How to protect the taxpayer against abuse in the use of exchanges of information by the French tax authorities?

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Abstract

The contemporary global financial environment legitimates transparency of information worldwide. The question of this legitimacy is no longer a matter for debate, and it is now necessary to focus on finding ways to protect taxpayers against the misuse of information collected. The tax aspects are far from being the most important, as information can also be used against fundamental principles. In order to face the risks of the inappropriate use of exchange of information, the taxpayer's advisors in all States should cooperate and unify their force and determination to improve the protection of the right of a defense.

Introduction

States have all progressively implemented internal mechanisms of information gathering in order to organize and monitor tax collection.

The principle of tax sovereignty has, however, long prevented States from organizing their right to collect tax information beyond their national borders, although certain States, among others France, have gradually found ways to obtain such information through alternative mechanisms.

The contemporary context legitimates transparency of information worldwide

In the contemporary context of globalization and the proliferation of international transactions, State tax authorities have sought ways to reach an overall transparency of information worldwide by legal and operational means, particularly in order to combat tax evasion.

As so often, the implementation of an efficient global system of information exchange finally owed its conception to one or more events that acted as catalysts.

It is quite clear that the attacks of 11 September 2001, and the subsequent efforts to fight terrorism (particularly its financing) on a worldwide basis, significantly contributed to the acceleration of this process.

Within this new context, the combination in the years 2008/2009 of the global financial crisis and several financial scandals led States and global institutions to respond even more effectively in this direction. In order to do so, practical means had to be found in order to allow States to work together on a worldwide basis.

On the one hand, following the so-called ''UBS affair'' of 2009, the USA introduced a unilateral and binding mechanism of automatic exchange of

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information, the Foreign Account Tax Compliance Act (FATCA), by virtue of which a whole set of bilateral agreements were signed between the US and other States.

In parallel with this, the joint conclusions of the G20 summit which took place in 2009, declaring war on tax havens, led the OECD to set up a legal framework for global financial and tax transparency, of which one of the more effective weapons would be the automatic exchange of information between the State's tax authorities.

The recent OECD/G20 work relating to the BEPS project as well as the work of the OECD/Global Forum aimed at implementing effective transparency of financial and tax information worldwide, represent two facets of the same objective.

On the basis of this gradual development of regulatory frameworks, State tax authorities now have the legal and operational means to access financial and tax information that is shared globally.

In addition, more recent financial scandals and data leaks, in particular, the ''Panama papers'', have shown that public opinion tend to pay even closer attention to these issues, thereby putting further pressure on State tax authorities not to leave fraudulent situations unpunished.

Given the governments' emphasis on combating international tax evasion, the international texts relating to the exchange of information have multiplied, without always being perfectly consistent with each other. The subject of the exchanges, the form and content of the exchanges and the guarantees of the taxpayers are, however, largely common.

As they begin to implement these new legal means, States have been left with almost no obstacles.

The question which arises above all is how the tax authorities will manage exchanging and processing such a huge wealth of information, and how they will use it. In the face of this challenge, numerous risk areas appear, the first one being the improper use of information.

The lack of guarantees provided to the taxpayers in order to prevent a misuse of the information obtained by the tax authorities

The question of the legitimacy of the exchange of information is in the author's view outdated and it is now necessary to focus on finding ways to protect taxpayers against the misuse of information collected.

Given the ease with which tax administrations can obtain tax information, it is more than necessary that taxpayers benefit from important guarantees to protect them against the risk of misuse of their information. However, the conclusion is clear, at least in France, that the safeguards are largely insufficient.

Ways and means available to the French Tax Authorities (FTA) to gather information as well as the existing safeguards for taxpayers should be discussed.

Internal ways and means available to the FTA to obtain (and transmit) information from abroad

The tools available to a State under domestic law are essential as a requested State may refuse to transmit information which the requesting State may not obtain in application of its own legislation. The requested State does not either have to transmit information to the requesting State if its legislation does not allow it.

Consequently, the more internal tools available to a State to collect information, the easier it will be for it to collect information held by other States and the more difficult it will be for it to refuse to transmit information.

The FTA has many options when it comes to collecting information.[1]

The author is of the opinion that the foreign trustees' reporting obligations,[2] as well as the 3% tax' reporting obligations on foreign corporations qualifying as real estate properties corporations,[3] do not comply with the principle of sovereignty under

1. Article L81 of the French tax procedure handbook (FTPH).
2. Article 1649 AB of the French tax code (FTC).
3. Article 990 D of the French tax code (FTC).

which France cannot organize its right to collect tax information beyond its national borders. This position is clearly reinforced since the FTA can obtain all information they need through the international exchange of information.

