

Exchange of Information and the Rule of Law: Protection of Personal and Business Data

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GLOBTAXGOV

A NEW MODEL OF GLOBAL GOVERNANCE IN INTERNATIONAL TAX LAW MAKING



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Topics

Data Flows

Taxation

Way forward



DATA FLOWS, TAXATION, INTERNET GOVERNANCE AND DIGITAL TRADE

Reading

- 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 number
Available <https://globtaxgov.weblog.leidenuniv.nl/articles/>
- with DEBELVA F. (2017) Privacy and Confidentiality in Exchange of Information: Some Uncertainties, Many Issues, but Few Solutions, Intertax, 45 (5): 362-381

1. Data Flows

Trade

- Restrict/Regulate online content
- Promote trade in digital services

Internet Governance

- Promote data flows: Openness
- Safeguard security and privacy

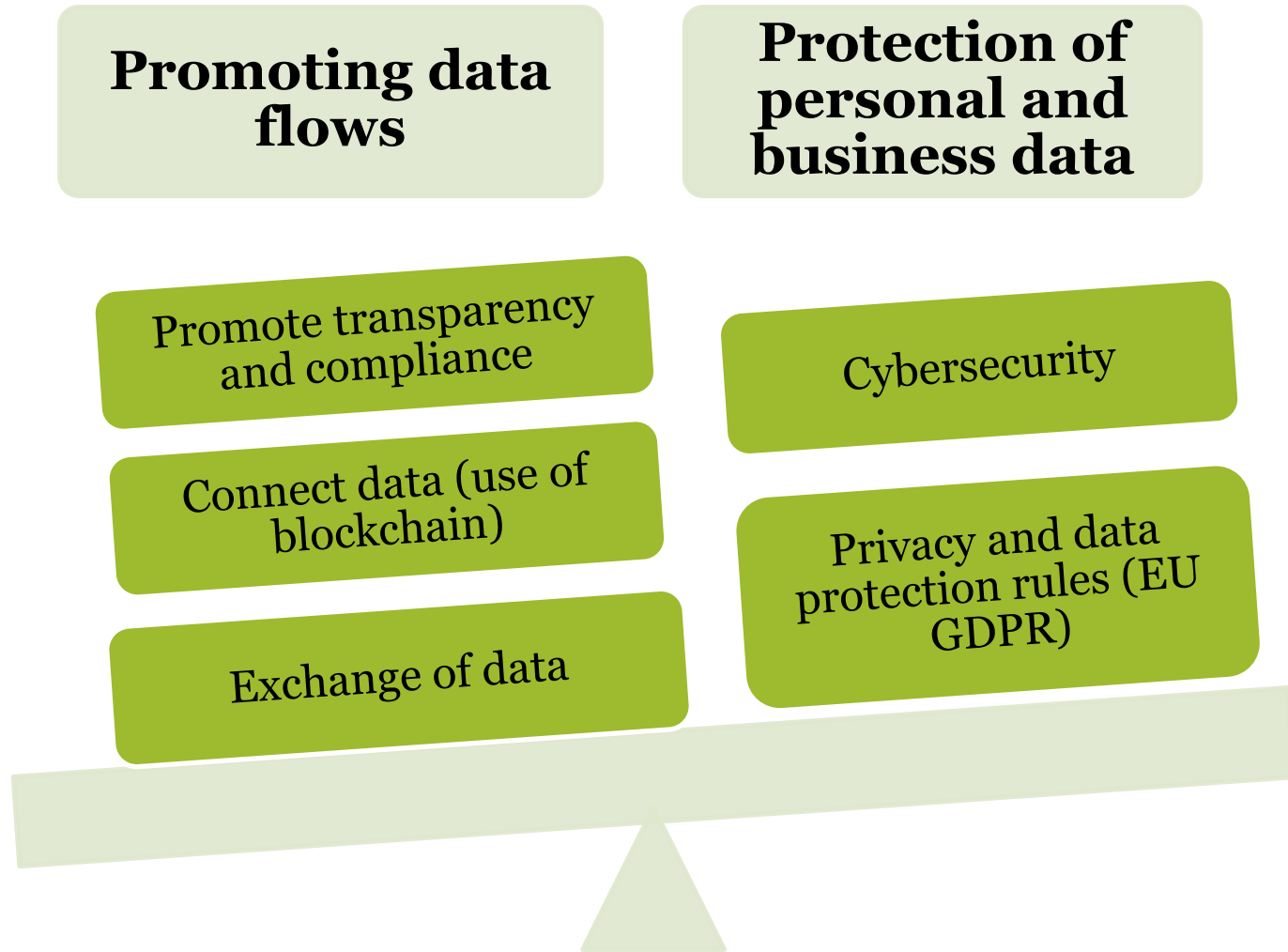
Taxation

- Increase exchange of data
- Proportional, legitimate and privacy

Privacy and data protection

- Protect personal and sensitive data and introduce safeguards

1. Data Flows: Balance



1. Protection of personal data

- To establish international rules in data flow;
- Regulate information sharing and automatic processing of personal data;
- Protection of privacy and personal data on the Internet and online media ;
- Improving user protection and security in cyberspace;
