Safeguards to protect taxpayers' rights during the exchange of information including big data and AI

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PROTECTION OF DATA IN EXCHANGE OF INFORMATION (EOI)

1. OECD Developments EOI

- Exchange of information very successful to tackle tax evasion. However, some jurisdictions **experienced delays due to technical issues** or **delays in putting in place the domestic or international legislative framework** for the collection and exchange of information.
- The focus is now also on ensuring that the exchange networks in place are sufficiently **broad** (i.e. they include all interested appropriate partners, being those interested in receiving information and that meet the **expected standards on confidentiality and data safeguards**)

AFTER 10 YEARS OF EOI, IT IS TIME TO ADDRESS CONFIDENTIALITY, PRIVACY AND DATA SAFEGUARDS.

BEFORE, DURING AND AFTER IT SYSTEMS ARE PUT INTO PLACE.

See also MOSQUERA VALDERRAMA I.J. (with F. Debelva) (2017), Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions, Intertax 45(5): 362-381.

2. Privacy and data protection

- Different rules regarding the standard of privacy and data protection
  - Not clear how to protect privacy and data during exchange of information?
  - Due to the access to public information acts: risk using data for profiling which may not be protected under the data protection laws
  - Data protection laws

EU: old rules vs. new rules

- ❑ To include rules for confidentiality and protection of sensitive data (personal, genetic and biometric data art. 5). It also applies to data controller and third parties.
- ❑ To include safeguards to prevent the access by any tax official to sensitive (political/content) tax data.
- ❑Also principles of data protection: purpose,adequacy, need, free access, quality, transparency, security, prevention.
- ❑To address big data and decision making based on algorithm

3. Challenges

- Automatic Exchange of Information (bulks of information). How to guarantee the right to privacy and the confidentiality?
- Rights less important due to the peer review. Peer review 90 days effective exchange of information (on request), thus, less rights to taxpayer in order to exchange information without any delay. With Automatic Exchange, even less.
- Tax administration will receive so much information that will be difficult to use all the information and to protect the confidentiality.
- Safeguards are needed to guarantee the confidentiality and to prevent situations where the leak of information may result in risky situations for the taxpayer and the family.

Risk is higher in developing countries than in developed countries.

3. Challenges

Constrains: How to ensure that confidentiality is protected?

- Technological: Equipment and software:

  -Access to information, storage of information, handling of information, use of databases, and use of electronic systems to exchange information

  -Electronic monitoring system to protect against unauthorised access and to monitor the use and the exchange of data

- Administrative: Personnel: To analyze information received. Software: Big data analytics

The sending of data should not constitute an excessive burden for the tax administration of the developing country that lacks of administrative capacity or technical knowledge to use the information and to develop a secure electronic system to exchange data. Also valid for taxpayer.

4. Instruments with safeguards

Safeguards:

1. EOI: the 2006 OECD Manual on Information Exchange. General and legal aspects of exchange of information including confidentiality and tax secrecy (Section 13).

2. Data protection: The 1980 (updated in 2013) OECD Guidelines on the protection of Privacy and Transborder Flows of Personal Data

   collection limitation (ii) data quality principle; (iii) purpose specification principle; (iv) use limitation principle; (v) security safeguards principle; (vi) openness principle; (vii) individual participation principle; and (viii) accountability principle.

3. Confidentiality: the 2013 OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax purposes

- Best practices adopted by tax administrations to protect the tax confidentiality of the information exchanged.
- Recommendations to help tax authorities to ensure that confidential taxpayer information is being adequately safeguarded.

4. Instruments with safeguards

Safeguards (cont.):

4. The UN 1990 Guidelines on Privacy and Data Protection

   Principles concerning the minimum guarantees that should be provided in national legislation. These principles are (i) lawfulness and fairness; (ii) accuracy; (iii) purpose-specification; (iv) interested-person access; (v) non-discrimination; and (vi) security

Also in OECD security and purpose specification

Not in OECD the principle of accuracy that provides for “the duty of data controllers to carry out regular checks of the quality of personal data”.

This principle of accuracy can be useful when dealing with bulks of information as a result of automatic exchange of information.

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PROTECTION OF AUTOMATIC PROCESSING OF PERSONAL DATA INCLUDING BIG DATA

Digitalisation

Need for digital connectivity through trust and confidence in the information and communications technology (ICT) environment.

Digitalisation/new technologies: Opportunities for tax administrations to “better manage compliance, tackle non-compliance and protect their tax base.

Objective: Tax Administrations to benefit from new information and communication technologies (e.g. artificial intelligence and data analytics methods).

Exchange of views and experiences between tax administrations.