Article 101 of the FTPH also provides that the judicial authority must communicate to the FTA any indication relating to tax fraud that it may collect.

In the fight against money laundering and in accordance with European directives, France has instituted a centralized financial intelligence system, called TRACFIN, responsible for collecting information which is then transmitted to the FTA when it relates to potential tax evasion or money laundering. This information can then be used in tax or criminal procedures.

Finally, the information is sometimes transmitted anonymously by whistleblowers. Numerous tax audits in France are started following an anonymous report.

Because of the FTA's extensive scope when requesting information, France can hardly ever refuse a request for information from another State on the grounds that it could not obtain this information in application of its internal law.

Bilateral and multilateral exchange of information's safeguards for taxpayers?

Several reasons allow a State to refuse to transmit the information requested by the other State. First, when the information requested by the requesting State is not ''foreseeably relevant''. The purpose of this notion was to expressly authorize the widest possible exchange of information in tax matters, while at the same time clearly indicating that it is not possible for Contracting States to go on fishing expeditions or to ask for information that is unlikely to be relevant to elucidating the tax affairs of a specific taxpayer.[4]

The fishing expedition relates to a request of information that is unlikely to be relevant to an ongoing investigation or control. For example, it would be considered a fishing expedition if a requesting State requested data on all its residents with an account on file at a bank in the requested State on the grounds that the bank is known to have many foreign holders, without providing additional information.[5]

It appears from the OECD comments that the ''foreseeably relevance'' condition is essentially intended to protect Contracting States (and not directly the taxpayers) by allowing them to refuse to transmit information to the requesting State. However, in a decision of the European Court of Justice (ECJ) of 16 May 2017,[6] the Court of Justice recognized a person's right to invoke the absence of foreseeable relevance and oppose the communication of information when interviewed by the requested State's authorities.

The requested State may also refuse to respond to a request for information when it would involve taking administrative measures derogating from its law and administrative practice.[7]

As mentioned before, this limit has never been an obstacle to the provision of information by France, given the extent of the right of communication available to the administration in the internal context (Article L. 81 of the FTPH).

The requested State may also decline a request for information when the requesting State, by virtue of its own law or administrative practice, is not in a position to obtain the requested information itself even though it would be legally possible for the requested State to obtain such information.

Thus, in terms of banking information, France is not required to respond to a request for assistance from a State or territory where bank secrecy is enforceable against the tax administration.

As stated in Article 26 of the OECD model, the principle of exchange on the basis of the more restrictive of the two legislations is also enshrined in

4. Comments OECD, C (26) No. 5.
5. Comments OECD, C (26) No. 8.1.
6. ECJ, 16 May 2017, Berlioz, C-682/15.
7. Article 26 (3) a and b of the OECD Model Convention.

Article 21 of the Multilateral Convention and in Article 17 of Directive No. 2011/16/EU.

Moreover, under Article 26.3 of the OECD Model Convention, a Contracting State is not obligated to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process.

The comments on Article 26 of the OECD Model Convention indicate that before invoking this provision, a Contracting State must carefully consider whether the interests of the taxpayer really justify its application with the risk that an overly broad interpretation of these stipulations would render the exchange of information ineffective.

In principle, financial information, including books and accounting documents, does not constitute a commercial or industrial secret.

On the contrary, some other reasons do not allow a State to refuse to transmit the information requested by the other State. The OECD standard now prohibits the requested State from hiding behind banking secrecy to oppose a request for information.[8] This principle is reflected in the multilateral convention,[9] in the information exchange model[10] and in the Directive 2011/16/EU.[11]

The recent tax treaties concluded by France are based on the OECD standard. The agreements with jurisdictions initially favorable to bank secrecy, such as Switzerland, Belgium and Austria, have been accordingly renegotiated.

The new OECD standards has led States to no longer be able to invoke the absence of a national tax interest to oppose a request for information. Consequently, requested States must transmit information to requesting States even though they do not need the information requested for their own purposes.

However, under French law, Article R. 114 A-2 of the FTPH provides that the FTA are not obliged to provide information which could not be used for the establishment or recovery of French taxes. This provision is no longer in line with the OECD standard as mentioned above.

There is also the question of communicating information obtained from the requested State to a third State. Article 22.4 of the Multilateral Convention provides that the communication must be authorized by the State at the origin of the information. Article 16.4 of the Directive No. 2011/16/EU provides that the requested State may object to the communication to a third State within a period of 10 days after receiving the request from the requesting State. In any case, the use of information in the third State is subject to the authorization of the first State.