- Protecting and balancing human rights and fundamental freedoms (privacy vs. freedom of information)

TAXATION

1. OECD and EU Developments EOI

Art. 26 UN/OECD Model, TIEAs, 1988 Multilateral Convention on Mutual Administrative Assistance in Tax Matters and its 2010 Protocol (MAC)

G20-OECD

- ❑ 2009: Exchange of Information on Request and Global Transparency Forum
- ❑ 2013: Common Reporting Standard (CRS) and MCAA

EU

- ❑ Directive on Administrative Cooperation incl. CRS, automatic exchange of rulings, mandatory disclosure and exchange of reportable arrangements
- ❑ ECOFIN Council: 2008 Standard of Good Governance: Transparency, exchange of information, fair tax competition. In 2018 BEPS 4 Actions.

See I. Mosquera, *Standard of Good Tax Governance*, *Intertax*, Vol. 47(5) 2019

1. OECD and EU Developments EOI

OECD Secretary General Report to G20 Finance Minister and Central Bank Governors (Fukuoka, Japan June 2019)

- 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

2. Domestic Framework EOI

- Public Access to Information
- Income Tax Law
- Tax Administration Act

See The rule of law and the effective protection of taxpayers' rights in developing countries. Irma Mosquera Valderrama Addy Mazz , Luís Eduardo Schoueri , Natalia Quiñones Cruz, Jennifer Roeleveld , Pasquale Pistone , Frederik Zimmer. Available at SSRN: <https://ssrn.com/abstract=3034360> Comparative analysis of 4 countries: Colombia, Uruguay, South Africa and Brazil.

