation</p>	<ul style="list-style-type: none"> <li>- <b>China</b> grants taxpayers the right to acquire their own tax information. The judicial system has no jurisdiction in deciding the access to information by third parties.</li> <li>- <b>Denmark</b> has enacted further guarantees to the right to confidentiality, pursuant to the EU General Data Protection Regulation.</li> <li>- <b>Spain's</b> <i>Audiencia Nacional</i> has acknowledged the limits to the right to access information in tax matters.</li> <li>- <b>Brazil's</b> Law 12,527, enacted in 2011, guarantees the protection of confidentiality of personal information held by government authorities. However, no encryption service is mentioned.</li> </ul>	
<p>Anonymized judgments and rulings</p>	<ul style="list-style-type: none"> <li>- <b>Luxembourg</b> introduced requirements to publish advance tax rulings by a grand-ducal regulation in December 2014.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Italy</b> does not publish tax rulings, and tax judgments are not anonymized.</li> <li>- <b>Brazil</b> does not publish tax rulings of the federal government. Administrative decisions on tax appeals include full information</li> </ul>

		regarding the taxpayer and the facts.
Legal professional privilege	<ul style="list-style-type: none"> <li>- <b>Canada's</b> Supreme Court has upheld the quasi-constitutional nature of solicitor-client privilege.</li> <li>- <b>Canada</b> has taken steps to require tax advisers to register all of their tax products with the tax administration.</li> <li>- <b>Serbia</b> grants professional privilege to lawyers, clergymen, taxpayers' family members, tax advisers and their assistants.</li> <li>- <b>South Africa's</b> Tax Administration Act has introduced the provision of a procedure when legal privilege is asserted.</li> </ul>	<ul style="list-style-type: none"> <li>- The <b>Australia</b> court confirmed an audit based on documents supplied by a third party in breach of the legal professional privilege based on a 1936 law.</li> <li>- <b>Portugal</b> requires lawyers to take the initiative to report certain transactions carried out by their clients in such ample terms that it may affect legal privilege and even the balance of the burden of proof.</li> <li>- <b>Serbia</b> regulates the search of premises containing privileged material only in the case of lawyers.</li> </ul>
<b>4. Normal audits</b>		
<i>Ne bis in idem</i>	<ul style="list-style-type: none"> <li>- <b>Chinese</b> legislation provides strict controls on the frequency of tax audits.</li> <li>- <b>Italy's</b> Constitutional Court has upheld the unconstitutionality of the "double track" system, which allowed double prosecution in VAT evasion-related matters.</li> <li>- <b>Mexico's</b> Constitutional Court limits tax audits in the same year to cases in which new facts appear.</li> <li>- <b>Poland's</b> Ministry of Finance prohibits carrying on an audit for a second time.</li> <li>- The <b>South African</b> judiciary forbids the tax authority from issuing an additional assessment without notice, as this is constitutionally unsound.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Poland's</b> prohibition of double tax audits provides for major exceptions and lacks effective instruments for taxpayers' defence in the event of a breach.</li> </ul>
Principle of proportionality	<ul style="list-style-type: none"> <li>- <b>Canadian</b> courts have overruled the general powers of the tax administration to have unrestricted access to the tax accrual working papers of the taxpayer.</li> <li>- <b>Serbia</b> has regulated proportionality in tax matters in line with the doctrine of the ECHR. Audits are based on risk assessment and are proportionate to the estimated risk.</li> <li>- The <b>Serbian</b> tax authority is bound to collect information that is in the possession of other state authorities by itself.</li> <li>- <b>Spain's</b> tax administration has proposed to adopt measures to require taxpayers to file all transactions that may lead to double non-taxation, with no standards for qualification of such operations.</li> <li>- <b>Turkey</b> has enacted legislation limiting the powers of the tax administration in tax audits.</li> </ul>	<ul style="list-style-type: none"> <li>- The <b>Venezuelan</b> Tax Code has increased all administrative and criminal sanctions associated with tax audits.</li> <li>- The <b>Indian</b> Finance Act 2017 has introduced provisions that indicate that there is no necessity to disclose reasons for a search to any authority or tribunal. Aside from this, survey operations can now be carried out at the premises of a charity organization.</li> </ul>
<i>Audi alteram partem</i>	<ul style="list-style-type: none"> <li>- <b>Turkey</b> has enacted legislation allowing taxpayers to include any kind of precedent advance rulings in the tax audit's minutes and to receive information on the audit before the issuance of the final report.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Italy's</b> Supreme Court has ratified the so-called "postponed exercise of defence". The Constitutional Court declared a challenge of said judgment inadmissible.</li> </ul>