On 13 February 2014, the OECD Tax Affairs Committee proposed a new global standard for the automatic exchange of information (OECD report ''Standard for Automatic Exchange of Financial Account Information - Common Reporting Standard'').

This standard requires that States and Territories obtain various information from their financial institutions and that it is exchanged automatically with each other on a yearly basis. It was adopted by the G20 Finance Ministers at the Sydney round on 22 and 23 February 2014, before being published by the OECD on 21 July 2014 and is subject to a multilateral agreement between competent authorities.

The OECD has developed a mutual competent authority agreement (MCAA) which was signed by France in Berlin on 29 October 2014 and which came into force on 24 February 2016, the purpose of which is to allow the implementation of the new global standard for automatic exchange of information.

France has also ratified the MCAA by the law No. 2015-1778 of 28 December 2015. The competent French authority transmits to its partners the required information on the taxpayers of the participating

8. Article 26 (5) of the OECD Model Convention.
9. Article 21.4 of the Multilateral Convention.
10. Article 5.4 of the Information Exchange Model.
11. Article 18.2 of the Directive 2011/16/EU.

States and territories according to their fiscal residence.

Under the MCAA, the required information is transferred through a predefined computer and security scheme, on an annual basis, within nine months of the end of the calendar year in which the information relates.

As a consequence, the Contracting States cannot oppose the communication of information regarding automatic exchange of information.

This situation is problematic as it inevitably leads to situations where the rights of the taxpayers are not fully respected.

How to protect the taxpayer against negligence or abuse in use of exchanges of information by the State's tax authorities and how to challenge incorrect information coming from abroad?

If there is no specific protection offered when information is transmitted spontaneously or automatically, some rules protecting the French taxpayer apply in case of exchange of information upon request.

The French taxpayer should be informed of the exchange of information request

Article L. 188 A of the FTPH provides for an extension of the limitation period of tax audits when certain conditions are met. It allows the FTA to effectively use the information it can obtain from other countries in the framework of administrative assistance.

This extension requires that the FTA send request for assistance to a foreign State or territory within the initial limitation period. The FTA should also inform the taxpayer within 60 days of the request for information sent abroad. The taxpayer must also be informed of the answer given by the requested State within 60 days of its reception by the FTA.

Article 26 of the OECD Model Convention provides that information obtained in the context of administrative assistance may be disclosed to persons ''concerned'' with the establishment and collection of taxes. This expression is broad enough to encompass the taxpayer.

As a consequence, secrecy clauses in accordance with the OECD standard do not preclude the application of Article L. 76 B of the FTPH, according to which ''the administration is obliged to inform the taxpayer of the content and origin of the information and documents obtained from third parties on which it relied to establish the imposition'' subject to a tax reassessment. The FTA must then provide the taxpayer who requests it with a copy of the documents obtained from the requested State before sending the assessment notices.

However, a number of older tax treaties (notably with Germany, Brazil or Greece) contain a clause inspired by the OECD model of 1963 which mentioned, among the authorized recipients of the information exchanged, the persons or authorities ''responsible'' for the establishment or collection of taxes. This wording excludes the taxpayer from the scope of the authorized recipients of the information. The French Administrative Supreme Court (''*Conseil d'Etat*'') ruled that these restrictive clauses precluded the communication to the taxpayer of documents obtained from the other Contracting State.[12]

In the presence of such an agreement, the tax administration specifies in its doctrine that the lack of communication to the taxpayer does not affect the regularity of the tax procedure.

Protection of French taxpayers by Judges

However, even if the FTA is not required to disclose to the taxpayer the content of the information

12. CE, 5 March 1993, No. 105069, Rohart with regard to Article 26 of the bilateral tax treaty signed between France and the USA on 28 July 1967; CE, 30 June 1995, No. 140891 with regard to Article 28 of the bilateral tax treaty signed between France and Switzerland on 9 September 1966.

obtained in the course of the exchange of information, the judge cannot base his decision on elements that have not been communicated to the taxpayer.[13]

The ECJ concluded that European Union (EU) law must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from a Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organized by the requested Member State.[14]

Moreover, insofar as French law does not grant the taxpayer with the right to be informed of a request for information of which he is the subject, it is almost impossible for him to have all the elements that would allow him to oppose a fishing expedition.

Besides, as a general rule, the information transmitted by the requested State can only be used for the establishment or collection of taxes concerned by the exchange, even if they may be of interest to other regulations or administrations or to reveal non-tax infringements. However, this framework was considered too rigid by the OECD Tax Committee, which, following the revision of Article 26 in July 2012, added the possibility of using the information for other purposes subject to the dual condition that this possibility results from the laws of both States and that the competent authority of the State providing the information authorizes such use.