3. Instruments

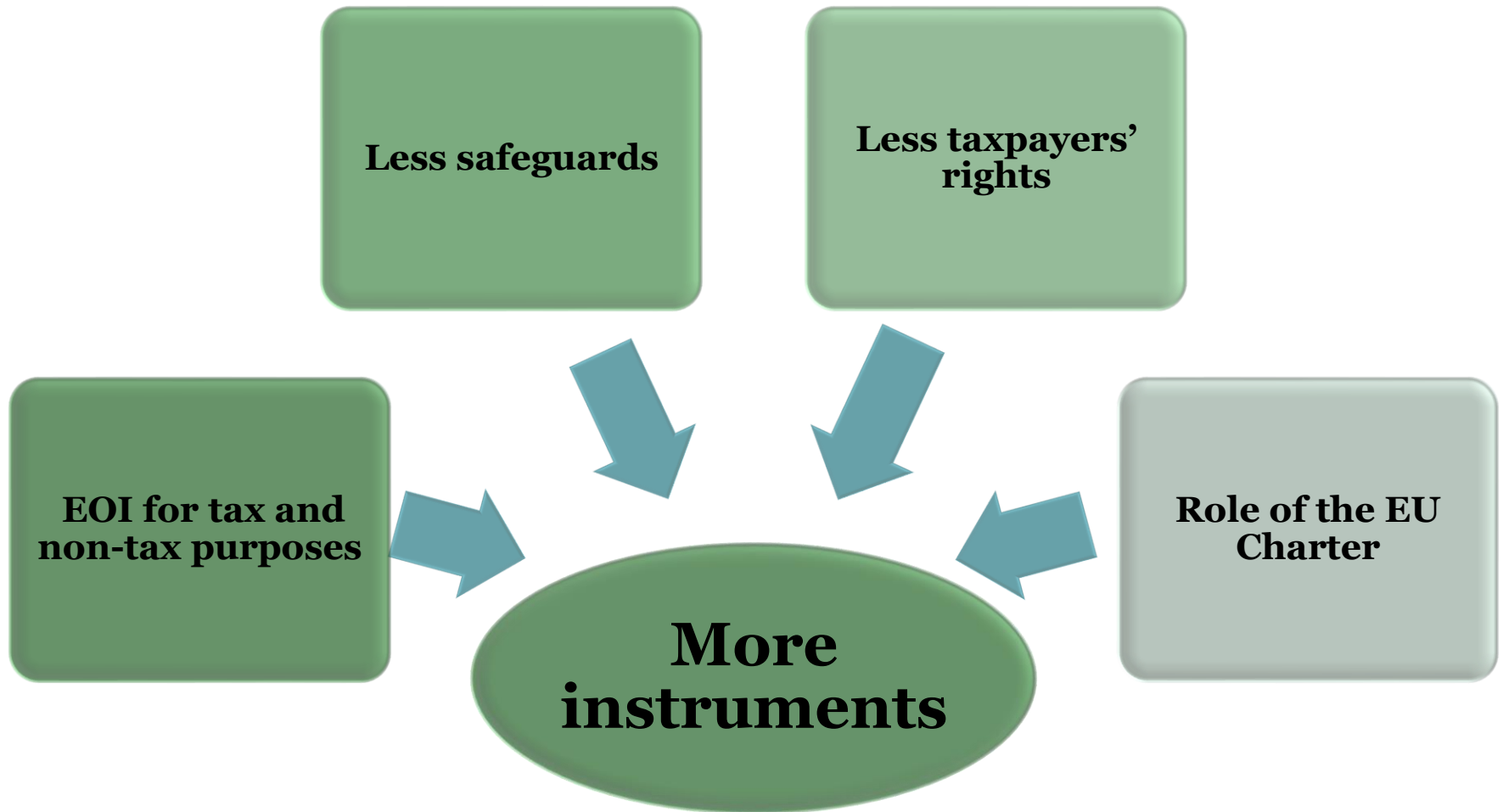
Confidentiality

- Article 26 OCDE: Confidentiality standard
- Other international instruments?
 - MAC
 - Instruments implementing automatic exchange of information: CRS and MCAA
- Domestic law e.g. Income Tax, Tax Administration Act

Privacy and data protection

- Right to privacy: International/ Regional Human Rights Conventions
- Data privacy: CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 1981 and its Additional Protocol of 8 Nov. 2001. Adopted by countries members of the Council of Europe and few third countries . 2018 Protocol to address big data.
- Domestic Law: Privacy Acts, Data Protection Laws (or Draft Bills). Sometimes based on the 1995 Data Protection Directive, therefore update to deal with current developments will be needed.

Exchange of information



3. Confidentiality

- Different rules regarding the standard of confidentiality
 - Definition of taxpayer information subject to confidentiality rules: Broader, specific, or none (e.g. use of biometric information)
 - Access to public information. Asking for personal and business information including taxpayer information. Allowed insofar as the information does not constitute data processing
 - Who has access to the data? All officials? Third parties (with contracts with the tax administration e.g. software developers); Oversight authorities: Same duty of confidentiality than tax officials or not?