	<ul style="list-style-type: none"> <li>- <b>Spain's</b> TEAC has upheld that the tax administration should justify the means selected and the procedures followed for tax assessment so that the taxpayer knows the suitability of the procedures and can file the corresponding reviews or appeals.</li> <li>- <b>Mexico's</b> Supreme Court has overruled the legislation that allowed the tax authority to issue a tax claim for a tax credit without hearing the taxpayer first.</li> </ul>	
<i>Nemo tenetur se detegere</i>	<ul style="list-style-type: none"> <li>- The <b>Australian</b> Senate Standing Committee on Tax and Revenue has recommended that taxpayers charged with tax fraud or tax evasion should be granted the presumption of innocence in court.</li> </ul>	<ul style="list-style-type: none"> <li>- The <b>Italian</b> Supreme Court has ruled that <i>nemo tenetur</i> cannot override the obligation to contribute to public expenses.</li> <li>- The <b>Mexican</b> Supreme Court has ruled that the presumption of innocence is not applicable in tax audits.</li> </ul>
The structure and content of tax audits	<ul style="list-style-type: none"> <li>- <b>Canada's</b> Auditor General has recommended reviews of the reasons for which objections are decided in favour of taxpayers in order to improve future assessments.</li> <li>- <b>Canada</b> has taken steps to enact a manual of good practices in tax audits.</li> <li>- <b>Denmark</b> has published a set of guidelines on the delimitation of cases during tax audits.</li> <li>- <b>Spain</b> has approved the general guidance of the 2017 Annual Audit Plan for Taxes and Customs.</li> <li>- <b>Serbia</b> obliges tax inspectors to inform taxpayers of the commencement of an audit.</li> <li>- <b>Turkey's</b> Ministry of Finance has issued regulations on tax inspections, limiting the scope of and time for performing a tax audit.</li> <li>- In <b>Spain</b>, the general guidance of the 2018 Annual Audit Plan for Taxes and Customs has been approved through the Decision of 8 January 2018 of the General Directorate of the Tax Administration.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Brazilian</b> tax authorities and administrative courts continue to understand that <i>nemo tenetur, audi alteram partem, ne bis in idem</i> and proportionality do not apply during auditing procedures.</li> <li>- <b>Colombia</b> has established a practice of notification of special summons via email without even visiting the taxpayer to obtain evidence.</li> <li>- <b>Poland's</b> reform of tax administration has attributed a number of invasive competences to tax auditors, so the line between "normal" and "more intensive" audits is not clearly drawn.</li> <li>- <b>Serbia</b> no longer publishes manuals of good practices in tax audits.</li> <li>- <b>Serbian</b> tax authorities have not acted upon tax audit requests by taxpayers.</li> </ul>
Time limits for tax audits	<ul style="list-style-type: none"> <li>- <b>China</b> has ruled a 60-day limit for tax audits.</li> <li>- <b>Turkey</b> has introduced a 2-month time limit for data collection due to an exchange of information upon request.</li> <li>- <b>Italy</b> has reduced the tax administration's time of reaction from 120 to 90 days.</li> <li>- <b>Finland</b> has reduced the tax administration's time for reassessment of income tax from 5 to 3 years, starting in 2017. After this 3-year period, <b>Finnish</b> tax authorities may reassess taxes in the case that certain criteria are met for no more than 6 years.</li> <li>- <b>Mexico's</b> Supreme Court has ruled that</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Colombia</b> extended the statute of limitations for the firmness of a taxpayer return from 2 to 3 years.</li> <li>- The <b>Luxembourg</b> judiciary has ruled that there are no specific time limits for the use of information obtained for the purposes of taxation of the same taxpayer in respect of other taxation years coming from an on-the-spot check outside the procedure for examining the tax return.</li> <li>- <b>Poland</b> has extended VAT refund deadlines, not providing for a maximum period of verification.</li> </ul>

	<p>if the authority does not acquire information from the taxpayer within 20 days after the request is presented, the procedure should end immediately with the information available.</p> <ul style="list-style-type: none"> <li>- <b>Portugal</b> has reduced the time for a tax audit request by the taxpayer.</li> <li>- The <b>Portuguese 2016 Budget Law</b> has clarified that the suspension of a tax audit for more than 6 months (for reasons not attributable to the taxpayer) renders such period irrelevant for purposes of the otherwise applicable suspension of the 4-year statute of limitation to issue additional tax assessments.</li> <li>- <b>Serbia</b> does not provide any time limits for tax audits, although estimation shall be included in the warrant delivered to the taxpayer.</li> <li>- <b>Spain</b> has reformed the General Tax Law to straightforwardly define the deadline of the verification procedure carried out by the tax administration. Such timeframe has been extended to 18 months, and the obligations of information for the taxpayer to supply information have been increased in connection with such deadline extension.</li> </ul>	
Tax audit reports	<ul style="list-style-type: none"> <li>- <b>Argentina</b> has enacted legislation obliging the tax administration to notify the taxpayer before starting an audit.</li> <li>- <b>China's</b> tax administration grants the taxpayer the right to a hearing while drafting the final audit report.</li> <li>- <b>Turkey</b> requires auditors to prepare a report, subject to the supervision of a commission. Taxpayers are provided with the draft of the report before the hearing so that they can provide their own observations.</li> <li>- <b>Italy's</b> Supreme Court has recently specified that a final audit report (<i>processo verbale di constatazione</i>) shall be issued also in the case of a "short tax inspection" made on the taxpayer's premises aimed at collecting specific elements of proof.</li> <li>- <b>South Africa's</b> judiciary requires the tax authority to issue a report in every case in which there is an audit. However, when conducting a verification, there appears to be no necessity of a report, since the tax authority revises an assessment without issuing a letter of findings to the taxpayer.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Brazil</b> usually issues a document asserting the completion of an audit, but there is no participation of the taxpayer.</li> </ul>
<b>5. More intensive audits</b>		
The general framework		<ul style="list-style-type: none"> <li>- <b>Poland's</b> reform of the tax administration attributed to tax</li> </ul>