Article R. 114 A-3 of the FTPH provides that information received from the administration of another EU Member State shall be used under the conditions and within the limits laid down in Articles L. 103 et seq. of the FTPH.

The lack of protection of foreign taxpayers when information received from FTA is transmitted somewhere else

Under French law, the FTA do not have to obtain the prior consent of the requested State before communicating the information to another non-tax French administration. French legislation does not comply with the OECD norm in this respect.

Besides, the requested State does not necessarily know the purpose of the information request. In order to ensure that this right is respected, taxpayers should be informed of requests for information emanating from the requesting State. This would enable them in certain cases to oppose it, with supporting evidence, proving that information is requested for a purpose other than taxation (persecution in the country, criminal prosecution, etc.).

Finally, France is at the forefront of the exchange of information and, moreover, refuses to sign tax treaties that do not contain the entire Article 26 of the OECD model. France has many tools in its domestic law allowing for the collection of almost any information. It is therefore virtually impossible for France to refuse to provide information to a requesting State on the pretext that it cannot obtain it under its domestic law. It is also almost impossible for a requested State to refuse to transmit information to France under the pretext that French domestic law would not allow it.

This situation may, in extreme cases, pose considerable risks when, for example, the legislation of the requesting country provides for the death penalty for tax evasion offenses (in particular China for certain, most serious offenses) or for same-sex couples. The communication of information may also be problematic in States with high risk of blackmail or kidnapping. In such a case, sending information to the requesting State without informing the taxpayer (a fortiori when the information sent can be erroneous) could have irremediable consequences.

13. CE, 26 January 2011, No. 311808.
14. ECJ, 22 October 2013, Sabou, C-276/12.

French domestic procedures protecting taxpayers against misuse or abuse of use of information

Very few domestic procedures aim at protecting the taxpayer and some tools may be used in this regard.

Indeed, provided that the tax treaty does not contain a clause of restrictive secrecy, the FTA are required to communicate information to the taxpayer obtained from the requested State on which they based their tax reassessment.

However, in practice, the FTA may very well base the tax reassessment on information obtained from abroad without informing the taxpayer that a request for information has been sent and answered. Since the FTA do not have to inform the taxpayer before sending a request for information (except if they want to extend the limitation period), he may never be informed of its existence. The FTA could then pretend to base their reassessment on information collected internally, while the information obtained abroad has given them a reason to reassess the taxpayer.

In the event that a request for information was made by France and that the FTA did not find it necessary to inform the taxpayer, it is possible that incorrect information was transmitted to the FTA without the taxpayer having the right to question them.

Another apparent protection of the taxpayer is the prohibition made to the FTA to rely on information obtained illegally. However, the fact that information reaches the administration through the exchange of information purges the illegality of the information if the exchange of information's procedure has been duly respected.

Moreover, not communicating the information exchanged to the taxpayer could be considered as contrary to the constitutional principle of the right to a defense, which could be the subject of a priority preliminary ruling on constitutionality (''*question prioritaire de constitutionnalité*'').

However, it is difficult to consider this option since the question of constitutionality must relate to a legislative provision. It is unclear which legislative provision could be deemed to be unconstitutional in the context of the exchange of information because of the international nature of the rules governing it. Indeed, the Constitutional Court (''*Conseil Constitutionnel*'') is not competent to make a judgment regarding an international convention's conformity with the Constitution.

Besides, it would be possible, theoretically, to engage the requesting State's responsibility for having requested a fishing expedition or having asked for not foreseeably relevant information. It would also be theoretically possible to engage the requested State's responsibility if the latter sent erroneous information or information obtained illegally. However, a taxpayer who wishes to engage the FTA's responsibility would have to prove the existence of a fault, a damage and a causal link between the fault and the damage. French case law is very demanding in this matter.[15]

Considering the fact that the taxpayer does not have to be informed of the content of the request made by the FTA, it would be very difficult for the taxpayer to prove the existence of a fault by the FTA as a requesting authority. Regarding the responsibility of the FTA as the requested State position, the success of the action would depend on the legislation of the requesting State that may provide the taxpayer with more information on the information requested and obtained from the FTA.

Finally, in the event that the information transmitted to the requested State by an informant was incorrect, it should be possible to engage the responsibility of this person. In French law, engaging a person's responsibility requires, once again, proving that a fault, causing injury, has been committed.

Thus, it will first of all be necessary to establish the fault of the informant, which appears obvious in the event that the information transmitted has been stolen, but which is less clear if the informant has transmitted erroneous information by mistake. However, even in the case where the fault would be

15. CAA Nancy, 13 February 1990, No. 89-231.

obvious, the taxpayer will very often not be able to invoke a fault insofar as they will not be informed of the request for information and especially of the person who transmitted the information to the required State.