From data to big data & data analytics/Artificial Intelligence

Governance and Legitimacy Issues

- Are the instruments in the era of digitalization sufficient to guarantee the privacy and data protection of individuals and business?
- How can **tax administrations** benefit from the amount of data that is being exchanged/collected? Differences between developed vs. less developed countries.
- How can **taxpayers** trust the tax administration/data collectors that the information will be safeguarded?
- Taxpayers need answers to question such as (i) who has my data? (ii) is my data properly collected, stored and monitored? (iii) is the processing of my data allowed? And (iv) who owns my data?

See Processing of personal and business data and the rule of law in the era of digital trade, Central European Political Science Review CEPSR Journal – 76. Available here

Regional? Global? Unilateral?

- Domestic level: Involvement of all stakeholders (Government, Legislative, Judiciary). Oversight and data protection authorities
- Regional: Data protection (e.g. GDPR), but how to ensure that there are also regional models of data protection. Mostly using 1995 Data Protection Directive (out of date). SGATAR, ATAF/AU, CIAT/Pacific Alliance.
- Global: Awareness of the EU Council of Europe Convention for the Automatic Processing of Data including Big Data.

Binding Instrument

Protects the individual against abuses which may accompany the collection and processing of personal data and which seeks to regulate at the same time the transfrontier flow of personal data including big data (since 2018 Protocol Update).

- 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.
- 2001 Protocol: Access to third countries. Ratified by CoE members and also non-members (In force: Argentina, Cabo Verde, Mauritius, Mexico, Morocco, Russian Federation, Senegal, Tunisia and Uruguay). Invited not yet signed (Burkina Faso).

Binding Instrument (2018 Update)

- ***2018 (October) Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223)***

  - Reinforced powers and independence of the data protection authorities and enhancing legal basis for international cooperation;
  - Greater transparency of data processing;
  - Obligation to declare data breaches;
  - New rights for the persons in an algorithmic decision making context, which are particularly relevant in connection with the development of artificial intelligence;
  - Stronger accountability of data controllers;
  - Requirement that the “privacy by design” and privacy by default principles are applied.

Binding Instrument (2018 Update)

- 2018 Protocol In process of ratification by CoE members and also non-members (Signed and ratified by: Argentina, Mauritius, and Uruguay. Signed Cabo Verde, Russian Federation, Tunisia Pending signature: Mexico, Morocco, Senegal). Link here

THE ETHICS OF ARTIFICIAL INTELLIGENCE (AI) AND

TAXPAYER RIGHTS

AI, Ethics and Taxpayer Rights

The effects of AI and its development and impact on human rights, democracy, and the rule of law. For taxation:

- What type of taxpayers' rights in decision based algorithm?
- What is the role of the judiciary when reviewing the tax administration decisions based on algorithms? Any deviations? Considerations of fairness, accountability?
- What principles should be used in AI? High-level principles or any other specifically for taxation?

Stakeholders

- Governments including tax administrations
- Taxpayer
- Internet/AI/ Digital platforms
- Civil society
- Judiciary (administrative and judicial review-decision making based on algorithm)
- Research/Academic Tax Institutions
- International organizations
- Regional organizations
- Other non-tax:
  - Organizations/academic/research institutions working on data governance/AI, etc. E.g. Committee on Artificial Intelligence set up by the Council of Europe in order to develop a [Framework] Convention on the development, design, and application of artificial intelligence

AI, Ethics and Taxpayer Rights

The use of Artificial Intelligence by tax administrations, a matter of principles by C. Garcia-Herrera Blanco CIAT.

- Principle of Prudence
- Principle of non-discrimination
- Principle of proportionality
- Principle of transparency
- Data Governance to ensure data security

However, principles alone cannot guarantee ethical AI.

See Mittelstadt, B. Principles alone cannot guarantee ethical AI. Nature Machine Intellingence 1, 501–507 (2019).

Pillars of a Digital Governance Framework also applicable to AI

a) Legitimacy: Sound Institutional Framework and attention to the process including decision making by tax administration based on AI and judicial review and political will to introduce these changes.

- Accountability
- Responsiveness
- Openness
- Transparency

b) Digitalization: Challenges taxpayer/tax administration/external

- Security (more than ICT, also monitoring, safeguards)
- Modernization
- Improvement Service
- Implementation Tools
- Digital Transformation to adapt to new changes

Digital Taxpayers' Rights Charter

- See EU DIGITAX Project that also provides for the introduction of a Digital Government for Citizens Charter related with tax collection, including what can Citizens reasonably expect from these services, from new technologies and from the Tax Administrations using or offering them.

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