		<p>auditors a number of invasive competences, so the line between “normal” and “more intensive” audits is not clearly drawn.</p>
<p>Court authorization or notification</p>	<ul style="list-style-type: none"> <li>- <b>Denmark’s</b> tax administration is no longer authorized to conduct inspections on outdoor professional construction work without a judicial order.</li> <li>- <b>Denmark</b> has decided not to continue to ask telecom operators to provide information about their customers’ mobile phone use.</li> <li>- <b>Spain’s</b> judiciary has upheld the need for a court order for a search and seizure. It should be done within the limits of the authorization.</li> <li>- <b>Italy’s</b> Supreme Court ruled out the possibility for the Public Prosecution to search third parties’ domiciles based on the search warrant for taxpayers’ premises.</li> <li>- <b>Mexico</b> has created a specialized centre for the control of investigations, detention at home and intervention of communications.</li> <li>- <b>Greece</b> has provided that tax authorities can enter the private home with prior authorization of the public prosecutor and in the presence of a member of the judiciary.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Brazil’s</b> Federal Supreme Court has ruled that tax authorities need no previous judicial authorization to access taxpayers’ bank accounts</li> <li>- In <b>Colombia</b>, the implementation of the Common Reporting Standards has made bank information available without any need for a judicial order.</li> <li>- <b>Serbia’s</b> tax authorities may access information related to natural persons who are not entrepreneurs without judicial authorization.</li> </ul>
<b>6. Reviews and appeals</b>		
<p>The remedies and their functions</p>	<ul style="list-style-type: none"> <li>- <b>Australia’s</b> Inspector General of Taxation has recommended that an Appeals Group be established to manage tax disputes independently for all taxpayers, including conducting pre-assessment reviews, objections and litigation processes and employing alternative dispute resolution mechanisms as necessary.</li> <li>- <b>Brazil</b> allows e-filing of review appeals.</li> <li>- <b>China</b> allows e-filing of review appeals, as long as certain conditions are met.</li> <li>- <b>South Africa</b> has enhanced the facilities for filing appeals online.</li> <li>- <b>Portugal</b> has clarified the deadline for a non-resident to file an administrative objection against tax withheld in excess.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Denmark</b> and <b>Spain</b> require the exhaustion of administrative reviews before an appeal can be filed.</li> <li>- <b>Portugal</b> has introduced new quantitative limits for the exercise of appeals.</li> </ul>
<p>Length of the procedure</p>	<ul style="list-style-type: none"> <li>- <b>Canada’s</b> Auditor General has made specific suggestions for setting timeframes for the decision of reviews and appeals.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Brazil’s</b> Federal Administrative Court of Tax Proceedings was closed due to criminal investigations between 2014 and 2015, so no tax appeal was examined.</li> <li>- <b>China</b> has extended the length of the procedure, but it shall not take more than 2 years.</li> <li>- <b>Denmark’s</b> National Audit Office has criticized the tax administration’s average time (27 months) for handling</li> </ul>

		<p>appeals.</p> <ul style="list-style-type: none"> <li>- <b>Serbia</b> has no limit on the length of the judicial appeal process.</li> <li>- <b>Portugal</b> has reduced the time for a tax audit request by the taxpayer, unbalancing the time for additional tax assessments between tax authorities and taxpayers.</li> </ul>
<i>Audi alteram partem</i> and the right to a fair trial	<ul style="list-style-type: none"> <li>- <b>China</b> allows applicants to participate in tax audits when they request to do so or by request of the tax authorities.</li> <li>- <b>Spain's</b> Supreme Court has declared that taxpayers are entitled to produce pieces of evidence in reviews and appeals when no evidence is provided in the assessment procedure.</li> <li>- <b>Serbian</b> law obliges the tax authorities to grant taxpayers the right to be heard before any decision is made.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Denmark's</b> legislation limits some of the existing procedural rights in appeals.</li> <li>- <b>Venezuela's</b> Tax Code grants the tax administration the right to exercise the criminal action on behalf of the state, contrary to the constitutional adversarial principle.</li> <li>- A <b>Brazilian</b> court decision ruled that first-level administrative secret judgments do not violate the due process of law.</li> </ul>
<i>Solve et repete</i>	<ul style="list-style-type: none"> <li>- <b>Portugal</b> is not required to provide guarantees or security to suspend tax foreclosure procedures when the tax claim is less than EUR 10,000 for corporations and EUR 5,000 for individuals.</li> <li>- <b>Portugal's</b> Supreme Court has clarified that collection proceedings shall remain suspended until the tax authorities provide a decision on the request for the amount of guarantees or securities to be provided.</li> <li>- <b>Mexico</b> has incorporated <i>Juicio de Fondo</i> (trial on the grounds), focusing on the substance of the case and not obliging taxpayers to pay taxes prior to the final decision.</li> <li>- <b>South African</b> senior tax officials may suspend payment of disputed tax or a portion thereof having regard to relevant factors.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Italy</b> allows the tax authorities to collect partially challenged taxes before the final decision.</li> <li>- <b>Venezuela</b> allows the tax authorities to fully collect challenged taxes before the final decision with no judicial review of such procedure.</li> </ul>
Cost of proceedings	<ul style="list-style-type: none"> <li>- <b>Brazil's</b> new Code of Civil Procedure makes the state liable to pay attorney fees to the taxpayer's representation if the state loses a lawsuit.</li> <li>- <b>Denmark</b> has expanded its system of reimbursement of costs in tax cases.</li> <li>- <b>Spain's</b> Constitutional Court has upheld that the excessive nature of court fees may dissuade and obstruct the fundamental right to seek effective judicial relief.</li> <li>- <b>Switzerland</b> will likely increase the costs of litigation for the party whose appeal has been declined.</li> </ul>	
Public hearings	<ul style="list-style-type: none"> <li>- In <b>Colombia</b>, tax judgments are made public unless the case is closed in the administrative stage.</li> <li>- <b>China</b> requires local governments to expand civil or administrative legal aid.</li> <li>- <b>Chinese</b> tax hearings are publicly held</li> </ul>	<ul style="list-style-type: none"> <li>- In <b>Brazil</b>, legal assistance for the taxpayer is limited only to the clarification on the application of the law that every public servant must provide to the citizen.</li> </ul>

