



VIII CONGRESSO BRASILEIRO DE
**DIREITO TRIBUTÁRIO
INTERNACIONAL**

**NOVOS PARADIGMAS DA TRIBUTAÇÃO
INTERNACIONAL E A COVID-19**

Safeguards to protect taxpayers' rights during the exchange of information

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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***

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- 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
 - Brazil Law 13,709/2018 includes the protection of sensitive data (personal, genetic and biometric data art. 5)
- Includes data controller
- Also principles of data protection: purpose, adequacy, need, free access, quality, transparency, security, prevention.
- No reference to big data/algorithm

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- 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.

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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.

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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.

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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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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 (Argentina, Cabo Verde, Mauritius, Morocco, Senegal, Tunisia and Uruguay).

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- **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.

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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
- 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.**

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Reading

- Processing of personal and business data and the rule of law in the era of digital trade. Irma Mosquera Valderrama, Central European Political Science Review CEPSR Journal – 76 number Available <https://globtaxgov.weblog.leidenuniv.nl/articles/>
- Privacy and Confidentiality in Exchange of Information: Some Uncertainties, Many Issues, but Few Solutions, Irma Mosquera Valderrama and Filip Debelva (2017) Intertax, 45 (5): 362-381
- 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.

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