3. Confidentiality

- Transparency and publicity of rules and sanctions
- Technological equipment and financial resources
- Training of at least one local tax official
- Rules for confidentiality
 - To address taxpayer information: biometric, personal and genetic data as (sensitive) confidential information
 - Disclosure for non-tax purposes: How confidentiality is protected?
 - Improper disclosure (use of stolen or illegally obtained information) KB-Lux case

4. 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

Outside the EU sometimes data protection laws are difficult to be approved (e.g. Brazil)

Countries implement the data protection rules based on the EU rules: In this legal transplant of new EU data protection rules by non-EU countries will these countries adopt the new rules? E.g. New rules: specific definitions of personal data, genetic data and biometric data (art. 3) and the protection of the processing of these data special categories of personal (sensitive) data (art. 10).

- Rules available but not binding, no specific for taxation, and sometimes no commitment of countries

5. Challenges

- Rules for confidentiality and privacy do not provide sufficient protection to the taxpayer in case of breach of confidentiality, or misuse of information exchange
- Rules for data protection need to be updated.
- Nowadays, information exchanged not only for tax purpose but also for other purposes (corruption, illicit money flows)

Important to exchange best practices and to introduce an international instrument to address taxpayers' rights.

5. 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.

5. 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.

6. Instruments with safeguards

- Non-binding
 - The 2006 OECD Manual on Information Exchange
 - The 1980 (updated in 2013) OECD Guidelines on the protection of Privacy and Transborder Flows of Personal Data
 - The 2013 OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax purposes
 - UN 1990 Guidelines on Privacy and Data Protection
 - 2005 Asia-Pacific Economic Cooperation (APEC) Privacy Framework
- Binding
 - CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 1981 and its Additional Protocol of 8 Nov. 2001. Adopted EU countries and Uruguay (2013); Mauritius and Senegal (2016).

6. Instruments with safeguards

Safeguards:

1. EOI: the 2006 OECD general and legal aspects of exchange of information including confidentiality and tax secrecy (Section 13).
2. Data protection: the 1980 Guidelines (with the 2013 update)
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
 - 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.

6. Instruments with safeguards

Safeguards (cont.):

4. Privacy and Data Protection: The UN 1990 Guidelines

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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6. Instruments with safeguards

Safeguards (cont.):

5. Privacy: 2005 Asia-Pacific Economic Cooperation (APEC)

Information privacy principles (i) preventing harm; (ii) providing notice; (iii) collection limitations; (iv) use of personal information; (v) mechanisms to exercise choice; (vi) integrity of personal information; (vii) security safeguards; (viii) access and correction; (ix) accountability.

The framework is inspired on at that time OECD 1980 Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (para. 5 preamble).

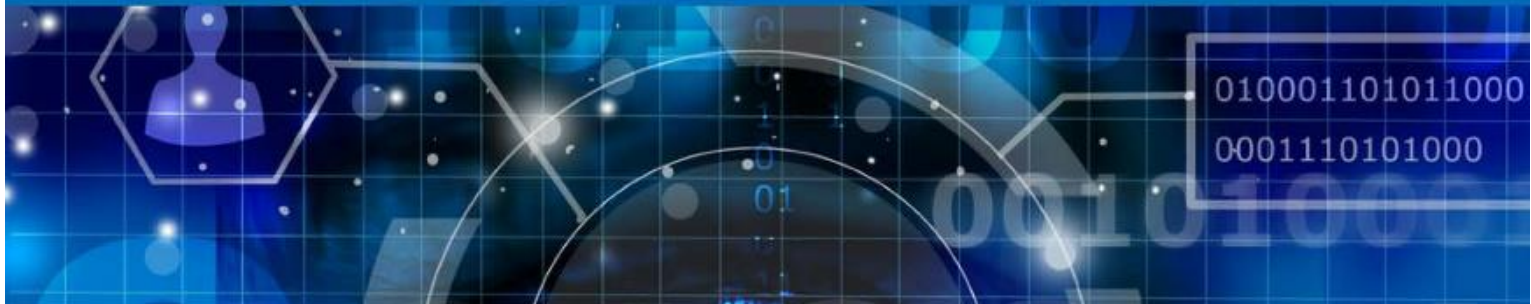
7. Binding Instrument

1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

- 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.
- 2001 Protocol: Access to third countries. Ratified by CoE members and also non-members) Cabo Verde, Mauritius, Mexico, Senegal, Tunisia and Uruguay).