	<p>unless national secrets, commercial secrets or individual privacy are involved.</p> <ul style="list-style-type: none"> <li>- <b>Italy</b> does not grant public hearings for tax appeals unless requested.</li> <li>- <b>Mexico's</b> ombudsman (PRODECON) has increased its activity in order to provide legal assistance to taxpayers who cannot afford it.</li> <li>- <b>Serbian</b> law provides that the state must bear the proceedings costs of the party who is unable to bear the costs without adversely affecting his minimum necessary means for support and the support of his family members.</li> <li>- <b>Spain</b> grants free legal aid in certain cases stated in the law.</li> </ul>	
<p>Publication of judgments and privacy</p>	<ul style="list-style-type: none"> <li>- <b>China</b> has published all judicial decisions online since 2016 unless secrecy has been decreed by the tribunal.</li> <li>- <b>Italy</b> publishes all administrative judgments online free of charge</li> <li>- <b>Italy</b> has a trend of publishing the principles established by (certain) provincial and regional lower courts' decisions. Tax judgments of higher courts are published on paid websites.</li> </ul>	
<p><b>7. Criminal and administrative sanctions</b></p>		
<p>The general framework</p>	<ul style="list-style-type: none"> <li>- <b>Argentinean</b> legislation has increased the requirements that the tax administration must fulfil in order to close an establishment and has eliminated the fine that used to be required along with the closure, and has also reduced the number of days that the establishment could be kept closed.</li> <li>- <b>Argentina</b> has maintained the Tax Criminal Law article that states that administrative authorities should not apply sanctions until the criminal procedure is finished.</li> <li>- <b>Brazil's</b> Federal Supreme Court applies general principles to tax penalties.</li> <li>- <b>Italy</b> has been ruled by the Court of Justice of the European Union not to apply national legislation laying down absolute limitation periods supposedly leading to impunity.</li> <li>- <b>Poland</b> has ruled out the objective responsibility system as a standard for certain withholding tax penalties.</li> <li>- <b>Sweden</b> has enacted legislation to meet <i>non bis in idem</i> requirements pursuant to the European Charter and the ECHR.</li> <li>- <b>Denmark</b> has no legal basis for administrative sanctions, but for the collection of tax with surcharges.</li> <li>- <b>Spanish</b> legislation includes the</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Colombia</b> has allowed both criminal and administrative procedures to take place simultaneously since 2017.</li> <li>- <b>Poland</b> has raised the penalties for VAT-related "invoice offences" to up to 25 years' imprisonment.</li> <li>- <b>Portugal</b> has added sanctions for companies whose tax affairs are not regularized, including the prohibition of certain capital market transactions and distribution of profits.</li> </ul>



	<p>prohibition of double penalties for the same facts, as well as the regulation of procedures in cases of tax crimes, aligned with the ECtHR interpretation of article 4 of Protocol No. 7 of the ECHR.</p> <ul style="list-style-type: none"> <li>- <b>Greece</b> has lowered administrative penalties, based on the need to keep penalties proportional, given that for in cases of tax fraud, criminal sanctions also apply.</li> </ul>	
Voluntary disclosure	<ul style="list-style-type: none"> <li>- <b>Luxembourg</b> has introduced a 2-year voluntary disclose programme for individuals and corporate entities, allowing them to declare any income that has not been declared since 2006. Sanctions in cases of disclosure are limited to the payment of taxes due, with an additional 20% increase if the corrective tax returns were filed in 2017.</li> <li>- <b>South Africa</b> has established a special voluntary disclosure programme for tax liabilities related to foreign assets.</li> <li>- <b>Spain</b> introduced, in 2015, a voluntary tax regularization programme, allowing the taxpayer to issue a complete acknowledgment and payment of the tax debt.</li> <li>- <b>Chinese</b> tax authorities are required to classify cases according to different situations, tempering the harshness of sanctions.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Canadian</b> authorities have proposed several changes to the legal framework, one of them being to restrict the kinds of penalties that can be waived in situations of “major non-compliance” (high levels of taxpayer culpability).</li> <li>- <b>Italy</b> maintains high penalties in order to promote voluntary disclosure.</li> </ul>
<b>8. Enforcement of taxes</b>		
	<ul style="list-style-type: none"> <li>- <b>Colombian</b> Law 1819/2016 provides for new opportunities for taxpayers to pay in arrears or even to receive a partial condoning of interest.</li> <li>- In <b>Colombia</b>, natural disasters are usually followed by an executive decree providing for a temporary tax relief, depending on the severity of the disaster. The Mocoa landslide of 2017 stimulated a 5-year relief.</li> <li>- <b>Italy</b>'s legislation has enacted a special procedure to allow taxpayers to seek a quick settlement of tax collection notices concerning tax debts until 31 December 2016.</li> <li>- <b>Italy</b>'s legislation has aligned with EU case law in admitting partial payments of VAT during pre-bankruptcy agreements with creditors.</li> <li>- <b>Portuguese</b> legislation excludes the judicial sale of the “family home” from tax collection procedures, except if the official tax value exceeds the higher Municipal Property Tax threshold (currently EUR 574,323).</li> <li>- <b>Mexican</b> Tax Courts have increased the number of decisions that consider the <i>minimum vitalis</i> as a milestone for</li> </ul>	<ul style="list-style-type: none"> <li>- In <b>Brazil</b>, Law No. 13,606 allows a prejudgment attachment without authorization by the judiciary.</li> <li>- <b>Brazil</b>'s progressive income tax rates on individuals have not been reviewed since 2015, obliging people with a monthly income equal or higher to BRL 1,903.99 (roughly USD 570.05) to pay the tax.</li> <li>- <b>Colombia</b>'s administrative practice of seizing bank accounts without judicial authorization has become quite common in most municipalities, causing severe damage to business flows for taxpayers.</li> <li>- The <b>Venezuelan</b> Tax Code privileges tax debts over almost any other obligation of the taxpayer, only excluding meal allowances, salaries and other rights derived from labour and social security.</li> <li>- <b>Venezuela</b> allows the tax authorities to fully collect challenged taxes before the final decision with no judicial review of such procedure.</li> </ul>