Moreover, given the international nature of the exchange of information, this will almost always be the responsibility of the resident of a State A that would be engaged by a resident of a State B, which inevitably adds some complexity (determination of the applicable law, determination of the competent court, difficulties raised by a judicial action before the Court of a foreign country).

Therefore, only prior and immediate information from the taxpayer is able to provide sufficient protection.

International instruments protecting taxpayers against misuse or abuse of use of information

Some bilateral conventions with a wide scope of secrecy are contrary to European law. This is the case, for example, of Article 22 of the Convention signed between France and the Republic of Germany, which covers persons ''in charge'' of the tax base and the recovery of the tax, which is therefore not in conformity to the Council Directive of 19 December 1977 which provides that the information exchanged ''shall be accessible only to persons directly concerned with the establishment of the tax'', including de facto the taxpayer.

The European Convention on Human Rights and, more precisely, Article 8 relating to the right to respect for family and private life, home and correspondence, and Article 6 relating to the right to a fair trial may be useful in protecting the taxpayer's rights in the context of the exchange of information. However, as a general rule, the European Court of Human Rights has judged that Article 6§1 of the European Convention on Human Rights was not applicable to tax matters[16] to the extent that they cannot be considered as ''civil rights'' or ''criminal charges''. However, the European Court of Human Rights has also judged that certain penalties may fall within the category of criminal charges depending on their classification in domestic law, the nature of the offense and the degree of severity of the possible penalties.[17]

A decision of the European Court of Human Rights based on Article 8 of the European Convention of Human Rights must be mentioned.[18] The Court concludes that the disclosure of information about the taxpayer's assets constitutes an infringement of the right to respect his private life which is nevertheless justified in the present case due to the fact that the decision was in accordance with the law, that it was proportionate and legitimate and that it pursued a goal of combating tax evasion.

In a decision of 26 September 1996,[19] the European Court of Human Rights admitted that Article 6§1 could be invoked to oppose the lack of communication of documents obtained from a foreign tax administration.

However, no French court has judged on the conformity with Article 6§1 of the information exchange procedure.

Bilateral instruments might also be used with the possible recourse to the Mutual Agreement procedures generally provided by tax treaties entered into between States under the OECD Model Convention, Article 25.

The Charter of Fundamental Rights of the EU (Article 7 relating to the respect for private and family life, Article 8 about protection on personal data and Article 47 relating to the right to an effective remedy and to a fair trial) may be invoked before a Court in order to challenge an exchange of information. These articles are all applicable before French courts, but here again the same conclusion must be made: without the taxpayer's prior knowledge about the information exchanged, it would be impossible in practice to challenge it.

16. ECnHR, 12 July 2001, *Ferrazzini v. Italy*, No. 44759/98.
17. ECnHR, 8 June 1976, *Engel and Others v. the Netherlands*, No. 5100/71.
18. ECnHR, 27 November 1996, *F.S. v. Germany*, Application No. 30128/96.
19. ECnHR, 26 September 1996, *Miailhe. v. France.*

From the point of view of guaranteeing the rights of the taxpayer, the right to be heard should be granted before a decision is taken at the end of the administrative phase in the requesting State. In addition, the taxpayer should be able to challenge the relevance and reality of the information obtained by the requesting State.

In its ''Sabou'' decision, the Court of Justice ruled that Member States are free to extend the rights they intend to confer on their taxpayers. It is therefore at the level of the internal laws of the States that the rights of taxpayers can be extended. This is already the case in many countries (e.g. Andorra, Belgium, Luxembourg, Portugal, Switzerland and the Netherlands), which have set up participation rights in order to protect the interests of taxpayers on the subject of request of information.

Conclusion

The administrative assistance procedures do not place sufficient emphasis on the protection of taxpayers' rights.

One must bear in mind that although the exercise of the taxpayer's right of defense against the administrative acts of the requesting State depends on the domestic law of that State, it is only if the taxpayer is aware of the details of the sources, safeguards and procedures used in the requested State that its right to defense can truly be exercised.

Having said that, the tax aspects are far from being the most important of the author's concerns. Information can also be used against fundamental principles: prosecution of same-sex couples, blackmailing, kidnapping and application of serious offenses for tax evasion such as death penalties in China.

In order to face the risks of the inappropriate use of exchange of information by the tax authorities, the taxpayer's advisors located in the different countries involved should cooperate and unify their force and determination to improve the protection of the right of a defense.

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