7. Guidelines 2017

Guidelines on
the protection of individuals
with regard to the processing
of personal data in a world of Big Data



7. Binding Instrument

- ***2018 (October) Protocol: Update***

- 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” principle is applied.

8. Way forward

- AEOI and safeguards require adequate protection. It is the responsibility of the tax administrations to ensure that the exchange of information has sufficient safeguards to protect the confidentiality and privacy of the information exchange
- To develop more partner projects which are properly assessed and adjusted in accordance to the needs of the countries
- Regional organizations also a relevant role e.g. Pacific Alliance, ECOWAS, SADC, EAC, African Union. To follow APEC example in privacy?
- To provide a multilateral framework that protects the automatic processing of personal data.
- **To sign and ratify the CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 1981 and its Additional Protocols of 2001 and 2018.**

EU/ECHR

1.2. ECHR – Cases

ECHR Rights

- F.S. v. Germany (1996)
 - Art. 8: Right to respect privacy and family life
- Othyma Investments BV v. The Netherlands (2015)
 - Art. 8 y Art. 13: Right to an effective remedy
- G.S.B. v. Switzerland (2015).

Art. 8 y Art. 14: Prohibition of discrimination

Professional secrecy

- Lindstrand Partners Advokatbyrå AB v. Sweden (2016)
 - Art. 6, 8, 13

Data Protection

Oy and Satamedia v. Finland (2016)

Art. 6 Right to a Fair Trial and Art. 10 Freedom of Expression

ECHR: Exchange of information

Articles ECHR

Art. 8: Right to respect privacy and family life

Art. 13: Right to an effective remedy

Art. 14: Prohibition of discrimination

F.S. v. Germany (1996)

EOI under the Directive: GER-NL
Infringement of art. 8 but justified and proportional: democratic society (no tax evasion).

Othyma Investments B.V. v. the Netherlands (2015)

EOI under the Directive: SP – NL
Tax inspector sent
• Requested information and
• Also from a prior investigation
Infringement of art. 8 but EOI is justified and proportional