	<p>taxation, limiting taxation on the amounts requested for the payment of the taxpayer's basic needs.</p> <ul style="list-style-type: none"> <li>- <b>South Africa</b> allows a person affected by tax collection to request the tax authorities to amend the notice to allow the taxpayer to pay basic living expenses for himself and his dependents.</li> <li>- <b>South African</b> taxpayers may apply to the SARS for a reduction of the amount to be paid based on his living expenses and those of his dependents.</li> </ul>	
<b>9. Cross-border procedures</b>		
<p>Exchange of information upon request: The right of the taxpayer to be informed and to challenge the exchange of information.</p>	<ul style="list-style-type: none"> <li>- <b>Australia's</b> Inspector General of Taxation has recommended the publication of guidance on exchange of information, including for when taxpayers should be informed of an exchange of information upon request being made.</li> <li>- <b>Australia's</b> tax administration should inform taxpayers when considering exchange of information and give them the opportunity to provide the information themselves.</li> <li>- <b>China's</b> tax authorities can notify the taxpayer, withholding agent or other related parties of the aim, source and content of the information requested, unless they are suspected of being involved in tax violations.</li> <li>- The <b>Brazilian</b> government has enacted Decree 8,842/2016, approving the OECD's Multilateral Convention on Mutual Assistance in Tax Matters for the purposes of implementing an international agreement on the automatic exchange of information under the Common Reporting Standards.</li> <li>- <b>Mexico</b> has indicated that the taxpayer is to be informed when a cross-border request for information is made.</li> <li>- <b>Mexico</b> has one of the highest standards for protection, encryption and security of the exchanged information.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Japan's</b> judiciary has rejected taxpayers' claims concerning exchange of information made by the tax authority, stating that such requests did not affect any legal rights of taxpayers.</li> </ul>
<p>Additional safeguards in connection with exchange of information upon request</p>	<ul style="list-style-type: none"> <li>- <b>Germany's</b> tax authorities must investigate both against and in favour of taxpayers, including in cross-border situations, according to the OECD's criterion of "foreseeable relevance" for the tax assessment.</li> <li>- <b>New Zealand</b> taxpayers subject to an exchange of information upon request related to a foreign taxpayer that arises from that foreign taxpayer's tax authority have the right to challenge the legal propriety of such a request.</li> <li>- <b>China's</b> legal framework prohibits the use of illegally obtained data.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Japan's</b> judiciary has rejected taxpayers' claims concerning exchange of information upon request made by the tax authority, stating that such requests did not affect any legal rights of taxpayers.</li> <li>- <b>New Zealand</b> does not allow taxpayers to participate in exchanges of information upon request unless the information is required to be provided in response to a request under the Official Information Act 1982, the Privacy Act 1993 and/or discovery obligations in litigation.</li> </ul>

	<ul style="list-style-type: none"> <li>- <b>Chinese</b> legislation gives enough time to financial institutions to submit information on changes in taxpayers' financial information.</li> <li>- The new double tax treaty signed by and between <b>Finland</b> and <b>Germany</b> includes specific conditions for the exchange of information.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Finnish</b> courts have allowed data originally stolen to be used as evidence of tax fraud since they were not obtained illegally by a state official.</li> </ul>
Automatic exchange of information: The different issues of taxpayer protection	<ul style="list-style-type: none"> <li>- <b>Australia</b> has updated its guidance on automatic exchange of information linked to FATCA and the Common Reporting Standards, as well as on country-by-country reporting.</li> <li>- <b>Australia</b> has signed a Memorandum of Understanding for the exchange of financial intelligence information with <b>China</b>.</li> <li>- <b>Canada</b> has passed legislation to formally implement country-by-country reporting for large multinationals, and the Canada Revenue Agency has issued the relevant reporting forms and related administrative guidance for country-by-country reporting.</li> <li>- <b>China</b> joined the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information in December 2015, which includes specified data security and a commitment to confidentiality.</li> <li>- The <b>Swiss</b> Exchange of Information Act provides for the protection of taxpayers' rights, even though stronger protection is under discussion at the parliament.</li> </ul>	<ul style="list-style-type: none"> <li>- Under <b>Luxembourg's</b> new Data Protection Law, there is no obligation to inform the taxpayer of an automatic exchange of information. Since the information is provided in EU or <b>Luxembourg</b> law (as is the case with the automatic exchange of financial information), it is impossible (or requires disproportionate efforts) to inform the subject that it is covered by professional secrecy.</li> </ul>
Mutual agreement procedure	<ul style="list-style-type: none"> <li>- <b>Denmark's</b> judiciary has ruled that taxpayers have the right to request the initiation of a MAP, if requirements are met, enforceable through ordinary court proceedings.</li> <li>- <b>Chinese</b> taxpayers have the right to request from provincial tax authorities the initiation of a MAP.</li> <li>- <b>Luxembourg</b> regulations make the MAP available to taxpayers in as many circumstances as possible (including in all cases relating to a tax audit), within a period of no less than 3 years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular tax treaty, or they do not provide for a deadline for such a request.</li> <li>- <b>Serbia's</b> signing of the MLI forecasts changes to its policy regarding MAPs.</li> </ul>	
<b>10. Legislation</b>		
Constitutional limits on tax legislation: Retrospective laws	<ul style="list-style-type: none"> <li>- <b>Italy</b> was ruled by the Court of Justice of the European Union not to apply national legislation laying down absolute limitation periods supposedly leading to impunity.</li> <li>- <b>Spain's</b> Constitutional Court has</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Australia</b> regards retroactivity as a general rule, particularly with regard to anti-avoidance legislation.</li> <li>- <b>Colombia's</b> judiciary allows retrospective legislation on the grounds of the economic effects</li> </ul>

	<p>upheld the unconstitutionality of a retrospective modification of the personal income tax for anti-avoidance purposes, as well as of the application of a valuation method in transfer pricing.</p> <ul style="list-style-type: none"> <li>- <b>Luxembourg</b> does not allow retrospective tax legislation. Exceptions include interpretative laws, more favourable fiscal laws and retroactivity for purposes of general interest, as well as combating tax evasion.</li> </ul>	<p>theory, bearing in mind the <b>Colombian</b> fiscal deficit after the peace agreements were signed.</p> <ul style="list-style-type: none"> <li>- <b>South Africa</b>'s judiciary upheld that a retrospective tax amendment did not violate the Rule of Law in the <b>South African</b> Constitution.</li> <li>- <b>China</b> has provided that regulations enacted as consequences of a request included in higher-level tax norms will be effective retroactively.</li> </ul>
Public consultation and involvement in the making of tax policy and law	<ul style="list-style-type: none"> <li>- <b>Brazil</b> has implemented public consultation before the adoption of new regulations, but the government provides no justification as to why a particular proposal is rejected or adopted.</li> <li>- <b>Denmark</b>'s tax authority aims to ensure, as a main rule, respect of the 4-week standstill for bill projects' consultation.</li> <li>- <b>Denmark</b>'s public consultations are established concerning draft general instructions for the tax administration concerning the application and interpretation of tax rules.</li> <li>- <b>China</b>'s drafts of new laws to be discussed should be published, including their drafting and instructions, for comments. In addition, drafting of tax rules should consider the views of local tax authorities as well as those of citizens if such rules will have a significant impact on taxpayers' rights and obligations</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Poland</b> has a practice of introducing tax legislation drafted by the government as bills submitted by the parliament, avoiding public consultation.</li> <li>- <b>Serbia</b> has subjected less than 8% of all law proposals to public discussion.</li> </ul>
<b>11. Revenue practice and guidance</b>		
	<ul style="list-style-type: none"> <li>- <b>Argentina</b>'s 2017 Tax Reform entitles taxpayers to access all rulings from the tax authority, which should be published with all regulations dictated, even though these rulings are not always binding precedents.</li> <li>- <b>Australia</b>'s tax authority has implemented procedures for modernizing its public binding advice by rewriting, updating, withdrawing or consolidating it with other advisory documents.</li> <li>- <b>Australia</b> has released a digital platform to raise awareness of important court decisions.</li> <li>- <b>Canada</b>'s ombudsman has made recommendations to improve transparency of rulings issued by the tax administration in respect of determinations of whether a worker is an employee or independent contractor for purposes of pension plans and employment insurance rules.</li> <li>- <b>German</b> law governing binding rulings</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Brazil</b> has not implemented digital inclusion satisfactorily, which is also reflected in some difficulties in accessing information on tax issues.</li> <li>- <b>Poland</b> overrules the possibility of obtaining a tax ruling on factual situations or future events that may fall under the GAAR or constitute VAT-related abuse.</li> <li>- <b>Serbia</b>'s tax administration applies its new criteria retroactively, even when otherwise expressly and previously indicated to the taxpayer.</li> <li>- <b>Portugal</b> has issued regulations on the term granted to the tax administration for issuing rulings, shortening it from 90 to 75 days.</li> </ul>