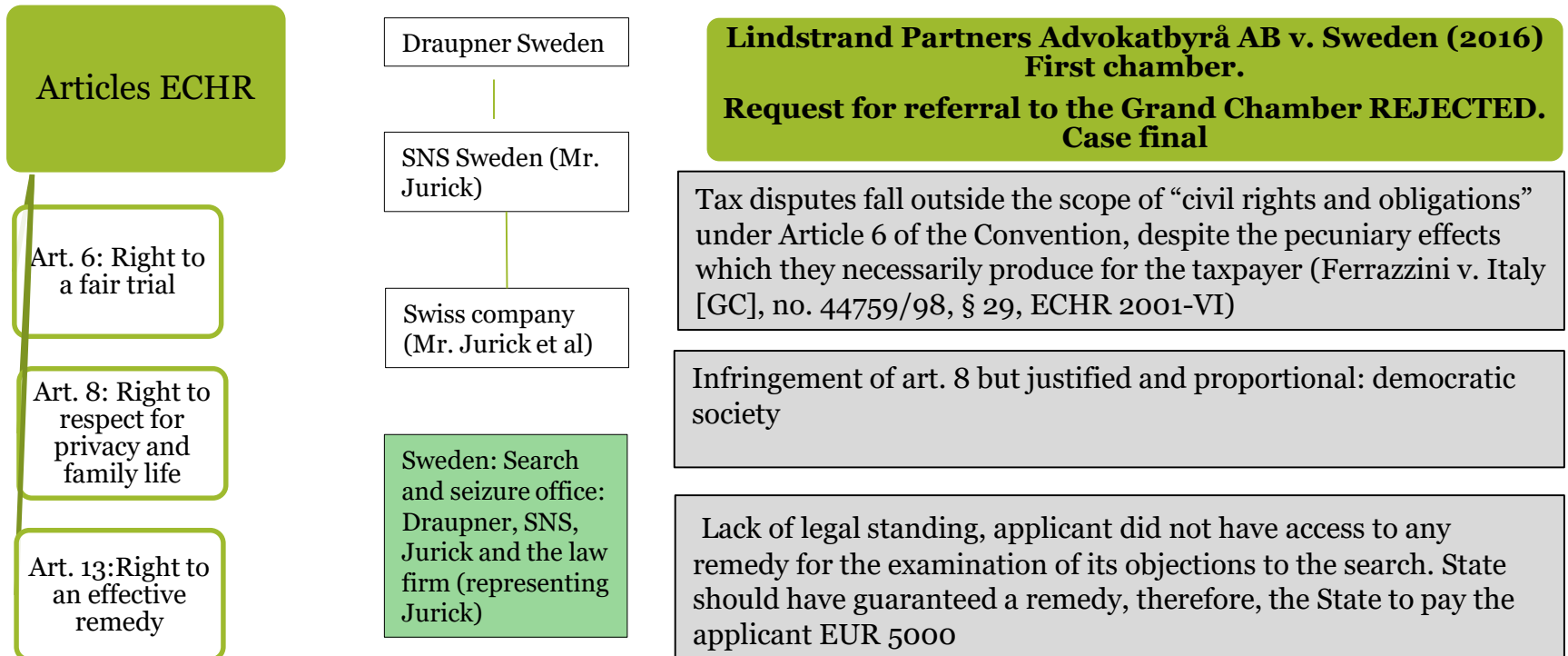
Art. 13 No infringement. No need to notify the taxpayer during the EOI (investigation stage).

G.S.B. v. Switzerland (2015)

EOI under the EOI US-SWITZ
Information requested US national which was an UBS client
• Infringement of art. 8 but justified and proportional (only the banking information)

Target: US taxpayers and clients of UBS.
Art. 14 No infringement. No proof of a different treatment.

ECHR: Professional secrecy



ECHR and TJEU Data Protection

Oy and Satamedia v.
Finland (2008)
TJEU

EU Directive on Data Protection
Collection and use of information possible.
BUT NOT processing of personal data.

Oy and Satamedia v. Finland
(2016)
ECHR

Art. 6: Right to fair trial infringement. Length of the procedure. therefore, the State to pay the applicant EUR 9500.

Art. 8: Infringement of art. 8 is justified in a democratic society.

Art. 10 Need to balance: the right to private life vs. freedom of expression

TJEU: Digital Rights Ireland

C 293/12 and C594/12

- Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks
- Objective Directive: To harmonise the obligations on providers to retain certain data and to ensure that those data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law
- Compatibility Directive: Charter of Fundamental Rights of the European Union
 - Art. 7 (right to privacy)- Use of data for profiling
 - Art. 8 (protection of personal data) – Requires to protect the data and to ensure the irreversible destruction of the data at the end of the data retention period.
 - Art 11 (freedom of expression) - retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication and, consequently, on their exercise of the freedom of expression

TJEU: Digital Rights Ireland

C 293/12 and C594/12

- Directive 2006/24 does not provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data.
- Directive 2006/24 does not lay down rules which are specific and adapted to
 - (i) the vast quantity of data whose retention is required by that directive,
 - (ii) the sensitive nature of that data,
 - (iii) the risk of unlawful access to that data, rules which would serve, in particular, to govern the protection and security of the data in question in a clear and strict manner in order to ensure their full integrity and confidentiality.
- Furthermore, a specific obligation on Member States to establish such rules has also not been laid down.
- See also Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* (EU:C:2010:662, paragraph 47).