	<p>was amended in 2016. As a consequence, tax authorities shall make a decision within 6 months after the application for a ruling is filed. If tax authorities cannot make a decision within the time limit, they must at least notify the applicant and give reasons.</p> <ul style="list-style-type: none"> <li>- <b>Italy</b> only publishes certain rulings. If considered particularly relevant, they are published as a “resolutions” of the <b>Italian</b> tax authorities in an anonymized form.</li> <li>- The <b>Mexican</b> Federal Constitutional Court has ruled that mandatory guidelines for accountants should be published in the Official Federal Diary. If they are not published, accountants cannot be punished for not following them.</li> <li>- <b>Poland</b> provides practical explanations on the general application of tax law provisions (<i>objaśnienia podatkowe</i>), including examples.</li> <li>- <b>Poland</b> has extended the protective effects of binding tax rulings to those who settle their tax liabilities in accordance with “settled interpretative practices”.</li> <li>- <b>Portugal</b> has ordered the tax authority to collate and publish (anonymized versions of) existing binding rulings and all binding rulings going forward.</li> <li>- <b>Denmark’s</b> judiciary has upheld that an established and well-known administrative tax practice can only be amended in the taxpayer’s disfavour prospectively and only after a notice.</li> <li>- <b>Serbian</b> taxpayers with no Internet access may obtain necessary information via the Tax Administration Contact Centre, either in person or over the phone.</li> </ul>	
<b>12. Institutional framework for protecting taxpayers’ rights</b>		
<p>Statement of taxpayers’ rights: Charters, service charters and taxpayer’s bills of rights</p>	<ul style="list-style-type: none"> <li>- <b>South Africa</b> is expected to enact a new Service Charter.</li> <li>- <b>Mexican</b> taxpayers receive a specific document called the “Charter of audited taxpayer’s rights” at the beginning of any tax audit.</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Australia’s</b> ombudsman has reported that the tax administration can introduce several measures to improve the protection of rights before enacting new amendments to the legal framework.</li> </ul>
<p>Organizational structures for protecting taxpayers’ rights</p>	<ul style="list-style-type: none"> <li>- <b>Australia’s</b> Inspector General of Taxation has outlined the critical role that external scrutiny plays in the tax administration system, so the institution shall continue exercising its powers.</li> <li>- <b>Australia’s</b> Inspector General of Taxation has assumed responsibility from the Commonwealth Ombudsman for investigating tax complaints from 1 May 2015.</li> <li>- <b>Colombian</b> tax courts have granted a large importance to the</li> </ul>	<ul style="list-style-type: none"> <li>- Italy’s ombudsman’s powers are weak and non-enforceable.</li> <li>- <b>Venezuelan</b> tax scholars have proposed the idea of enacting a taxpayers’ Bill of Rights and creating an ombudsman, which has not yet been discussed by the National Assembly.</li> </ul>

	<p>recommendations writ issued by the taxpayer defender in specific cases, which has lately increased the effectiveness of the institution.</p> <ul style="list-style-type: none"> <li>- <b>South Africa</b> has amended the Tax Administration Act, enhancing the independence of the tax ombudsman.</li> <li>- <b>Denmark</b> has established a new tax ombudsman office, responsible for reviewing tax and tax administration cases only.</li> <li>- <b>China's</b> tax administration has created specialized agencies to handle the complaints of taxpayers, the operating mechanism of which is relatively independent (even though they are part of the tax administration branch).</li> <li>- <b>China's</b> tax authorities have established an organization for the protection of taxpayers' rights that provide legal advice and assistance to taxpayers, including mediation with tax administrative disputes.</li> <li>- <b>Mexico's</b> tax ombudsman has acted as a moderator between the tax administration, taxpayers and tax practitioners to review the draft of the rules to follow Action 13 of the OECD BEPS Project, (article 76-A of the Income Tax Law).</li> <li>- <b>Spain</b> has indicated that the number of complaints and suggestions reviewed by the ombudsman office has increased in comparison with prior years.</li> </ul>	
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## 6.2. Appendix B: What is foreseeable in 2018: A preview

In addition to the information comprised in this General Report with regard to the compliance with the minimum standards and best practices set forth in the IFA 2015 General Report, it is possible to provide some relevant information with regard to the first quarter of 2018.

In **Australia**, regarding the use of systems to prevent impersonation or interception in communication with taxpayers, from 22 February 2018, the tax authority will have clear obligations to report eligible data breaches. This will require all reasonable steps to be taken to ensure that an assessment is completed within 30 days. If an eligible data breach is confirmed, as soon as practicable, they must provide a statement to each of the individuals whose data was breached or who are at risk, including details of the breach and recommendations of the steps that individuals should take. A copy of the statement must also be provided to the Office of the **Australian** Information Commissioner.

In the case of **Greece**, in 2018, articles 18 and 19 of the Greek Tax Procedure Code were amended, providing for the ability to file an initial or amending late tax return after the audit has commenced. If the amount due is paid within 30 days of the assessment based on the tax return, the fines imposed are reduced by 40%. The system was adopted specifically as a means to

enhance collaboration during the audit procedure. This is also compatible with the principle of *nemo tenetur*: a person who discloses voluntarily is not subject to the same penalties as those imposed after the audit.<sup>374</sup>

Also, the European Court of Human Rights issued the decision *Cacciato v. Italy*<sup>375</sup> (Application No. 60633/16, 16 January 2018), considering the application inadmissible. The complaint referred to the breach of the protection of property rights due to the intention of collecting taxes on lands expropriated by the municipal authorities. Applicants complained that taxing the compensation paid due to the expropriation would effectively imply receiving less than the market value of the land. The Court considered that the tax imposed on the compensation was not unreasonable or disproportionate and that there was no sign that the payment of the levy significantly undermined the applicant's financial situation.

Regarding the assistance for those facing difficulties in meeting compliance obligations, including those with disabilities, those located in remote areas and those unable or unwilling to use electronic forms of communication, **Argentina's** General Resolution 4418-E (January 2018) establishes the obligation of making appointments via the Internet for information and assistance to taxpayers in order to make administration more efficient and keep a registry of the consultations made. Further, the **Argentinean** tax administration has, since 2013, operated a mobile tax agency system for taxpayers residing in remote areas. The AFIP's web page now allows the taxpayers to request a mobile tax agency to come to a certain destination. Also, the mobile tax agency has visited big corporations to help individuals with their returns.

Regarding the time limit for audits, the **Portuguese** 2018 Budget Law introduced the possibility of extending the audit period in the case that new facts are presented by the taxpayers while exercising their right to a hearing. On the topic of reviews and appeals, the 2018 Budget Law clarified that the monetary thresholds for not providing guarantees or security to suspend tax foreclosure proceedings while the underlying tax liability is still being disputed apply to each tax debt separately.<sup>376</sup> Also, regarding the validity of the *ne bis in idem* principle in **Portugal**, the 2018 Budget Law introduced the possibility of a second audit for the "mere review or collection of documents". There is not yet sufficient clarity as to how the tax authority will interpret this concept.

In this regard, the Court of Justice of the European Union issued a very important decision in the case of *Luca Menci*,<sup>377</sup> according to which the duplication of proceedings (namely procedural *bis in idem*) in order to ensure VAT collection through administrative and criminal sanctions is acceptable under certain conditions. Although it qualifies the principle as a fundamental right,<sup>378</sup> the Court of Justice of the European Union admits the relaxation of *ne bis in idem* in this case, on the grounds that the public interest involved in the VAT collection justifies allowing exceptions to the rule by operation of law, provided that they "do not alter the

<sup>374</sup> See Greece (National Report).

<sup>375</sup> IT: ECtHR, 16 Jan. 2018, Application No. 60633/16, *Cacciato v. Italy*, available at <http://hudoc.echr.coe.int/eng?i=001-180957> (last access 24 April 2018).

<sup>376</sup> Up to EUR 10,000 for corporations and EUR 5,000 for individuals. See Portugal (National Report).

<sup>377</sup> IT: ECJ, 20 Mar. 2018, Case C-524/15, *Menci v. Italy* available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=200404&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=777608> (last access 24 April 2018).

<sup>378</sup> Id., at para. 39.

hard core of the right”.<sup>379</sup> In this regard, the judgment justifies the persecution and punishment of tax-illicit conduct associated with the payment of VAT, even under strict liability and fixed penalties,<sup>380</sup> as this criterion meets the Court’s minimum standard for proportionality. Otherwise, Member States will not have the discretion needed to ensure fulfilment of VAT in the geographical space of the European Union.<sup>381</sup> In addition, legal predictability of material and procedural duplication of penalties (tax evasion, in this case) is, arguably, a “guarantee” for the taxpayer, who would safeguard the “hard core” of fundamental rights in this case, according to the Court of Justice of the European Union.<sup>382</sup> Therefore, the Court upholds (i) the suspension of the execution of the administrative penalty for the pendency of the criminal procedure; (ii) the exclusion of this execution by the imposition of a criminal penalty; and (iii) the fact that the appreciation of the voluntary payment of the tax as a mitigating circumstance of criminal responsibility rationalizes the use of double jeopardy, making it compatible with the demands of a democratic society in VAT collection.<sup>383</sup> Thus, according to the Court of Justice of the European Union, the Italian legislation applicable to this case ensures a rational exercise of *ius puniendi* within the framework of a democratic society, pursuant to articles 50 and 52(1) of the Charter of Fundamental Rights of the European Union, in accordance with article 4 of Protocol No. 7 of the ECHR, although limiting the *ne bis in idem* principle, when “they have a sufficiently close connection in substance and time”.<sup>384</sup> Consequently, in the interpretation of the Court, there is no violation of the *ne bis in idem* principle when both criminal and administrative sanctions are applied to the same individual due to the same facts, as long as (i) such dual sanctions are provided in the law; (ii) such double penalty pursues an objective of general interest, provided that VAT collection is one of such interests; (iii) it is legally limited to what is considered “necessary”; and (iv) proportionality is safeguarded.<sup>385</sup>

Lastly, the **South African** tax authority has adopted a statement of taxpayer rights, obligations and service timelines, effective from April 2018. Additionally, a 13 February 2018 judgment of the Tax Court of **South Africa** declared void a tax claim delivered by the tax authority due to its failure to issue a letter of completion of the audit (pursuant to sections 40 and 42 of the Tax Administration Act No. 28 of 2011), therefore not allowing the taxpayer to be informed of the grounds of such claim. This is an important decision, as it reflects the status of protection of **South African** taxpayers’ rights in tax audits, particularly regarding the audit report.<sup>386</sup>

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<sup>379</sup> Id., at para. 44.

<sup>380</sup> Id., at para. 45.

<sup>381</sup> Id., at para. 47.

<sup>382</sup> Id., at para. 51.

<sup>383</sup> Id., at para. 56.

<sup>384</sup> Id., at para. 62.

<sup>385</sup> Id., at para. 63.

<sup>386</sup> See South Africa (National Report).



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