TJEU: Directive 2006/24 is invalid

TJEU: Exchange of information and taxpayers' rights: Sabou (Czech Republic)

C-276/12

- Directive 77/799 Administrative Cooperation
- Czech tax authorities requested information on Mr. Sabou from the Spanish, French and the United Kingdom tax authorities. Also information requested from Hungary tax authorities.
- Mr. Sabou claim that Czech tax authorities had obtained information about him illegally.
 - No prior notification to Sabou before request
 - Sabou has not been able to take part in formulating questions addressed to those tax authorities
 - Sabou not invited to take part in the examination of witnesses in other Member States

TJEU: Exchange of information and taxpayers' rights: Sabou (Czech Republic)

- Taxpayer right to be informed prior to request? Taxpayer right to take part in formulating the request on exchange of information? **NO**
- Taxpayer right to take part in the examination of witnesses in the requested Member State in the course of dealing with a request for information? Is the requested Member State obliged to inform the taxpayer beforehand of when the witness will be examined, if it has been requested to do so by the requesting Member State? **NO**

THIRD QUESTION

- Are the tax authorities in the requested Member State obliged, when providing information in accordance with Directive [77/799], to observe a certain minimum content of their answer, so that it is clear from what sources and by what method the requested tax authorities have obtained the information provided?
- May the taxpayer challenge the correctness of the information thus provided, for example on grounds of procedural defects of the proceedings in the requested State which preceded the provision of the information?
- Or does the principle of mutual trust and cooperation apply, according to which the information provided by the requested tax authorities may not be called in question? **NO**
IN THE DIRECTIVE, ONLY NATIONAL LAWS CAN LAY DOWN RELEVANT RULES.

TJEU: Exchange of information and taxpayers' rights: Sabou (Czech Republic)

- Exchange of information
- Directive provides for administrative cooperation, but does not grant rights to the taxpayers.
- Exchange of information:
 - Gathering information: No participation taxpayer
 - Investigation stage: Participation taxpayer including right to interview witnesses.

TJEU:

- Tax assessment 28 May 2009, thus EU charter is not applicable (entry into force 1 Dec 2009)
- Directive on administrative cooperation- Assistance in gathering information

TJEU: Exchange of information and taxpayers' rights: Berlioz (Luxembourg)

C-682/15 – 16 May 2017

- Request of information from France to Luxembourg in light of Directive 2011/16/EU
- Luxembourg request information to Berlioz
- Berlioz provided the information requested except as regards the names and addresses of its members, the amount of capital held by each member and the percentage of share capital held by each member, on the ground that that information was not foreseeably relevant
- Luxembourg tax authority administrative fine of EUR 250 000 on Berlioz, on the basis of Article 5(1) of the Law of 25 November 2014, on account of its refusal to provide that information.
- Administrative Tribunal reduced the fine EUR 150000 but dismissed the action as to the remainder, holding that there was no need to adjudicate on the action for annulment brought in the alternative.

TJEU: Exchange of information and taxpayers' rights: Berlioz (Luxemburg)

Questions to TJEU

- Application EU Charter?
- Art. 47 EU Charter: Right to an effective remedy?
- Is foreseeable relevance a requirement for exchange of information
- Does the national judge requires to review the foreseeable relevance?

TJEU

- EU Charter is applicable in case of an administrative fine. Taxpayer will have a right to an effective remedy.
- Directive 2011/16 allows the requested tax authority to ensure that the information requested is foreseeable relevant.
 - Domestic Judge is competent to modify the administrative fine and to control the legality of the request for information (regarding the foreseeable relevance). Access to the request and to all information. Also possible to request additional information.
 - Taxpayer does not have access to the request for information, only regarding the identity of the person of the person under examination or investigation and the tax purpose for which the information is sought.

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